Court of Justice EU, 13 October 2011, Pierre Fabre Dermo Cosmétique

See also: IPPT20171206, CJEU, Coty v Parfumerie Akzente

Pierre Fabre
Dermo-Cosmétique

COMPETITION LAW

A contractual clause in the context of a selective distribution system that bans online sale of cosmetics and personal care products amounts to a restriction of competition within the meaning of provision 101(1) TFEU when it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified:

- **it is for the referring court to examine whether the clause can be justified by a legitimate aim**

In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, 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 network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, paragraph 20, and **Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16**).

42. Although it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see **L'Oréal**, paragraph 14).

- **the need to provide individual advice to the customers is not accepted as legitimate aim in the context of non-prescription medicines**

It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44. In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, Deutscher Apothekerverband, paragraphs 106, 107 and 112, and Case C-108/09 Ker-Optika [2010] ECR I-0000, paragraph 76).

- **the aim of maintaining a prestigious image is also not a legitimate aim for restricting competition**

The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

47. In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

Article 4(c) of Regulation No 2790/1999 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to the clause at cause:

- **it cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within that article**

It should be pointed out that, by referring to 'a place of establishment', Article 4(c) of Regulation No 2790/1999 concerns only outlets where direct sales take place. The question that arises is whether that term can be taken, through a broad interpretation, to encompass the place from which internet sales services are provided.

57. As regards that question, it should be noted that, as an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.

58. Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating

out of an unauthorised place of establishment within the meaning of Article 4(c) of Regulation No 2790/1999.

Source: curia.europa.eu

Court of Justice EU, 13 October 2011

(K. Lenaerts, Juhász (Rapporteur), G.Arestis, T. von Danwitz and D. Šváby)_

JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 (*)

(Article 101(1) and (3) TFEU - Regulation (EC) No 2790/1999 - Articles 2 to 4 - Competition - Restrictive practice - Selective distribution network - Cosmetics and personal care products - General and absolute ban on internet sales - Ban imposed by the supplier on authorised distributors)

In Case C‑439/09,

REFERENCE for a preliminary ruling under Article 234 EC from the cour d'appel de Paris (France), made by decision of 29 October 2009, received at the Court on 10 November 2009, in the proceedings

Pierre Fabre Dermo-Cosmétique SAS

v

Président de l'Autorité de la concurrence,

Ministre de l'Économie, de l'Industrie et de l'Emploi,

intervening parties:

Ministère public,

European Commission,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G.Arestis, T. von Danwitz and D. Šváby Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2010,

after considering the observations submitted on behalf of:

- Pierre Fabre Dermo-Cosmétique SAS, by J. Philippe, avocat,
- the président de l'Autorité de la concurrence, by B. Lasserre, F. Zivy, I. Luc and L. Gauthier-Lescop,
- the French Government, by G. de Bergues and J. Gstalter, acting as Agents,
- the Italian Government, by M. Massella Ducci Teri, avvocato dello Stato,
- the Polish Government, by M. Szpunar, acting as Agent,
- the European Commission, by P.J.O. Van Nuffel and A. Bouquet, acting as Agents,
- the EFTA Surveillance Authority, by O. Einarsson and F. Simonetti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2011,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 81(1) and (3) EC and of 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).

2. The reference has been made in an action for annulment and, in the alternative, for amendment by Pierre Fabre Dermo‑Cosmétique SAS ('Pierre Fabre Dermo-Cosmétique') against decision No 08‑D‑25 of 29 October 2008 ('the contested decision') of the Conseil de la concurrence (French Competition Board; now, since 13 January 2009, the Autorité de la concurrence (French Competition Authority)), regarding the ban imposed by Pierre Fabre Dermo‑Cosmétique, contained in its selective distribution contracts, on distributors which it previously chose to authorise, on the sale of its cosmetics and personal care products via the internet, contrary to the provisions of Article L. 420-1 of the code de commerce (Commercial Code) and Article 81 EC.

Legal context

European Union legislation

3. Recital 10 in the preamble to Regulation No 2790/1999 states:

'This Regulation should not exempt vertical agreements containing restrictions which are not indispensable to the attainment of the positive effects mentioned above; in particular, vertical agreements containing certain types of severely anti-competitive restraints such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.'

4. Article 1(d) of Regulation No 2790/1999 defines a *'selective distribution system'* as *'a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors'*.

5. Article 2(1) of Regulation No 2790/1999 provides:

'Pursuant to Article 81(3) of the Treaty [Article 101(3) TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) [Article 101(1) TFEU] shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) [Article 101(1) TFEU] ("vertical restraints").'

6. Under Article 3(1) of that regulation *'…the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services'*.

7. Article 4 of Regulation No 2790/1999 provides that the exemption to the prohibition laid down in Article

81(1) EC [Article 101(1) TFEU] is not to apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
'…
(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
…'

National legislation

8. Article L. 420-1 of the French Commercial Code provides:
'Common actions, agreements, express or tacit understandings or coalitions, particularly when they are intended to:
(1) limit access to the market or the free exercise of competition by other undertakings;
(2) prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices;
(3) limit or control production, markets, investment or technical progress;
(4) share markets or sources of supply,
shall be prohibited, even through the direct or indirect intermediation of a company in a group established outside France, when they have the object, or may have the effect, of preventing, restricting or distorting competition in a market.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9. Pierre Fabre Dermo-Cosmétique 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.
10. The products at issue are cosmetics and personal care products which are not classified as medicines and are, therefore, not covered by the pharmacists' monopoly laid down by the code de la santé publique (Public Health Code).
11. In 2007, the Pierre Fabre group had 20% of the French market for those products.
12. Distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that such sales must be made exclusively in a physical space, in which a qualified pharmacist must be present.
13. Articles 1.1 and 1.2 of the general conditions of distribution and sale of the brands stipulate:
'The authorised distributor must supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained to:
acquire a thorough knowledge of the technical and scientific characteristics of the products…, necessary for the proper fulfilment of the obligations of professional practice…
regularly and consistently give the consumer all information concerning the correct use of the products...
give on-the-spot advice concerning sale of the…product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails.
In order to do this, the person in question must have a degree in pharmacy awarded or recognised in France…
The authorised distributor must undertake to dispense the products…only at a marked, specially allocated outlet…'
14. Those requirements exclude de facto all forms of selling by internet.
15. By decision of 27 June 2006, the Competition Authority opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products.
16. By decision No 07-D-07 of 8 March 2007, the Competition Authority approved and made binding the commitments proposed by the group of undertakings concerned, with the exception of Pierre Fabre Dermo‑Cosmétique, to amend their selective distribution contracts in order to enable the members of their networks to sell their products via the internet, subject to certain conditions. The proceedings opened against Pierre Fabre Dermo‑Cosmétique followed their ordinary course.
17. During the administrative proceedings, Pierre Fabre Dermo‑Cosmétique explained that the products at issue, by their nature, require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may, in all circumstances, request and obtain the personalised advice of a specialist, based on the direct observation of the customer's skin, hair and scalp.
18. In view of the fact that there might be an effect on trade between the Member States, the Competition Authority analysed the practice in question in the light of the provisions of French competition law and European Union law.
19. In the contested decision, the Competition Authority first of all noted that the ban on internet sales amounted to a limitation on the commercial freedom of Pierre Fabre Dermo‑Cosmétique's distributors by excluding a means of marketing its products. Moreover, that prohibition restricted the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers who are not located in the 'physical' trading area of the authorised distributor. According to the Authority, that limitation necessarily has the object of restricting competition, in addition to the limitation inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorised to distribute the product and prevents distributors from selling the goods to non-authorised distributors.

20. Since Pierre Fabre Dermo‑Cosmétique's market share is less than 30%, the Competition Authority examined whether the restrictive practice could benefit from the block exemption provided for in Regulation No 2790/1999. Although the practice of prohibiting internet selling is not expressly referred to in that regulation, it is equivalent to a ban on active and passive sales. Consequently, the practice falls within Article 4(c) of the regulation, which excludes restrictions on active or passive sales by members of a selective distribution system from the automatic block exemption.

21. According to the Competition Authority, the ban on internet sales does not meet the conditions for exception provided for in Article 4(c) of Regulation No 2790/1999, according to which those restrictions on sales are without prejudice to the possibility of prohibiting a member of the system from operating 'out of an unauthorised place of establishment'. The Authority held that the internet is not a place where goods are marketed, but an alternative means of selling which is used in the same way as direct selling in a shop or mail-order selling by distributors in a network which have physical outlets.

22. Moreover, the Competition Authority noted that Pierre Fabre Dermo‑Cosmétique failed to demonstrate that it could benefit from an individual exemption pursuant to Article 81(3) EC and to Article L. 420-4, paragraph 1, of the Commercial Code.

23 In that regard, the Authority rejected Pierre Fabre Dermo‑Cosmétique's argument that the ban on internet sales at issue contributes to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free-riding between authorised pharmacies. Pierre Fabre Dermo‑Cosmétique's choice of a selective distribution system, with the presence of a pharmacist at the place of sale, guaranteed that an advisory service is provided at all authorised pharmacies and that each of them bears the cost.

24. In response to Pierre Fabre Dermo‑Cosmétique's argument on the need for a pharmacist to be physically present when the products at issue are purchased, in order to ensure the consumer's well-being, the Competition Authority first of all noted that the products concerned were not medicines. In this respect, the specific legislation by which they are governed concerns rules which apply to their manufacture and not to their distribution which is free, and, moreover, a pharmacist does not have the power to make a diagnosis, only a doctor being authorised to do so. The Competition Authority then applied Case C‑322/01 Deutscher Apothekerverband [2003] ECR I-14887, concerning restrictions on the distribution of non-prescription medicines via the internet, to the products at issue.

25. According to the Competition Authority, Pierre Fabre Dermo‑Cosmétique also failed to demonstrate in what way visual contact between the pharmacist and the users of the product ensures 'cosmetovigilance', which requires health-care professionals to record and communicate any adverse reactions to cosmetic products. Indeed, any negative effects of the products at issue will become apparent only after the product has been used and not when it is purchased. In the event of problems linked to its use, the patient will tend to consult a doctor.

26. In response to Pierre Fabre Dermo‑Cosmétique's final argument, the Competition Authority did not find the fact that internet distribution does not lead to a reduction in prices to be relevant. The benefit for the consumer lies not only in the reduction of prices, but also in the improvement of the service offered by the distributors including, inter alia, the possibility of ordering the products at a distance, without time restrictions, with easy access to information about the products and allowing prices to be compared.

27. The Competition Authority thus concluded that the ban imposed by Pierre Fabre Dermo‑Cosmétique on its authorised distributors on selling via the internet amounts to a restriction on competition contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, and ordered it to remove from its selective distribution contracts all terms that are equivalent to a ban on internet sales of its cosmetics and personal care products and to make express provision in its contracts for an option for its distributors to use that method of distribution. Pierre Fabre Dermo‑Cosmétique was ordered to pay a fine of EUR 17 000.

28. On 24 December 2008, Pierre Fabre Dermo‑Cosmétique brought an action for annulment and, in the alternative, for amendment of the contested decision before the cour d'appel de Paris. At the same time Pierre Fabre Dermo‑Cosmétique requested the first president of the court to stay execution of the contested decision. In support of its action, Pierre Fabre Dermo‑Cosmétique claimed, primarily, that the contested decision was vitiated by an error of law in that it denied the contested practice the benefit of both the block exemption provided for in Regulation No 2790/1999 and the individual exemption provided for in Article 81(3) EC.

29. On 18 February 2009, the first president of the cour d'appel de Paris ordered a stay of execution of the orders made by the Competition Authority against Pierre Fabre Dermo‑Cosmétique until the referring court had ruled on the merits of the action.

30. In its order for reference, the cour d'appel de Paris, after recalling the reasons behind the contested decision, and the content of the written observations that the European Commission presented pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), nevertheless noted that neither the Commission's guidelines nor its observations were binding on the national courts.

31. In those circumstances, the cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]'

Consideration of the question referred

32. It is to be observed at the outset that neither Article 101 TFEU nor Regulation No 2790/1999 refer to the concept of 'hardcore' restriction of competition.

33. In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause - where it falls within the scope of Article 101(1) TFEU - may benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Article 101(3) TFEU.

The classification of the restriction in the contested contractual clause as a restriction of competition by object

34. It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'. It has, since the judgment in Case 56/65 LTM [1966] ECR 235 been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where the anticompetitive object of the agreement is established it is not necessary to examine its effects on competition (see Joined Cases C‑501/06 P, C‑513/06 P, C‑516/06 P and C‑519/06 P GlaxoSmithKline Services and Others v Commission and Others [2009] ECR I‑9291, paragraph 55 and the case-law cited).

35. For the purposes of assessing whether the contractual clause at issue 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 (see GlaxoSmithKline and Others v Commission and Others, paragraph 58 and the case law cited).

36. The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.

37. According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point de facto prohibits the authorised distributors from any form of internet selling.

38. As the Commission points out, by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.

39. As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 AEG‑Telefunken v Commission [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

40. However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (AEG‑Telefunken v Commission, paragraph 33).

41. In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, 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 network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 Metro SB‑Großmärkte v Commission [1977] ECR 1875, paragraph 20, and **Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16**).

42. Although it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see **L'Oréal**, paragraph 14).

43. It is undisputed that, under Pierre Fabre Dermo‑Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44. In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not

accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, Deutscher Apothekerverband, paragraphs 106, 107 and 112, and Case C-108/09 Ker-Optika [2010] ECR I-0000, paragraph 76).

45. Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.

46. The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

47. In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

The possibility of a block exemption or an individual exemption

48. If it is established that an agreement or contractual clause restricts competition within the meaning of Article 101(1) TFEU, it will be for the referring court to examine whether the conditions in paragraph 3 of that article are met.

49. The possibility for an undertaking to benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU derives directly from the Treaty. It is not contested in any of the observations submitted to the Court. That possibility is also open to the applicant in the main proceedings.

50. However, in that regard, given that the Court does not have sufficient information before it to assess whether the selective distribution contract satisfies the conditions in Article 101(3) TFEU, it is unable to provide further guidance to the referring court.

51. As regards the possibility that the selective distribution contract may benefit from the block exemption of Regulation No 2790/1999, it should be noted that the categories of vertical agreements that are eligible have been defined by the Commission in that regulation, on the basis of the Council's authorisation contained in Council Regulation No 19/65/EEC of 2 March 1965 on the application of [81(3)] of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966, p. 35).

52. Under Articles 2 and 3 of Regulation No 2790/1999, a supplier, in the context of a selective distribution system, may, in principle, benefit from an exemption, where its market share does not exceed 30%. It is apparent from the documents before the Court that Pierre Fabre Dermo-Cosmétique's market share does not exceed that threshold. However, that regulation, pursuant to Article 2 of Regulation No 19/65, has excluded certain types of restrictions that have severely anticompetitive effects, irrespective of the market share of the undertakings concerned.

53. Hence, it follows from Article 4(c) of Regulation No 2790/1999 that the exemption is not to apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, 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, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

54. A contractual clause such as the one at issue in the main proceedings, prohibiting de facto 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.

55. According to Pierre Fabre Dermo-Cosmétique, the ban on selling the contractual products via the internet is equivalent however to a prohibition on operating out of an unauthorised establishment. It submits that, since the conditions for exemption laid down at the end of the provision, cited in paragraph 53, are thus met, Article 4 does not apply to it.

56. It should be pointed out that, by referring to 'a place of establishment', Article 4(c) of Regulation No 2790/1999 concerns only outlets where direct sales take place. The question that arises is whether that term can be taken, through a broad interpretation, to encompass the place from which internet sales services are provided.

57. As regards that question, it should be noted that, as an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.

58. Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within the meaning of Article 4(c) of Regulation No 2790/1999.

59. In the light of the foregoing considerations, the answer to the second and third parts of the question referred for a preliminary ruling is that Article 4(c) of

Regulation No 2790/1999 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

Costs

60. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

Article 4(c) of 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 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

[Signatures]

OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 3 March 2011 (1)

Case C‑439/09

Pierre Fabre Dermo-Cosmétique SAS

v

Président de l'Autorité de la Concurrence

and

Ministre de l'Économie, de l'Industrie et de l'Emploi

(Reference for a preliminary ruling from the Cour d'appel de Paris (France))

(Article 81(1) EC - Competition - Selective distribution - General and absolute ban on selling cosmetics and personal care products to end-users via the internet - Restriction of competition by object - Regulation (EC) No 2790/1999 - Article 4(c) - Restriction of active and passive sales - Hardcore restriction - Individual exemption - Article 81(3) EC)

I - Introduction

1. The present reference for a preliminary ruling arose in the context of an action by Pierre Fabre Dermo-Cosmétique SAS ('PFDC') for the annulment and in the alternative the amendment of Decision No 08‑D‑25 of 29 October 2008 ('Decision') of the Conseil de la concurrence (French Competition Board; 'the Board'). The Decision found that PFDC had infringed Article L.420-1 of the Code de Commerce (Commercial Code) and Article 81 EC (now Article 101 TFEU) by effectively imposing in its selective distribution agreements a general and absolute ban on the sale by its selected (authorised) distributors of cosmetics and personal care products to end-users via the internet. The Board considered that the ban on internet sales resulted from the requirement in PFDC distribution contracts that sales of the products in question be made in a physical space in the presence of a qualified pharmacist.

II - The dispute in the main proceedings and the question referred for a preliminary ruling

2. The Pierre Fabre Group markets a number of ranges of pharmaceutical, homeopathic and para-pharmaceutical products. PFDC manufactures and markets cosmetics and personal care products and has several subsidiaries, including the cosmetics laboratories: Avène, Klorane, Galénic and Ducray. In 2007 the groups Pierre Fabre and Cosmétique Active France, a subsidiary of L'Oréal, were the major players, with market shares of 20% and 18.6%, respectively, being well established and having a large 'portfolio' of brand names.

3. The contracts awarded by PFDC for the distribution of cosmetics and personal care products in respect of the Avène, Klorane, Galénic and Ducray brands stipulate that such sales must be made in a physical space and that a qualified pharmacist must be present. (2) The referring court states that it is agreed between the parties that those requirements exclude de facto all forms of selling via the internet.

4. By decision of 27 June 2006, the Board opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products. By Decision No 07-D-07 of 8 March 2007, the Board approved and made binding the commitments proposed by the undertakings under investigation, with the exception of the Pierre Fabre Group, to amend their selective distribution contracts in order to enable members of their networks to sell their products via the internet. The Rapporteur General decided on 30 October 2006 that the practices of the Pierre Fabre Group would be subject to a separate examination.

5. The goods to which the investigation relates are cosmetics and personal care products distributed through selective distribution systems and offered for sale with the advice of a pharmacist. Those goods, which belong to the broader sector of cosmetics and personal care, are subject to various requirements relating to their composition and labelling. However, as

they are not classified as medicines and do not therefore come under the monopoly of pharmacists there is nothing to prevent such goods from being freely marketed outside the pharmacy network.

6. Competition between manufacturers on the market in cosmetics and personal care products is keen, owing in particular to the nature of the goods, in respect of which innovation plays a major role. In the main, distribution is carried out through pharmacies, independent 'para-pharmacies' and para-pharmacies located in large food supermarkets, and perfumeries. Pharmacies, however, are still the main distribution channel with over two thirds of sales, as a result of the monopoly over distribution held until the end of the 1980s and their geographical coverage and also on account of the positive image afforded by the presence of a pharmacist and the proximity of the sale of prescription medicines. At the same time, internet sales of all goods have risen sharply. According to the Board, although it is still too early to measure the trend in online sales of cosmetics and personal care products, the main luxury brands in the areas of perfumes, jewellery and accessories have recently developed their own online sales sites in France and abroad.

7. In the course of their hearing by the Rapporteur on 11 March 2008, the representatives of inter alia PFDC explained the reasons that had led the Pierre Fabre Group to ban the sale of their products via the internet: *'The design of these products requires advice from a qualified pharmacist because of the way in which those products act, as they have been developed as health care products. … Our products are suitable for specific skin problems, for example, intolerant skins where there is a risk of an allergic reaction. Hence, we consider that internet selling would not meet the expectations that consumers and health professionals have of our products and consequently the requirements we lay down in our general conditions of sale. Those products are also recommended by the medical profession …'*

8. The Board, in view of the fact that there might be an appreciable effect on intra-Community trade, (3) examined the practices in the light of the provisions of Article L.420‑1 of the Commercial Code and Article 81 EC. In the Decision, the Board found that in prohibiting its authorised distributors from selling products via the internet, PFDC limits the commercial freedom of its distributors by excluding a means of marketing its cosmetics and personal care products. PFDC also restricts the choice of consumers wishing to purchase online. The Board also noted that the ban on authorised distributors deprives them of the ability to approach customers by sending messages or to meet unsolicited requests made to their site, and that the practice in question is thus equivalent to a restriction of distributors' active or passive sales.

9. The Board found that the ban necessarily has the object of restricting competition which is in addition to the limitation of competition inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorised to distribute the product and prevents distributors from selling the goods to non-authorised distributors. Given that Pierre Fabre products' market share is below 30%, the Board examined whether the restrictive practice is covered by 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 (4) which would require it not to constitute a hardcore restriction. The Board found that although the practice of prohibiting internet selling is not expressly referred to in the Community regulation, it is equivalent to a ban on active and passive sales. Thus the ban, when operated within a selective distribution network, constitutes a hardcore restriction under Article 4(c) of Regulation No 2790/1999 which cannot be automatically exempt under that regulation.

10. PFDC claimed inter alia that it had the right to ban internet sales as the organiser of a network retains the right to ban sales by an authorised distributor 'out of an unauthorised place of establishment'. PFDC stated that even if the ban on internet selling constitutes a hardcore restriction, it is incumbent on the competition authority to demonstrate the object or effect of the practice by carrying out an individual examination of that practice, which the Rapporteur did not do in this case. PFDC also claimed that in view of the exceptional and homogeneous coverage provided by distributors' physical outlets, every consumer has access to PFDC resellers and so the practice has no effect on intra-brand competition.

11. The Board considered that an internet site is not a place where goods are marketed but an alternative means of selling. The Board also found inter alia that hardcore practices for the purposes of Regulation No 2790/1999 are restrictions of competition by object, and it is not necessary to demonstrate in greater detail in what way that object restricts competition or to analyse the effects of the practices.

12. With regard to the question of an individual exemption pursuant to Article 81(3) EC (now Article 101(3) TFEU) and Article L.420‑4 of the Commercial Code, the Board took the view that PFDC had not demonstrated economic progress or that the restriction on competition was indispensable in circumstances making it eligible for an individual exemption, noting in particular that PFDC had not established that the practice at issue contributed to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free-riding between registered pharmacies nor that it ensured the welfare of the consumer through the physical presence of the pharmacist at the product's point of sale.

13. The Decision, in addition to finding that PFDC had infringed Article L.420‑1 of the Commercial Code and Article 81 EC, ordered PFDC to remove from its selective distribution contracts all terms that are equivalent to a ban on internet selling of its cosmetics and personal care products and to make express provision for an option for its distributors to use that method of distribution, within a period of three months

from notification of the Decision. PFDC was also ordered to send to all its outlets, within a period of three months from notification of the Decision, a letter informing them of the amendments to their selective distribution contracts and to supervise, if it sees fit, the setting-up of the internet sites for its distribution network, laying down rules for the layout or configuration of the websites, and to notify the Board accordingly within a period of three months from notification of the Decision. A fine of EUR 17 000 was imposed on PFDC.

14. On 24 December 2008, PFDC brought an action before the referring court for the annulment and in the alternative the amendment of the Decision. In support of its appeal, PFDC claims, firstly, that the Decision is inadequately reasoned as regards the finding of an anticompetitive object. PFDC claimed inter alia that the Board failed to analyse the legal and economic context of the practice which is obligatory in order to establish the existence of an infringement by object. Secondly, PFDC claims that the Decision is flawed by an error of law in that it refers to an object that is 'necessarily' anticompetitive. PFDC observes inter alia that the purpose of its selective distribution agreements is not to restrict competition but, on the contrary to ensure a satisfactory level of service for the consumer. The agreements seek merely to enable the customer to request and obtain at all times a specialist opinion on the most appropriate choice of Pierre Fabre products. PFDC claims that the classification of the impugned practice as an infringement per se is at odds with the general trend in competition law. According to PFDC, the Decision denied it the opportunity to show that the anticompetitive practice in question was lawful by providing objective justifications. Thirdly, PFDC claims that the Decision is flawed by an error of law and a manifest error of assessment in that it denied the practice at issue the benefit of the block exemption provided for by Regulation No 2790/1999. Lastly, PFDC claims that the Decision is flawed by an error of law in that it makes the practice at issue ineligible for an individual exemption as provided for in Article 81(3) EC, although the ban on internet selling ensures the well-being of the consumer through the physical presence of a qualified pharmacist when the product is sold, and also avoids the risks of counterfeiting and free-riding. Furthermore, abolition of that ban would not give rise to increased competition or, in particular, to any reduction in prices.

15. By document dated 11 June 2009, the Commission submitted written observations to the Cour d'appel de Paris under Article 15(3) of Council Regulation (EC) No 1/2003. (5) According to the referring court, the Commission observed that any general and absolute ban on online selling of contract goods to end-users, imposed by a supplier on its authorised distributors within the framework of a selective distribution network, constitutes a hardcore restriction on competition by object for the purposes of Article 81(1) EC, whatever the market share held by that supplier. The Commission considered that whether online selling is classified as passive or active selling is irrelevant in the case of selective distribution inasmuch as any restriction on resale, be it an active or a passive sale, constitutes a hardcore restriction. Moreover, if the distribution of contract goods is not regulated, the Commission considers that it is only in exceptional circumstances that an objective justification for a hardcore restriction may be put forward. As regards application of the block exemption provided for in Regulation No 2790/1999, the Commission considered that a selective distribution agreement containing a hardcore restriction on competition, like the one banning authorised distributors from selling contract goods online, is not covered by a block exemption under that regulation as that use of the internet cannot be equated to a supplier opening a physical outlet in a place of establishment not authorised by the supplier. However, it cannot necessarily be ruled out that the restriction may fulfil the four cumulative conditions relating to individual exemption under Article 81(3) EC and thus be covered by that exemption. Under Article 2 of Regulation No 1/2003, the burden of proof that the four conditions are met lies with the undertaking claiming that exemption.

16. It was in these circumstances, that the Cour d'appel de Paris by judgment dated 29 October 2009 decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC?'

III - Proceedings before the Court

17. Written pleadings were submitted by the PFDC, the French Competition Authority ('Authority'), (6) the French, Polish and Italian Governments, the Commission and the EFTA Surveillance Authority. A hearing was held on 11 November 2010.

IV - Introductory remarks

18. In my view, the question referred by the Cour d'appel de Paris may, as argued by the Authority and the Commission, be conveniently divided into three questions. Firstly, does a general and absolute ban on selling the contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, have the object of restricting competition for the purposes of Article 81(1) EC? Secondly, can such a restriction benefit from the block exemption provided for by Regulation No 2790/1999? Thirdly, in the event that the restriction in question cannot benefit from the block exemption, can it benefit from an individual exemption pursuant to Article 81(3) EC?

V - Question I - Anticompetitive object

19. PFDC claims that a hardcore restriction pursuant to Regulation No 2790/1999 does not in itself constitute

an infringement by object pursuant to Article 81(1) EC and therefore cannot relieve the relevant authority or court of demonstrating in the present case the existence of such an infringement. Pursuant to the case-law of the Court, competition authorities must carry out an individual in concreto analysis of the agreement or practise in the light of its legal and economic context. PFDC considers that such an analysis was not carried out in the Decision which merely found that a hardcore restriction constitutes an infringement by object. PFDC also indicates that the object of the agreement was pro-competitive and sought to ensure that consumers had the best possible advice when buying one of its products. In order to give the best possible advice, a pharmacist must observe directly the skin, hair and scalp of the client. Advice of an equivalent quality cannot be given for internet sales. In addition, PFDC considers that if it authorised internet sales, the requirement that a pharmacist be present in a physical outlet could be regarded as discriminatory. PFDC also notes that selective distribution agreements must not be examined solely on the basis of price but also in the light of the services provided to consumers. Moreover, given the very high level of intra-mark competition resulting from the 23 000 outlets in France, an in concreto examination shows that the object of the agreement is not to restrict competition.

20. The Authority considers that the ban, having regard to its anticompetitive object, is a hardcore restriction pursuant to Article 4(c) of Regulation No 2790/1999 and is prohibited in accordance with Article 81(1) EC. The ban limits active and passive sales in accordance with Article 4(c) of Regulation No 2790/1999. The Authority notes that the internet is a new channel of distribution and an important tool for increasing competition which must be reconciled with more traditional channels such as selective distribution thereby justifying the imposition of certain conditions. However, the general and absolute ban on internet sales and the total elimination of their obvious advantages from a competition perspective is disproportionate. The ban is detrimental to competition and consumers and hinders the integration of the internal market thereby infringing one of the most essential objectives of the Treaty. The economic and legal context of the main proceedings does not alter that conclusion. While a selective distribution system is permissible if it complies with the case-law thereon, such a system leads to a reduction of competition, and as a result the remaining competition becomes all the more important.

21. The French Government considers that two interpretations of Article 81(1) EC are possible in the present case. Firstly, the ban may be considered a restriction by object of competition which not only has an adverse effect on the structure of competition, due to the imposition in effect of territorial restrictions on distributors, but also prejudices the interests of consumers and is not objectively justified. Secondly, the French Government considers that there is currently inadequate experience on whether the ban in question has by its very nature the object of restricting competition. An assessment of the positive and negative effects of the ban in question is thus indispensable. The French Government notes that the ban could contribute to improving the image of the trademark of the product to the benefit of inter-mark competition. The Italian and Polish Governments consider that the general and absolute ban on internet sales constitutes an infringement by object of Article 81(1) EC.

22. The Commission considers that the ban constitutes an infringement by object as it is by its very nature likely to considerably reduce the possibility of a distributor selling to clients outside its contractual territory or area of activity. This is particularly the case in the context of selective distribution which gives rise to a risk of market segmentation. However, the Commission notes that this interpretation is without prejudice to the right of a manufacturer to choose its distributors on the basis of specific criteria and to impose qualitative conditions relating to the advertising, presentation and sale of the products in question. The EFTA Surveillance Authority considers that a general and absolute ban on selling contract goods to end-users via the internet imposed on authorised distributors in the context of a selective distribution network, firstly, can only be regarded as proportionate in line with the existing case-law regarding selective distribution systems, and therefore compatible with Article 101(1) TFEU, if the legitimate requirements on which the selective distribution system is based cannot be fulfilled in the case of internet sales and, secondly, amounts to a restriction of competition by object pursuant to Article 81(1) EC if, in light of the economic and legal context, it is aimed at partitioning national markets or making the interpenetration of national markets more difficult, in particular by preventing or restricting parallel trade.

A - Hardcore restriction/restriction by object

23. According to the order for reference, the Decision found, inter alia, that the requirement in PFDC's distribution contracts that sales of the products in question be made in a physical space in the presence of a qualified pharmacist constituted a de facto ban on internet selling, is equivalent to a restriction of authorised distributors' active or passive sales and necessarily has the object of restricting competition. In addition, the ban was found to limit the commercial freedom of PFDC's distributors by excluding a means of marketing its products which also restricts the choice of consumers wishing to purchase online. The referring court has queried whether, since there is no mention in Regulation No 2790/1999 of a ban on online selling, a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, constitutes a hardcore restriction on competition by object for the purposes of Article 81(1) EC.

24. I consider that a degree of confusion is apparent from the file before the Court with regard to the distinct concepts of a restriction of competition by object and a

hardcore restriction. PFDC has also referred at length to this confusion in its pleadings before the Court. Moreover, it would appear (7) from the Commission's written observations to the referring court pursuant Article 15(3) of Regulation No 1/2003 that the Commission considered that the ban in question 'constitutes a hardcore restriction of competition by object for the purposes of Article 81(1) EC'. (8) The Commission however in its pleadings before the Court clarified its position on this point by stating that while there may be links between them, a restriction by object and a hardcore restriction constitute two distinct legal concepts.

25. It is clear from the case-law of the Court that vertical agreements may, in certain circumstances, have the object of restricting competition. (9) The concept of a restriction by object flows, as indicated by PFDC, from the wording of Article 81(1) EC. (10) Where the anticompetitive object of the agreement is established it is not necessary to examine its effects on competition. (11) However, while a finding of infringement by object with respect to an agreement will not require a demonstration of its anticompetitive effects in order to establish its anticompetitive nature, the Court has held that regard must be had, inter alia, to the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part. (12)

26. The anticompetitive object of an agreement may not therefore be established solely using an abstract formula.

27. Thus while certain forms of agreement would appear from past experience to be prima facie infringements by object, this does not relieve the Commission or a national competition authority (13) of the obligation of carrying out an individual assessment of an agreement. I consider that such an assessment may be quite truncated in certain cases, for example where there is clear evidence of a horizontal cartel seeking to control output in order to maintain prices, but it may not be entirely dispensed with.

28. The concept of a 'hardcore restriction' is not derived from the EC Treaty nor indeed Community legislation but is referred to in the Commission's Guidelines on Vertical Restraints (14) ('Guidelines') which state at paragraph 46 that '[Regulation No 2790/1999] [(15)] contains in Article 4 a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of [that regulation]'. (16) Such hardcore restrictions thus include restrictions of the buyer's ability to determine its sale price, restrictions of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, the restriction of active or passive sales (17) (18) to end-users by members of a selective distribution system operating at the retail level of trade and the restriction of cross-supplies between distributors within a selective distribution system. In my view, while the inclusion of such restrictions in an agreement would give rise to concerns regarding the conformity of that agreement with Article 81(1) EC (19) and indeed, after examination of, inter alia, the particular agreement and the economic and legal context of which it forms a part, may in fact result in a finding of a restriction by object, there is no legal presumption that the agreement infringes Article 81(1) EC.

29. In that regard, the Court has recently restated in Pedro IV Servicios (20) the manner in which the distinct paragraphs of Article 81 EC operate. Thus 'where an agreement does not satisfy all the conditions provided for by an exempting regulation, it will be caught by the prohibition laid down in Article 81(1) EC only if its object or effect is perceptibly to restrict competition within the common market and it is capable of affecting trade between Member States. In that latter case, and in the absence of individual exemption pursuant to Article 81(3) EC, that agreement would be automatically void under Article 81(2) EC'. In my view, the passage cited indicates that an agreement which does not satisfy all the conditions provided for by an exempting regulation (21) does not necessarily have the object or effect of restricting competition pursuant to Article 81 EC.

30. An individual examination is therefore required in order to assess whether an agreement has an anticompetitive object even where it contains a restriction which falls within the scope of Article 4(c) of Regulation No 2790/1999, thereby rendering the restrictive clause ineligible for exemption under that regulation.

B - Objective justification

31. PFDC considers that the ban in question is objectively justified due to the nature of the products in question and their use. It claims that an incorrect use of its products could detrimentally affect consumers thus justifying the need for a service providing high quality advice. Only the presence of a pharmacist can guarantee the optimal level of advice to consumers. Contrary to the claims of the Commission and the Authority, PFDC considers that the concept objective justification is more extensive than safety and public health concerns. PFDC considers that the restrictive approach of the Authority and the Commission is contrary to the case-law of the Court which recognised, in relation to other branches of law, that the validity of certain practices should be examined in the light of imperatives other than safety and public health. PFDC cited in that regard paragraph 37 of the judgment of the Court in Copad (22) which provides that 'the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark's prestige, sales to discount stores…, provided it has been established that that contravention … damages the allure and prestigious image which bestows on them an aura of luxury'.

32. PFDC states that in any event the ban on internet sales is justified for safety and public health reasons. At the hearing, following a question put to it by the Court, PFDC stated that the ban in question is aimed at

ensuring the correct use of its products by individual consumers.
33. The Authority considers that the concept objective justification must be interpreted narrowly and applies only in two instances: firstly, where the practice derives directly from national or Community law intended to protect the public sphere and, secondly, where the practise is objectively necessary for the existence of that type of agreement. Therefore, only objective justifications, external to the undertaking concerned and its commercial choices, may be invoked. The two instances outlined do not apply in respect of PFDC's selective distribution agreements. The Commission states that as indicated in paragraph 51 of the Guidelines, a restriction on internet sales will not fall within the prohibition in Article 81(1) EC if it is objectively justified. In exceptional cases a restriction will not fall within the scope of that provision where it is objectively necessary for the existence of an agreement of that type. The Commission considers that when the marketing of the contractual products is not subject to regulation, an objective justification for a hardcore restriction generally cannot apply. Undertakings may not in principle replace the competent public authorities in establishing and enforcing the requirements concerning the safety of products and the protection of public health. The Commission also notes that following the Board's investigation, other undertakings in a similar situation to PFDC were able to organise their selective distribution systems without an absolute ban on internet sales.
34. It is clear from the file before the Court that the products in question are not medicinal products (23) and that there is no regulatory requirement either at national or Union level which would mandate their sale in a physical space and only in the presence of a qualified pharmacist (24) thereby justifying the general and absolute ban on internet sales in question. (25) PFDC's public health and safety claims would appear therefore to be objectively unfounded.
35. I would not exclude the possibility that, in certain exceptional circumstances, private voluntary measures (26) limiting the sale of goods or services via the internet could be objectively justified, by reason of the nature of those goods or services or the customers to whom they are sold. I agree therefore with the Polish Government's statement in its pleadings that there may exist other situations where the ban on internet sales is objectively justified even in the absence of national or Community regulation. Private voluntary measures, if included in an agreement, may fall outside the scope of Article 81(1) EC (27) provided the limitations imposed are appropriate in the light of the legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality. In my view, the legitimate objective sought must be of a public law nature (28) and therefore aimed at protecting a public good and extend beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products.
36. Restrictions aimed at protecting the products' image or the manner in which they are marketed must, in my view, be examined in the light of the case-law of the Court on selective distribution. (29)
37. I therefore consider that PFDC's claims regarding the correct use of its products and the need for advice by a pharmacist do not constitute an objective justification for the general and absolute ban on internet sales.
38. PFDC also claims that the ban is objectively justified due to the major risk of an increase in counterfeited products due to internet sales, with the resulting dangers for consumer health, (30) and the risk of free-riding which could lead to the disappearance of the services and advice provided in pharmacies as the owners of internet sites could free-ride on the investments of distributors who do not have such sites.
39. In my view, the threat of counterfeiting and the risk of free-riding are valid concerns in the context of selective distribution.
40. However, I am uncertain how the distribution by a selected distributor of a manufacturer's products via the internet could itself lead to an increase in counterfeiting and how any detrimental effects resulting from such sales cannot be counteracted by adequate security measures. As regards the question of free-riding, given that the setting-up and operation of an internet site to a high standard undoubtedly entails costs, the very existence of free-riding by internet distributors on the investments of distributors operating out of a physical outlet cannot be presumed. Moreover, I consider that a manufacturer can impose proportionate and non-discriminatory conditions on its selective distributors selling via the internet in order to counteract such free-riding, thereby ensuring that the manufacturer's distribution network operates in a balanced and 'equitable' manner. In the light of such considerations, it would appear that the general and absolute ban is inordinate and not commensurate with the risks in question.
41. PFDC's claims concerning counterfeiting and free-riding would appear therefore, subject to verification by the referring court, to be unfounded.

C - Restriction on active and passive sales

42. The Decision would appear to be premissed on the fact that the de facto ban on internet sales (31) is equivalent to a restriction of distributors' active or passive sales and in the context of a selective distribution system necessarily infringes Article 81(1) EC. (32) While, as the Commission has correctly indicated, the Court has held that, in principle, (33) agreements aimed at prohibiting or limiting parallel trade (34) have as their object the prevention of competition, (35) in my view, the mere fact that the selective distribution agreements in question in the main proceedings may restrict parallel trade (36) may not in itself be sufficient to establish that the agreement has the object of restricting competition pursuant to Article 81(1) EC. (37) Indeed, it is settled case-law that selective distribution systems necessarily affect competition (38) as they not only limit price

competition, (39) but also affect parallel trade (40) as distributors may only sell to other authorised distributors or end-users. However, despite such restrictions, the Court has held that in certain circumstances selective distribution agreements do not have the object of restricting competition.

43. Moreover, while it would appear that the ban on internet sales restricts parallel trade more extensively than such restrictions inherent to any selective distribution agreement and accordingly must be taken into consideration by the referring court, an assessment of whether clauses in the selective distribution system in question in the main proceedings have the object of restricting competition must, in my view, be carried out in the light of the nature of selective distribution agreements and the case-law thereon which forms part of the economic and legal context in which the agreements were concluded and operate.

D - Selective distribution

44. It would appear from the file before the Court that the presence of a pharmacist at the point of sale enhances the image of the products in question. (41) In its judgment in Copad, (42) the Court held that the characteristics of goods are derived not only from their material qualities but also from the aura emanating from them. The Court also stated that the characteristics and conditions of a selective distribution system can, in themselves, preserve the quality and ensure the proper use of goods, (43) in that case luxury goods. (44)

45. Where a manufacturer wishes to impose conditions concerning the manner in which its products are sold, such as an obligation that distributors and their staff be specialised in the sale of such products and provide appropriate sales advice to customers or obligations concerning the presentation of those products in a manner which would enhance their image, the manufacturer may set up and operate a selective distribution system in order to choose its distributors in accordance with those specifications.

46. In Metro I, (45) the Court held that the nature and intensiveness of competition may vary in accordance, inter alia, with the products or services in question. A manufacturer can therefore adapt its manner of distribution to meet the requirements of its customers and selective distribution systems may in certain circumstances constitute an aspect of competition which accords with Article 81(1) EC. Thus in AEG, (46) the Court held that the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products (47) may justify a reduction of price competition in favour of competition relating to factors other than price. A reduction in price competition will however only be justified provided competition on the basis of other factors is improved. (48)

47. It is settled case-law that selective distribution systems are permissible provided distributors are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the distributor and its staff and the suitability of its trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion. (49) A manufacturer may thus not refuse to approve distributors who satisfy the qualitative criteria of the distribution system. (50)

48. Much of the case-law of the Court has focused on whether distributors are selected in a uniform and non-discriminatory manner. The question of admission to the Pierre Fabre Group's selective distribution system is not, per se, in question in the main proceedings as there is no suggestion that the group's selection system operates in a discriminatory manner. Rather what is in question is the legality pursuant to Article 81(1) EC of the selection criteria chosen. I would note in that regard that the selection criteria which were identified in the Decision as breaching Article 81(1) EC relate in fact to the technical qualifications of the Pierre Fabre Group's selected distributors and their staff (51) and the fact that the products be sold in a physical space.

49. The Court held that, in principle, where admission to a selective distribution network is made subject to conditions going beyond simple, objective qualitative selection, those conditions fall within the prohibition laid down in Article 81(1) EC in particular when they are based on quantitative (52) selection criteria. (53) In that regard, a clear distinction between qualitative and quantitative criteria has been drawn in the case-law.

50. However, not all qualitative criteria for the selection of distributors are permissible under Article 81(1) EC. (54)

51. A manufacturer which operates a selective distribution system must therefore in accordance with the case-law impose qualitative criteria which exceed national or Union rules governing sales of those products, (55) the characteristics of the goods in question must necessitate a selective distribution system in order to preserve their quality and ensure their proper use (56) and the criteria must not go beyond what is objectively necessary (57) in order to distribute those products in an appropriate manner, in the light not only of their material qualities but also their aura or image. (58)

52. In my view, qualitative criteria in a selective distribution agreement which comply with the aforementioned conditions but which lead to a restriction of parallel trade which is more extensive than the restriction inherent to any selective distribution agreement do not have the object of restricting competition pursuant to Article 81(1) EC.

53. I consider, subject to verification by the referring court, that the products in question in the main proceedings are appropriate for distribution by means of a selective distribution system. Moreover, I consider, subject to verification by the referring court, that the requirements imposed by the Pierre Fabre Group in its selective distribution agreements that its products be sold in a physical space in the presence of a pharmacist are not aimed at restricting parallel trade, but rather at preserving the image its products have acquired due to the particular services directly and immediately available to customers at the point of sale. (59)

54. While the referring court has noted the positive image afforded by the presence of a pharmacist and the proximity of the sale of prescription medicines, that court must in my view examine whether a general and absolute ban on sales via the internet is proportionate. It is conceivable that there may be circumstances where the sale of certain goods via the internet may undermine inter alia the image and thus the quality of those goods thereby justifying a general and absolute ban on internet sales. However, given that a manufacturer can, in my view, impose appropriate, reasonable and non-discriminatory conditions concerning sales via the internet (60) and thereby protect the image of its product, a general and absolute ban on internet sales imposed by a manufacturer on a distributor is, in my view, proportionate only in very exceptional circumstances.

55. In the case in the main proceedings, the referring court should examine, for example, whether individualised information and advice on the products in question could be adequately provided at a distance over the internet to users, with the possibility of users submitting pertinent questions on the products without the need to go to a pharmacy. (61) The distributors of the Pierre Fabre Group could also indicate in such instances that individual and direct advice is available to users at certain physical outlets.

56. Moreover, while it would appear from the file before the Court that intra-mark competition is already strong given the sales of the products in a very large number of physical outlets in France, a general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition. Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question. (62)

57. I therefore consider that a general and absolute ban on selling goods to end-users via the internet imposed on authorised distributors in the context of a selective distribution network which prevents or restricts parallel trade more extensively than such restrictions inherent to any selective distribution agreement and which goes beyond what is objectively necessary in order to distribute those goods in an appropriate manner in the light not only of their material qualities but also their aura or image, has the object of restricting competition for the purposes of Article 81(1) EC.

VI - Question II - Regulation No 2790/1999

58. Pursuant to Article 2 of Regulation No 2790/1999, Article 81(1) EC does not apply to certain categories of vertical agreements or concerted practices entered into between two or more undertakings and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. (63) The exemption provided for in Article 2 of Regulation No 2790/1999 is not to apply, according to Article 4(c) of that regulation, to selective distribution agreements which restrict active or passive sales to end-users by members of the distribution system operating at the retail level of trade. However, this is without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

59. In my view, the general and absolute ban on internet sales restricts both active and passive sales (64) thereby rendering the clauses in question in PFDC selective distribution agreements ineligible for the exemption provided for under Regulation No 2790/1999 unless sales via the internet may be considered as operating out of an unauthorised place of establishment.

60. PFDC considers that internet sales are not equivalent to sales from an authorised physical establishment; they must thus be considered as sales from another (virtual) establishment. Even the very nature of such sales is different and sales in the presence of a pharmacist cannot be assimilated to sales via the internet. Moreover, Article 4(c) of Regulation No 2790/1999 does not refer to internet sales, thereby permitting a manufacturer to object to an authorised distributor selling the contract goods out of an unauthorised place of establishment, whether that establishment be a physical outlet or an internet site.

61. Article 4(c) of Regulation No 2790/1999 makes no reference to sales via the internet. (65) However, in my view, the internet may not be considered in the present context as a (virtual) establishment but rather as a modern means of communication and marketing goods and services. Thus while an authorised distributor may be restricted in accordance with Article 4(c) of Regulation No 2790/1999 from moving its outlet/premises without the prior consent of the manufacturer, thereby ensuring that the latter may inter alia control the quality and presentation of that outlet/premises, I consider that a general and absolute ban on internet sales in a selective distribution agreement will forfeit the benefit of the exemption pursuant to Article 4(c) of Regulation No 2790/1999. As stated at point 54 above, a manufacturer can, in my view, impose appropriate, reasonable and non-discriminatory conditions concerning sales via the internet thereby ensuring the quality of the presentation and distribution of the goods and services advertised and marketed by that means.

62. I therefore consider that a selective distribution agreement which contains a general and absolute ban on internet sales cannot benefit from the block exemption provided for by Regulation No 2790/1999, as such a ban operates as a limitation on active and passive sales pursuant to Article 4(c) of that regulation. The sale via the internet of contract goods by an authorised dealer does not constitute operating out of an unauthorised place of establishment pursuant to Article 4(c) of Regulation No 2790/1999.

VII - Question III - Individual exemption pursuant to Article 81(3) EC

63. The referring court has asked the Court to indicate whether, in the event that the general and absolute ban on internet sales cannot benefit from the block

exemption under Regulation No 2790/1999, it can benefit from an individual exemption pursuant to Article 81(3) EC.

64. It is only if the referring court finds that the ban in question restricts competition within the meaning of Article 81(1) EC and does not benefit from the block exemption under Regulation No 2790/1999 will it be necessary for that court to carry out an analysis by reference to Article 81(3) EC. Moreover, any agreement which restricts competition may in principle benefit from an exemption pursuant to Article 81(3) EC. Thus, as the Commission correctly indicated in its pleadings, even where an agreement is found to have the object of restricting competition pursuant to Article 81(1) EC that agreement is not automatically excluded from the benefit of Article 81(3) EC.

65. The applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. First, the arrangement concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose any non-essential restrictions on the participating undertakings; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question. (66)

66. Moreover, in accordance with Article 2 of Regulation No 1/2003, entitled 'Burden of proof', the undertaking claiming the benefit of Article 81(3) EC bears the burden of proving that the conditions of that paragraph are fulfilled. However, the facts relied on by that undertaking may be such as to oblige the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged. (67)

67. As there is insufficient evidence in the file before the Court on the matter, I consider that the Court is not in a position to provide the referring court with indications concerning the specific application of Article 81(3) EC to the facts in the main proceedings.

68. I therefore consider that a selective distribution agreement which contains a general and absolute ban on internet sales may benefit from an individual exemption pursuant to Article 81(3) EC, provided the four cumulative conditions laid down in that provision are met.

VIII - Conclusion

69. In the light of the foregoing observations, I propose that the Court should answer as follows the questions referred by the Cour d'appel de Paris:

(1) A general and absolute ban on selling goods to end-users via the internet imposed on authorised distributors in the context of a selective distribution network which prevents or restricts parallel trade more extensively than such restrictions inherent to any selective distribution agreement and which goes beyond what is objectively necessary in order to distribute those goods in an appropriate manner in the light not only of their material qualities but also their aura or image, has the object of restricting competition for the purposes of Article 81(1) EC.

(2) A selective distribution agreement which contains a general and absolute ban on internet sales cannot benefit from the block exemption provided for by 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, as such a ban operates as a limitation on active and passive sales pursuant to Article 4(c) of that regulation. The sale via the internet of contract goods by an authorised dealer does not constitute operating out of an unauthorised place of establishment pursuant to Article 4(c) of Regulation No 2790/1999.

(3) A selective distribution agreement which contains a general and absolute ban on internet sales may benefit from an individual exemption pursuant to Article 81(3) EC, provided the four cumulative conditions laid down in that provision are met.

---

1 - Original language: English.

2 - Article 1.1 of the general conditions of those contracts requires each distributor '*to supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained … to give on-the-spot advice concerning sale of the [PFDC] product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails. In order to do this the person in question must have a degree in pharmacy awarded or recognised in France.*' Article 1.2 states that the products concerned may be sold only '*at a marked, specially allocated outlet*'.

3 - It is clear from the order for reference that the effect on intra-Community trade is not contested by the parties and is considered by the referring court to be proven.

4 - OJ 1999 L 336, p. 21.

5 - Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1.

6 - It would appear that the Authority succeeded to the Board pursuant to Law No 2008‑776 of 4 August 2008 on modernisation of the economy (JORF, No 181 of 5 August 2008, p. 12471).

7 - Subject to verification by the referring court.

8 - See paragraphs 11, 19 and 21 of those observations.

9 - Case 56/65 LTM [1966] ECR 235, and Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299.

10 - Which refers to agreements which have as their object or effect the prevention, restriction or distortion of competition. The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings, namely 'infringements by object', can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. See Case C‑209/07 Beef Industry Development Society and Barry

Brothers [2008] ECR I‑8637, paragraph 17; see also paragraph 16.

11 - In its judgment in Joined Cases C‑501/06 P, C‑513/06 P, C‑515/06 P and C‑519/06 P GlaxoSmithKline Services v Commission [2009] ECR I‑9291 ('GSK'), at paragraph 55, the Court confirmed that the anticompetitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 81(1) EC. The alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent.

12 - See GSK, cited in footnote 11, paragraph 58, and Case C‑551/03 P General Motors v Commission [2006] ECR I‑3173 ('General Motors'), at paragraph 66. See also Case C‑8/08 T-Mobile Netherlands and Others [2009] ECR I‑4529, paragraph 31, where the Court refers to the 'specific legal and economic context'. The list of factors outlined by the Court would not appear to be exhaustive in nature.

13 - When applying Article 81(1) EC.

14 - Commission notice - Guidelines on Vertical Restraints, OJ 2000 C 291, p. 1.

15 - As its title indicates, Regulation No 2790/1999 concerns the application of Article 81(3) EC, rather than Article 81(1) EC, and has as its legal basis Regulation No 19/65/EEC of 2 March [1965] of the Council on application of Article [81(3) EC] to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966(I), p. 35).

16 - I would note that Article 4 itself of the Block Exemption Regulation does not use the term 'hardcore restriction'.

17 - The terms 'active sales' and 'passive sales' are not defined in Regulation No 2790/1999. However, the Guidelines, which are not binding on the Court (see paragraph 4 of the Guidelines), provide at paragraph 50 that '"[a]ctive" sales mean actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group by for instance direct mail or visits; or actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in media or other promotions specifically targeted at that customer group or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor's exclusive territory. "Passive" sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion in media or on the internet that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in non-exclusive territories or in one's own territory, are passive sales.'

18 - I consider that a general and absolute ban on internet sales effectively restricts both active and passive sales as it limits the possibilities for an authorised distributor to sell to end-users in other Member States. The ban in question makes the interpenetration of national markets more difficult and thus constitutes a restriction in accordance with Article 4(c) of Regulation No 2790/1999 thereby preventing the application of the exemption under Article 2 of that regulation. The absence of any specific mention of internet sales in Article 4(c) of Regulation No 2790/1999 does not preclude such a finding.

19 - Provided that it is capable of having an appreciable effect on trade between Member States.

20 - Case C‑260/07 [2009] ECR I‑2437, paragraph 68.

21 - Such as Regulation No 2790/1999.

22 - Case C‑59/08 [2009] ECR I‑3421.

23 - The Court has noted the very particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods. Those therapeutic effects have the consequence that, if medicinal products are consumed unnecessarily or incorrectly, they may cause serious harm to health, without the patient being in a position to realise that when they are administered. See Joined Cases C‑171/07 and C‑172/07 Apothekerkammer des Saarlandes and Others [2009] ECR I‑4171, paragraphs 31 and 32.

24 - See point 5 above.

25 - I consider, by analogy with the judgment in Case C‑322/01 Deutscher Apothekerverband [2003] ECR I‑14887, that such a general and absolute ban on internet sales of the goods in question in the main proceedings would, in principle, if imposed by national law, contravene the rules on free movement of goods. In that case, the Court found that a national prohibition on the sale by mail order of medicinal products the sale of which is restricted to pharmacies in the Member State concerned is in that regard a measure having an effect equivalent to a quantitative restriction. Article 30 EC may, however, be relied on to justify such a national prohibition on the sale by mail order of medicinal products in so far as the prohibition covers medicinal products subject to prescription. However, Article 30 EC cannot be relied on to justify an absolute prohibition on the sale by mail order of medicinal products which are not subject to prescription in the Member State concerned. See also by analogy, the recent judgment of the Court in Case C‑108/09 Ker-Optika [2010] ECR I‑0000, in relation to the sale of contact lenses via the internet.

26 - As opposed to limitations imposed by national or Union law.

27 - Certain goods or services may indeed be inherently unsuitable for sale via the internet.

28 - See by analogy, Case C‑309/99 Wouters and Others [2002] ECR I‑1577.

29 - See point 44 et seq. below.

30 - PFDC claims in effect that due to the ban, consumers know that any products sold with PFDC's brand via the internet are counterfeit.

31 - The Decision relies inter alia on paragraph 51 of the Guidelines which states that '[e]very distributor must be free to use the internet to advertise or to sell products'. Nonetheless, the Commission accepts in that same paragraph 51 that 'a supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general. The latter may be relevant in particular for selective distribution. An outright ban on internet or catalogue selling is only possible if there is an objective justification.'

32 - See points 8 and 9 above.

33 - The Court has on occasion held that certain agreements which directly or indirectly restricted parallel trade were compatible with Article 81(1) EC. The cases in question are in my view exceptional in nature and are perhaps limited to the facts of the cases in question. However, they suffice to establish the principle that agreements which restrict directly or indirectly parallel trade do not automatically have the object of restricting competition for the purposes of Article 81(1) EC. Thus a mere appraisal of the terms of an agreement without assessing for example the economic and legal context in which it was drafted and currently operates will not in my view suffice. See, for example, Case 27/87 Erauw-Jacquery [1988] ECR 1919, and Case C‑306/96 Javico [1998] ECR I‑1983. See also Case 262/81 Coditel and Others ('Coditel II') [1982] ECR 3381, which must in my view be read in conjunction with Case 62/79 Coditel and Others ('Coditel I') [1980] ECR 881. As regards the Coditel cases, see however the recent Opinion of Advocate General Kokott in Case C‑403/08 Football Association Premier League and Others (not yet published in the ECR), points 193 to 202; see also points 243 to 251.

34 - I would note that the Decision, subject to verification by the referring court, does not appear to specifically refer to the term 'parallel trade'. However, in my view, a restriction on active or passive sales has the potential to restrict parallel trade between Member States.

35 - See GSK, cited in footnote 11, paragraph 59. An agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the objective of the Treaty to achieve the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that Treaty article. See Joined Cases C‑468/06 to C‑478/06 Sot. Lélos kai Sia [2008] ECR I‑7139, paragraph 65 and case-law cited. In General Motors (cited in footnote 12), the Court found at paragraph 67 that an agreement concerning distribution has a restrictive object for the purposes of Article 81 EC if it clearly manifests the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market in question.

36 - By limiting active and passive sales of the products by means of a ban on internet sales.

37 - This is not to suggest that the question of affectation of parallel trade is not relevant in the context of selective distribution agreements. Indeed, the Court has found that selective distribution agreements may in certain circumstances infringe Article 81(1) EC due to their restriction of parallel trade. See Case C‑70/93 Bayerische Motorenwerke [1995] ECR I‑3439. The Court held that the grant of absolute territorial protection to BMW dealers was precluded by Article 81(1) EC. See also Case 86/82 Hasselblad v Commission [1984] ECR 883.

38 - Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151 ('AEG'), paragraph 33.

39 - In Case 75/84 Metro v Commission ('Metro II') [1986] ECR 3021, the Court stated that some limitation in price competition is inherent in any selective distribution system due to lack of competition between specialist and non-specialist dealers but that the lack of price competition was compensated by competition concerning quality of service supplied to customers which is not normally possible in the absence of an adequate profit margin covering the higher costs entailed by such services. In Case 26/76 Metro SB-Großmärkte v Commission ('Metro I') [1977] ECR 1875, paragraph 21, the Court acknowledged that in selective distribution systems price competition is not emphasised either as an exclusive or indeed as a principal factor. Thus while price competition can not be eliminated it does not constitute the only form of competition or that to which absolute priority must in all circumstances be accorded. In AEG (cited in footnote 38), paragraph 42, the Court referred to the counterbalancing of price and non-price competition.

40 - See to that effect, Case C‑376/92 Cartier ('Metro III') [1994] ECR I‑15, paragraphs 26 to 29. The de facto effect on parallel trade may vary depending for example on the degree of 'imperviousness' of a selective distribution system. The degree of imperviousness in this context relates to the degree to which the products subject to a selective distribution agreement reach consumers only through authorised dealers.

41 - See point 6 above.

42 - This case (cited in footnote 22) establishes inter alia that where an authorised distributor sells goods subject to a selective distribution agreement to an unauthorised distributor, a trademark holder may bring

a trademark action - in addition to an action based in contract law - against the authorised distributor if the sale by the unauthorised distributor damages the allure and prestigious image which bestows on the goods an aura of luxury. Moreover, in such circumstances the trade mark may not be exhausted.

43 - It is clear from the judgment in Copad (cited in footnote 22) that the manner in which certain trademarked goods are sold may detrimentally affect their image and ultimately their very quality in the eyes of consumers. In that case, the Court stated in relation to luxury goods that their quality is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury. Since luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods. Therefore, an impairment to that aura of luxury is likely to affect the actual quality of those goods. See also Case T‑88/92 Leclerc v Commission [1996] ECR II‑1961 ('Leclerc'), paragraph 109, in which the General Court found that the concept of the characteristics of luxury cosmetics cannot be limited to their material characteristics but also encompasses the specific perception that consumers have of them, in particular their aura of luxury.

44 - While the case is based on trademarked goods, I believe this ratio could be extended in certain circumstances to non-branded goods and indeed services where the manner in which goods and services are presented will affect consumers' perception of their quality. It is clear, however, that in order to invoke trade mark rights, a trade mark must be registered in respect of the goods and services. Thus the Court stated in paragraph 35 of the Copad judgment (cited in footnote 22) that while it has not excluded the possibility that services provided in the context of the retail trade of goods from being covered by the concept of 'services' within the meaning of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), as amended by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), the trade mark must have been registered for those services.

45 - Cited in footnote 39.

46 - Cited in footnote 38.

47 - The General Court has rightly found in my view in Leclerc (cited in footnote 43), paragraph 107, that such distribution systems may be established in sectors other than those covering the production of high-quality and technically advanced consumer durables without infringing Article 81(1) EC.

48 - See paragraph 33.

49 - Case 99/79 Lancôme and Cosparfrance Nederland [1980] ECR 2511, paragraph 20.

50 - AEG, cited in footnote 38, paragraph 45.

51 - The requirement that the products in question be sold in the presence of a qualified pharmacist.

52 - For example the achievement of turnovers and obligations relating to minimum supply and to stocks.

53 - See Case 31/80 L'Oréal [1980] ECR 3775, paragraph 17.

54 - I would note the use of the terms 'in particular' used by the Court in paragraph 17 of Metro I (cited in footnote 39).

55 - In L'Oréal (cited in footnote 53), paragraph 16, the Court stated that a selective distribution system is not required in order to preserve the quality and proper use of a product where those objectives are already satisfied by national rules governing admission to the re-sale trade or the conditions of sale of the product in question.

56 - L'Oréal (cited in footnote 53), paragraph 16. In Case T‑19/91 Vichy v Commission [1992] ECR II‑415, the General Court noted that the characteristics of certain products are such that there is no point offering them to the public without the intervention of specialised distributors (paragraph 65).

57 - See by analogy, L'Oréal, cited in footnote 53, paragraph 16.

58 - In Leclerc (cited in footnote 43), the General Court found that it is in the interests of consumers seeking to purchase luxury cosmetics that they are appropriately presented in retail outlets and that their luxury image is preserved in that way. It follows that, in the luxury cosmetics sector, and in particular in the luxury perfumes sector, qualitative criteria for the selection of retailers which do not go beyond what is necessary to ensure that those products are suitably presented for sale are in principle not covered by Article 81(1) EC, in so far as they are objective, laid down uniformly for all potential retailers and not applied in a discriminatory fashion.

59 - The EFTA Surveillance Authority stated that 'nothing in the order for reference appears to suggest that the ban is targeted at parallel trade or other forms of cross-border sales. Rather, it would appear to be based on the nature of the products and the way in which Pierre Fabre wishes to market its products.'

60 - A possibility which is referred to in paragraph 51 of the Guidelines (cited in footnote 14). See also the recently adopted Commission Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1; 'New Guidelines'). While not temporally relevant to the facts in the main proceedings and not binding on the Court, the New Guidelines provide guidance on certain conditions in a distribution agreement which the Commission considers acceptable relating to internet sales. See for example paragraphs 52(c) and 54 of the New Guidelines.

61 - See, to that effect, as regards the selling of medicinal products via the internet, Deutscher Apothekerverband, cited in footnote 25, paragraph 113, and the selling of contact lenses via the internet in Ker-Optika, cited in footnote 25, paragraph 73.

62 - And between the products in question and other brands (inter-mark competition).

63 - In accordance with Article 3(1), the exemption provided for in that regulation is to apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the

contract goods or services. The referring court in the order for reference stated that the Pierre Fabre Group had a market share of 20%.

64 - See footnote 18 above.

65 - See footnote 18 above. See also Article 4(c) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1), which makes no reference to internet sales. Regulation No 330/2010 entered into force on 1 June 2010 and effectively replaced Regulation No 2790/1999 which expired on 31 May 2010. See, however, Article 9 of Regulation No 330/2010 on transitional period. Regulation No 330/2010 is not temporally relevant to the main proceedings.

66 - See, to that effect, Joined Cases 43/82 and 63/82 VBVB and VBBB v Commission [1984] ECR 19.

67 - See GSK, cited in footnote 11, paragraph 83.