The AMPYME, with this model, seeks above all to assist the franchisor in creating a franchise planning document, so that prospective investor franchisees involved in the franchise system may learn about the franchise. Specifically, such franchisees may use this document as an instrument of planning and consultation, thereby learning all strategic, commercial and operational aspects of the franchise. The franchisor will also develop knowledge of what must be achieved to develop a successful franchise project.

The AMPYME has identified the following benefits or contributions of franchises to the national government:

- promoting the development of micro, small and medium-sized businesses;
- job creation;
- promoting self-employment;
- increase in the quality and productivity of trade and services;
- GDP growth;
- growth in consumption;
- development of investment;
- foreign exchange earnings on exports of franchises;
- increased range of products and services in remote areas; and
- regional development.

Due to the construction of new shopping centres, Panama currently has over 200 local and international franchises, with foreign franchises dominating the market. This foreign domination is one of the reasons why the AMPYME has chosen ten concepts to be developed for the creation of franchises such as: beauty salons, ice cream parlours, grill restaurants, laundrettes, shoe stores, tailors, popular pharmacies, nurseries, bakeries and pastry shops.

Finally, the success of franchises in Panama bases its success on trust and communication between the parties and the entrepreneurial spirit of the franchisee and the professional management of the franchisor.

The absolute ban on internet sales and what 'prestige' has to do with it – the *Pierre Fabre* decision of the ECJ

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Does a general and absolute ban on selling goods 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 purpose of 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 101(3) TFEU?

The unsurprising and short answer is 'yes' (if you skip the 'hardcore' part because this term or concept is neither found in Article 101(1) TFEU nor in the then applicable Regulation No 2790/1999).[1]

And even though this answer – which of course was given in a more elaborate way by the European Court of Justice (ECJ) in its judgment in the *Pierre Fabre* case[2] – does not come as a surprise in view of the Commission's doctrine expressed in paragraph 51 of the Guidelines on Vertical Restraints[3] which explicitly state that 'every distributor must be free to use the Internet to advertise or to sell products'. It is of great interest to have a closer look as to how the ECJ approached this question presented to it by the cour d'appel de Paris ('Court of Appeal') and how it came to its findings. And even more interesting is what the ECJ did not state and what can be read between the lines.

Background

Pierre Fabre Dermo-Cosmétique SAS ('Pierre Fabre') is part of the Pierre Fabre group which was established in 1961 in France. Pierre Fabre

manufactures cosmetics and personal care products under brands such as Klorane, Avène, Ducray, Galénic and others, and markets the same by using a selective distribution system allowing mainly pharmacies in France, but also in various countries worldwide, the sale of the products. The market share of the Pierre Fabre group in France in the relevant product category was said to be 20 per cent at the time (in 2007).

The distribution agreements used by Pierre Fabre contained a clause pursuant to which the sales of its cosmetic and personal care products had to be made exclusively in a physical space, in which a qualified pharmacist (ie, a person with 'a degree in pharmacy awarded or recognised in France') was present. This clause led to the effect that online sales of Pierre Fabre products were de facto prohibited which the Conseil de la Concurrence ('the Council')[4] considered to form a 'hardcore' restriction contravening rules on competition.

The Council had initiated investigations against several cosmetic manufacturers whose selective distribution agreements contained clauses which were classified by the Council as restricting competition by 'object'. Whereas other manufacturers agreed to amend their distribution agreements to the effect to enable their distributors to sell their products via the internet and to remove from their distribution agreements any sort of clauses restricting competition by 'object' pursuant to Article 101 (1) TFEU, Pierre Fabre refused to do so. The Council thereupon ordered Pierre Fabre to pay a fine of €17,000 by a decision dated 29 October 2008.

Pierre Fabre's arguments raised in the course of the proceedings included:

- the ban on internet sales at issue actually contributed to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free riding between authorised pharmacies;
- the physical presence of a pharmacist was required in order to ensure the consumer's well-being and to ensure that his or her skin, hair and scalp could be examined to find the right product;
- the visual contact between the pharmacist and the user of the products ensured 'cosmetovigilance' dedicated to record and communicate any adverse reactions to cosmetic products; and
- the internet distribution did not lead to a reduction in prices.

All of these arguments were rejected.

Pierre Fabre appealed the Council's decision before the Court of Appeal in Paris which in turn on 29 October 2009 filed for a preliminary ruling under Article 234 TEC[5] and presented to the ECJ the question quoted above.

The ECJ's approach

The ECJ's approach to the question presented lead to stipulations which go beyond a mere discussion of why a ban on internet sales actually contravenes EU competition rules.

First, the ECJ pointed out that since the concept of 'hardcore' restriction is neither part of Article 101 TFEU, nor is it referred to in Regulation No 2790/1999, the question had to be understood as to whether the restriction on selective distributors to market products via the internet is to be classified as a restriction of competition 'by object'.

By referring to the precedents *GlaxoSmithKline*[6] and *AEG-Telefunken*,[7] the ECJ stated that agreements constituting selective distribution systems necessarily affect competition in the common market and that such agreements are to be considered, 'in the absence of an objective justification', as 'restrictions by object'. And as the ECJ had already pointed out in the cases *Metro*[8] and *L'Oreal*,[9] selective distribution systems are not prohibited by Article 101 (1) TFEU provided that the resellers are chosen on the basis of objective criteria that are laid down uniformly for all potential resellers which the ECJ confirmed to be the case at Pierre Fabre. The question remained in this context whether by imposing said restriction on the distributors Pierre Fabre pursued a legitimate aim in a proportionate manner.

Here, the ECJ referred to the precedents *Deutscher Apothekerverband*[10] and *Ker-Optika*.[11] In said decisions, the ECJ had rejected the arguments relating to the need to provide individual advice to the customer to ensure his protection against incorrect use of the products (non-prescriptive medicines in the one case and contact lenses in the other) as not sufficient to justify a ban on internet sales.

Pierre Fabre, however, had also argued that the disputed clause was necessary in order to maintain the prestigious image of the products at issue and would therefore fall outside Article 101 (1) TFEU. This argument was likewise rejected by the ECJ:

'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.'

Secondly, after having determined that the relevant clause was not objectively justified, the ECJ examined whether the selective distribution contract may benefit from the block exemption of Regulation 2490/1999.

The ECJ concluded that a contractual clause prohibiting de facto the internet as a method of marketing and distribution at the very least has as its object the restriction on passive sales. It hereby rejected Pierre Fabre's view that prohibiting the sale via the internet would actually be comparable to the (permissible) prohibition on operating out of an unauthorised establishment thereby referring to 'a place of establishment' within the meaning of Article 4(c) of the Regulation 2490/1999. Pursuant to the ECJ, the internet constitutes a method of marketing as opposed to an (unauthorised) establishment.

Thirdly, the ECJ addressed the question whether an individual exemption was available. Here, the information available to the EJC was not considered sufficient to establish whether or not the conditions for an individual exemption were met and the ECJ therefore simply stated that such an exemption as provided for in Article 101(3) TFEU was not ruled out.

The ECJ's ruling

On the grounds set forth above, the ECJ ruled as follows (operative part):

> '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.'

Comments

Manufacturers of luxury, prestigious and high-priced items claiming that the prestige and image of their products is a tremendous asset and bearing in mind the demanding clientele that are used to a high degree of personal attention cannot be amused by the ECJ's judgment. The ECJ's statement and the absoluteness thereof that the prestigious image does not constitute a legitimate aim for restricting competition is somehow unexpected in view of the fact that the ECJ had pointed out earlier in *Leclerc II*:[12]

> 'Accordingly, the Court considers that the concept of the `characteristics' of luxury cosmetics, within the meaning of the judgment in L'Oréal, cannot be limited to their material characteristics but also encompasses the specific perception that consumers have of them, in particular their "aura of luxury". This case is therefore concerned with products which, on the one hand, are of a high intrinsic quality and, on the other, have a luxury character arising from their very nature. …'

Previously, in its *Pronuptia*[13] decision, the ECJ stated that a franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing their business name or symbol and thereby recognised the image and the prestige of a product as an inherent element of competitiveness.

It nevertheless seems obvious that Pierre Fabre's main interest was not necessarily the protection of prestige and image but rather the attempt to limit competitive restraints by avoiding that customers are given the opportunity to compare prices.

And it is probably because of that rather transparent motive that the ECJ did not even discuss Pierre Fabre's argument that an examination of hair, skin and scalp was

actually required in order to provide qualified advice to the customer and to ensure that the right product was recommended to him or her. Instead, the ECJ simply reverted to the precedents *Deutscher Apothekerverband* and *Ker-Optika* and thereby failed to acknowledge that Pierre Fabre had not even argued that the restriction aimed at the protection of health. What else is remarkable in this context is that the referenced decisions were rendered in connection with the principle of free movement of goods rather than under the aspect of restrictions on competition.

The ECJ's decision is surely to be welcomed from a consumer perspective as an increase of the pricing pressure on the over-the-counter trade is a likely side effect of concurrent online sales. However, in the long run, another accompanying effect, the free riding (or 'parasitism'), which the Council in its decision of 29 October 2008 had addressed, will require a closer observation. Evidence may be produced showing that as a result of concurrent online distribution, the stationary shops are losing business to a degree that restrictions of the kind used by Pierre Fabre are actually indispensible for the protection of the system and of the brand and could therefore be classified as not having a restrictive effect within the meaning of Article 101 (1) TFEU. For now, the *Pierre Fabre* ruling puts some additional rocks on the path that manufacturers of luxury products using a selective distribution system must follow when trying to protect the prestige, image and 'aura of luxury' of their products by warding off or limiting online sales.

Notes

1 Commission Regulation (EC) No 2790/1999 of 22 December 1999, OJ L 336/21.
2 Judgment of 13 October 2011 – *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, C-439/09.
3 OJ C 291, 13 October 2000, p 1–44.
4 Since 2009, known as the Autorité de la Concurrence ('French Competition Authority').
5 Now Article 267 TFEU.
6 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission and Commission, EAEPC and Aseprofar v GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc.*
7 Judgment of 25 October 1983 – *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, C-107/82 R.
8 Judgment of 25 October 1977 – *Metro SB-Großmärkte GmbH & Co KG v Commission*, C-26/76.
9 Judgment of 11 December 1980 – *NV L'Oréal and SA L'Oréal v PVBA 'De nieuwe AMCK'*, C-31/80.
10 Judgment of 11 December 2003 – *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*, C-322/01.
11 Judgment of 02 December 2010 – *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete*, C-108/09.
12 Judgment of 12 December 1996 – *Groupement d'achat Édouard Leclerc v Commission*, Case T-88/92.
13 Judgment of 28 January 1986 – *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, Case 161/84.

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Franchising under Regulation 330/2010 on Vertical Restraints – part II

The novelties which impact directly on franchising

In this article, I will deal with other amendments which have a particular (not to say, fundamental) impact for franchising contracts.

We all recall that the franchising agreement was governed in Europe by the Regulation on Vertical Restraints No 2790/1999, which expired on 31 May 2010; therefore, it seems useful to briefly outline certain amendments which more directly concern such contracts.

In particular, the main issues over which the franchising business community was unsatisfied by the expired discipline were the following: (i) know-how; (ii) resale price maintenance; and (iii) online sales.

Know-how

The first amendment which needs to be mentioned concerns the notion of 'substantial know-how', that in the previous Regulation No 2790/1999 encompassed