



## The ban on Internet sales within selective distribution networks is possible if it is objectively justified

*Judgment of the European Court of Justice (ECJ) of 13 of October of 2011, case C-439/09, Pierre Fabre*

### Background

The French company Pierre Fabre markets some of its cosmetics and personal care products through selective networks of authorized distributors. The contracts with such distributors establish the obligation that the sales of the products have to be made in the presence of someone with a degree in Pharmacy so that the client may obtain a personalized opinion from a specialist. According to the ECJ, such requirement excludes de facto all forms of selling by Internet.

The French competition authority (Autorité de la Concurrence) examined ex officio the practices in the distribution sector of cosmetics and personal care products and concluded that the ban on Internet sales is equivalent to a ban on active and passive sales that cannot benefit from the block exemption established in the regulation on vertical agreements. Likewise, it considered that Pierre Fabre had not proven that it fulfilled the criteria required in order to benefit from an individual exemption. Consequently, the Autorité de la Concurrence ordered Pierre Fabre to pay a fine and to establish expressly in its contracts the possibility that its authorized distributors may resort to selling via the Internet.

Pierre Fabre appealed against this decision before the Cour d'Appel of Paris, which raised questions with the ECJ relating to the legality of the ban on Internet sales in a selective distribution network.

### Selective distribution systems

The ECJ starts by reminding that selective distribution systems are legitimate if they intend to reach a legitimate result in sectors where competition is not based only on the price, but also on other factors such as the provision of specific services for high quality or high technology products.

The requirements that must be met by selective distribution systems are the following:

- (i) the choice of the distributors must be made according to objective criteria of a qualitative nature, applied in a non discriminatory way.
- (ii) the system must be necessary in order to preserve the quality and ensure an appropriate use of the product.
- (iii) the measures required must be proportionate in relation with the objective pursued and must not exceed what is necessary.

### Ban on Internet sales

On the basis of the referred criteria, the ECJ considers that the ban on Internet sales represents a restriction of competition by object if such ban is not objectively justified after an individual and specific exam of the wording and purpose of the contractual clause, as well as of the legal and economic context.



It is for the national court competent in each case to determine, in the light of the specific circumstances, whether or not there is any justification for the mentioned ban.

Nevertheless, the ECJ provides the national judge with two elements of interpretation. The first is that the ECJ has already considered in its judgments *Apothekerverband* (C-322/01) and *Ker Optika* (C-108/09) that the need to provide the client with a personalized assessment and to guarantee his protection in the event of an inappropriate use of the products in question (OTC medicinal products and contact lenses) is not sufficient to justify a ban on Internet sales. The second criterion is that the protection of the prestigious image of a product cannot be considered a legitimate objective to justify such ban.

### Block or individual exemption

What the ECJ does establish clearly is that the ban on Internet sales in a selective distribution system may not benefit from the block exemption foreseen in Regulation 330/2010 on vertical agreements.

Such regulation establishes the possibility to prohibit a member of a selective distribution system to operate outside an authorized place of establishment. The ECJ considers that the terms “a place of establishment” must be interpreted restrictively, including only the physical points of a direct sale, and not the places from which the services of Internet sales are provided. That is, the Regulation allows the ban on sales outside the authorized physical point of sales in a network of selective distribution, but it does not allow the ban on Internet sales.

In any case the ECJ concludes that a selective distribution agreement that excludes Internet sales de facto may benefit from an individual exemption if the legal requirements are satisfied (the system must contribute to improving the production or distribution of the products or to promoting the technical or economic progress without imposing restrictive not-essential measures).

### And now what?

The judgment rules out the applicability of the block exemption to the ban on Internet sales in a selective distribution system, but it does not close the door on considering it justified or worthy of an individual exemption according to the circumstances of the case.

On the other hand, let us remember that the judgments to which the ECJ makes reference (*Apothekerverband* and *Ker Optika*) make a clear distinction between the act of buying and selling and the act of delivery or dispensing of the product. Indeed, according to such judgments Member States cannot prevent the buying and selling of OTC medicinal products or of contact lenses via the Internet, but they can demand that the products be delivered by a qualified person that can warn the client about possible health risks and inform him about their correct use.

We understand that the same reasoning would be applicable in selective distribution systems, so that even when it would be considered that there is no justification for the ban on Internet sales, nothing would prevent that it can be required that the delivery of the product must be made in the presence of the corresponding qualified person.