

Using the facts described in the judgments of the European Court of Justice in the cases *Pierre Fabre* and *Coty* develop one or more theories of harm and economic justifications that might be considered for the competitive assessment of the practices concerned.

Pierre Fabre Dermo-Cosmétique SAS

Judgment of European Court of Justice of 13 October 2011, in case C-439/09

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.

...

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.

...

23 [...] 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.

...

40 [...] 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).

...

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, [...] 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.

Coty Germany GmbH

Judgment of the European Court of Justice of 6 December 2017 in case C-230/16

8 Coty Germany sells luxury cosmetics in Germany. It markets certain brands in that sector via a selective distribution network, on the basis of a selective distribution contract also used by the undertakings affiliated to it. That contract is supplemented by various special contracts designed to organise that network.

9 Parfümerie Akzente has for many years distributed Coty Germany goods, as an authorised distributor, both at its brick-and-mortar locations and over the internet. Internet sales are carried out partly through its own online store and partly via the platform ‘amazon.de’.

10 [...] Coty Germany justifies its selective distribution system in the following terms: ‘the character of Coty Prestige’s brands requires selective distribution in order to support the luxury image of these brands’.

11 In this respect, as regards brick-and-mortar retail, the selective distribution contract provides that each of the distributor’s sales locations must be approved by Coty Germany, which implies compliance with a number of requirements, set out in Article 2 of that contract, relating to their environment, décor and furnishing.

[...]

14 Furthermore, the contractual framework linking the parties includes a supplemental agreement on internet sales which provides, in Article 1(3), that ‘the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised’.

15 Following the entry into force of Regulation No 330/2010, Coty Germany revised the selective distribution network contracts as well as that supplemental agreement, by providing in the first subparagraph of Clause I(1) of that supplemental agreement that ‘the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is

conducted through an “electronic shop window” of the authorised store and the luxury character of the products is preserved’. In addition, Clause I(1)(3) of that supplemental agreement expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige.

16 Parfümerie Akzente refused to sign the amendments to the selective distribution contract. [...]

21 By its first question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods can comply with that provision.

25 With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, it must be recalled that the Court has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods (see, to that effect, judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraphs 24 to 26 and the case-law cited).

26 In that regard, the Court has considered that the characteristics and conditions of a selective distribution system may, in themselves, preserve the quality and ensure the proper use of such goods (judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraph 28 and the case-law cited).

27 In that context, the Court has in particular taken the view that the establishment of a selective distribution system which seeks to ensure that the goods are displayed in sales outlets in a manner that enhances their value contributes to the reputation of the goods at issue and therefore contributes to sustaining the aura of luxury surrounding them (see, to that effect, judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraph 29).

28 It thus follows from that case-law that, having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly.

30 Contrary to the claims of Parfümerie Akzente and the German and Luxembourg Governments, that conclusion is not invalidated by the assertion contained in paragraph 46 of the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C-439/09, EU:C:2011:649).

34 In that context, the Court took the view that the need to preserve the prestigious image of cosmetic and body hygiene goods was not a legitimate requirement for the purpose of justifying a comprehensive prohibition of the internet sale of those goods. The assertion in paragraph 46 of that judgment related, therefore, solely to the goods at issue in the case that gave rise to that judgment and to the contractual clause in question in that case.

[...]

43 It is therefore necessary to ascertain whether, in circumstances such as those at issue in the main proceedings, the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods at issue is proportionate in the light of the objective pursued, that is to say, whether such a prohibition is appropriate for preserving the luxury image of those goods and whether or not it goes beyond what is necessary to achieve that objective.

44 With regard, in the first place, to the appropriateness of the prohibition at issue in the main proceedings in the light of the objective pursued, it must be observed, first, that the obligation imposed on authorised distributors to sell the contract goods online solely through their own online shops and the prohibition on those distributors of using a different business name, as well as the use of third-party platforms in a discernible manner, provide the supplier with a guarantee, from the outset, in the

context of electronic commerce, that those goods will be exclusively associated with the authorised distributors.

45 Since such an association is precisely one of the objectives sought when recourse is had to such a system, it appears that the prohibition at issue in the main proceedings includes a limitation which is coherent in the light of the specific characteristics of the selective distribution system.

46 Consequently, if, as is apparent from the case-law of the Court, those characteristics make the selective distribution system an appropriate means by which to preserve the luxury image of luxury goods and therefore contribute to sustaining the quality of those goods (see, to that effect, judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraphs 28 and 29 as well as the case-law cited), a limitation such as that stemming from the prohibition at issue in the main proceedings, the effect of which is inherent in those characteristics, must also be regarded as being such as to preserve the quality and luxury image of those goods.

47 Second, the prohibition at issue in the main proceedings enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.

[...]

50 Third, given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers.

51 Consequently, the prohibition imposed by a supplier of luxury goods on its authorised distributors to use, in a discernible manner, third-party platforms for the internet sale of those goods is appropriate to preserve the luxury image of those goods.

52 With regard, in the second place, to the question of whether the prohibition at issue in the main proceedings goes beyond what is necessary for the attainment of the objective pursued, it must be noted, first, that, in contrast to the clause referred to in the case which gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the clause here at issue in the main proceedings does not contain an absolute prohibition imposed on authorised distributors to sell the contract goods online. Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers.

53 Consequently, authorised distributors are permitted to sell the contract goods online both via their own websites, as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved, and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer.

54 Second, it must be noted that, as is apparent from the provisional results of the Preliminary Report on the E-commerce Sector Inquiry carried out by the Commission pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), adopted on 15 September 2016, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, is nevertheless constituted by distributors' own online shops, which are operated by over 90% of the distributors surveyed. That fact was confirmed in the final report relating to that inquiry, dated 10 May 2017.

55 Those factors support the view that it may be inferred that a prohibition, such as the prohibition which the applicant in the main proceedings imposed on its authorised distributors, on using, in a

discernible manner, third-party platforms for the internet sale of luxury goods does not go beyond what is necessary in order to preserve the luxury image of those goods.

[...]

57 It follows that, subject to inquiries which it is for the referring court to make, such a prohibition appears to be lawful in relation to Article 101(1) TFEU.