



Press and Information

Court of Justice of the European Union

PRESS RELEASE No 14/11

Luxembourg, 3 March 2011

Advocate General's Opinion in Case C-439/09
Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la
Concurrence & Ministre de l'Économie, de l'Industrie et de l'Emploi

**In the opinion of Advocate General Mazák, cosmetic company Pierre-Fabre's
absolute refusal to allow its French distributors to sell its products on the Internet
appears to be disproportionate**

*Such a ban may not benefit from a block exemption but may, however, benefit from an individual
exemption pursuant to Article 81(3) EC.*

Article 81 EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) prohibits agreements which have, as their object or effect, the restriction of competition. Article 81(3) EC provides, under certain conditions, for agreements which improve the distribution of goods or promote economic progress to be granted an exemption. In addition, a number of regulations provide that certain kinds of agreements qualify for a block exemption. One such regulation, the Vertical Agreements Block Exemption Regulation¹, provides for a block exemption for distribution agreements which fulfil certain criteria. This regulation contains a list of so-called "hardcore restrictions" which cannot benefit from the block exemption.

Pierre Fabre Dermo-Cosmétique ("PFDC") is the manufacturer of a number of ranges of cosmetic and personal care products. PFDC's French distribution contracts for the Avène, Klorane, Galénic and Ducray brands include a clause that requires all sales be made in a physical space and that a qualified pharmacist be present, thereby effectively restricting all forms of selling via the Internet.

In October 2008, following an investigation, the Conseil de la concurrence (French Competition Board) now the Autorité de la Concurrence (Competition Authority), decided that by effectively banning all internet sales, PFDC's distribution agreements constituted anti-competitive agreements which infringed the French Commercial Code as well as EU competition law. The Board found that PFDC limited the commercial freedom of its distributors and restricted consumer choice, concluding that it was equivalent to a ban on active or passive sales. As such the Board decided that the ban on internet sales necessarily had the object of restricting competition and was a hardcore restriction which could not benefit from a block exemption. Moreover the Board decided that the distribution agreements could not benefit from an individual exemption under Article 81(3) EC as PFDC had not shown economic progress or that the restriction on competition was indispensable.

PFDC challenged that decision before the Cour d'appel de Paris (Paris Court of Appeal) which has asked the Court of Justice whether the general and absolute ban on internet sales constitutes a "hardcore" restriction of competition by object, whether such an agreement can benefit from a block exemption and whether it would be eligible for an individual exemption under Article 81(3) EC.

In today's Opinion, Advocate General Ján Mazák, first concludes that **a general and absolute ban on selling via the Internet** in the context of a selective distribution network which goes beyond what is objectively necessary in order to distribute goods in an appropriate manner in light of their material qualities, aura and image, **has the object of restricting competition** and falls within the scope of Article 81(1) EC.

¹ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21.)

In this regard, the Advocate General considers that PFDC's claim that the ban is justified on public health grounds, as correct use of its products requires the advice of a pharmacist, appears to be objectively unfounded. It is clear to the Advocate General that such products are not medicinal products and there is no regulatory requirement which would mandate their sale in a physical space and only in the presence of a qualified pharmacist.

As to the aim of preserving the luxury image of the beauty products in question, Advocate General Mazák notes that, in the past, the Court has found that selective distribution agreements may be justified in order to preserve the aura and image of the goods in question. While accepting that the cosmetic and personal care products are, in principle, appropriate for a selective distribution agreement and that the presence of a pharmacist may enhance the image of those products, the Advocate General nevertheless believes that **the national court must examine whether a general and absolute ban on Internet sales is proportionate. In his view**, given that a manufacturer could impose appropriate, reasonable and non-discriminatory conditions on Internet sales, thereby protecting the image of its products, **a general and absolute ban on Internet sales could only be proportionate in very exceptional circumstances.** The Advocate General suggests that the national court should examine whether information and advice could be adequately provided over the Internet. Moreover, Advocate General Mazák notes that a ban on Internet sales eliminates a modern means of distribution which would allow customers outside the catchment area of a physical outlet to buy these products, thereby, combined with the increase in price transparency that Internet sales would provide, enhancing intra-mark competition.

Next, Advocate General Mazák states that, in his view, such a ban on Internet sales restricts both active and passive sales by preventing use of a modern communicating and marketing tool. **It therefore constitutes a hardcore restriction within the meaning of the Vertical Agreements Block Exemption Regulation and as such would be ineligible for the exemption** provided by that regulation. In this respect the Advocate General disagrees with PFDC's assertion that sales on the Internet should be classified as sales from an unauthorised (virtual) establishment.

Finally, the Advocate General recalls that any anti-competitive agreement which restricts competition and would, in principle, be prohibited by Article 81(1) EC, may, in principle, benefit from the exemption provided by Article 81(3) EC. In order to determine whether that is the case, it is for the referring court to determine whether the agreement in question fulfils the four criteria contained in that article: first that it contributes to improving the production or distribution of the goods in question or promotes economic or technical progress; second, that consumers are allowed a fair share of the resulting benefit; third, that it does not impose any nonessential restrictions on the parties to the agreement, and fourth, that it does not give the possibility of eliminating competition. However, as there is insufficient evidence in the file before the Court on the matter, Advocate General Mazák considers that the Court cannot provide any more specific guidance on this point.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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