



Press and Information

Court of Justice of the European Union

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Judgment in Case C-439/09

Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la
Concurrence and Others

**A clause in a selective distribution contract banning the distributors of the company
Pierre Fabre Dermo-Cosmétique from selling its products online amounts to a
restriction on competition by object, unless that clause is objectively justified**

*Such a ban may not benefit from a block exemption but may, if certain conditions are met, benefit
from an individual exemption*

Article 101 TFEU prohibits agreements which have as their object or effect the restriction of competition. Article 101(3) TFEU provides, subject to certain conditions, for agreements which improve the distribution of products or contribute to promoting economic progress to be granted an individual exemption. In addition, various regulations provide that certain categories of agreements may qualify for a block exemption. One of those regulations, the Vertical Agreement Block Exemption Regulation¹, provides such an exemption for distribution agreements which meet certain conditions. However, that regulation contains a list of agreements which may not benefit from a block exemption.

Pierre Fabre Dermo-Cosmétique ('PFDC') is one of the companies in the Pierre Fabre group. It manufactures and markets cosmetics and personal care products and has several subsidiaries, including, inter alia, the Klorane, Ducray, Galénic and Avène laboratories, whose cosmetic and personal care products are sold, under those brands, mainly through pharmacists, on both the French and the European markets.

The products in question are not classified as medicines and are, therefore, not covered by the pharmacists' monopoly laid down by French law. However, distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that sales must be made exclusively in a physical space and in the presence of a qualified pharmacist, thereby restricting in practice all forms of internet selling.

In October 2008, following an investigation, the Autorité de la concurrence (French Competition Authority) decided that, owing to the *de facto* ban on all internet sales, PFDC's distribution agreements amounted to anti-competitive agreements contrary to both French law and European Union competition law. The Competition Authority found that the ban on internet selling necessarily had as its object the restriction of competition and could not benefit from a block exemption. The Authority also decided that the agreements could not benefit from an individual exemption either.

PFDC challenged that decision before the Cour d'appel de Paris (France), which has asked the Court of Justice whether a general and absolute ban on internet selling amounts to a restriction of competition 'by object', whether such an agreement may benefit from a block exemption and whether, where the block exemption is inapplicable, the agreement may benefit from an individual exemption under Article 101(3) TFEU.

In its judgment today, the Court recalls that in order to assess whether a contractual clause involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part.

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).

As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market. Such agreements are to be considered, **in the absence of objective justification**, as 'restrictions by object'. However, a selective distribution system is compatible with European Union law to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a distribution network in order to preserve the product's quality and ensure its proper use, and, finally, that the criteria laid down do not go beyond what is necessary.

After recalling that **it is for the referring court to examine** whether a contractual clause which *de facto* prohibits all forms of internet selling **can be justified by a legitimate aim, the Court provides the referring court** for that purpose with **guidance on the interpretation of European Union law** to enable it to reach a decision.

Thus, the Court points out that, in the light of the freedoms of movement, it has not accepted – as it has already stated in the context of the sale of non-prescription medicines² and contact lenses³ – arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, put forward to justify a ban on internet sales. Similarly, the Court rules that the need to maintain the prestigious image of PFDC's products is not a legitimate aim for restricting competition.

As to whether a selective distribution contract may benefit from a block exemption, the Court recalls that the exemption does not apply to vertical agreements which have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade. A contractual clause which *de facto* prohibits the internet as a method of marketing at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. Consequently, the block exemption does not apply to that contract.

However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU, if the referring court finds that the conditions laid down in that provision are met.

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 judgment is published on the CURIA website on the day of delivery.

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² Case [C-322/01](#) Deutsche Apothekerverband (see also Press Release [113/03](#))

³ Case [C-108/09](#) Ker-Optika (See also Press Release [117/10](#))