



网络零售竞争

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和制造业监管处（E2）

2014年3月12日

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欧盟限制竞争协议规则

TFEU第101条 独立公司间签署协议

第101(1)条 以限制或破坏竞争为目的或有此效果的协议应予禁止

第101(3)条 如果协议及其限制对创造有利于消费者的效率必不可少，且不会消除竞争，则不予禁止

效果为基的方法：基于协议对竞争与消费者产生的整体效果进行评估

Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

基于目的的限制

具有限制竞争目的的协议被视为对竞争有严重限制

例如价格操纵卡特尔和转售价格维持

核心限制：

按照第 101(1)进行负面影响推定

假定其不太可能满足第101(3)

在可能的效率得到令人信服的证明后，也不排除适用个案豁免，但可能性非常低。
提出证据/说明效率的顺序可以调换

在执法部门/原告展示可能的不利影响前，可能的效率先需要由被告证明

基于效果的限制

具有限制竞争效果的协议

执法部门/原告必须按照第101（1）明确可能的不利影响

一旦确定可能的不利影响，被告必须按照第101（3）条说明可能的效率（“消费者福利测试”）

《集体豁免条例》（BER）为多种低于特定市场份额门槛的协议创建了“安全港”

推定净余额

例外：核心限制

指南帮助解释BER，并指导BER不适用时（高于市场份额门槛）如何评估负面和正面影响

关于供应和分销协议的欧盟规则

2010年, 委员会通过了: 《纵向限制集体豁免条例》(Rec. 330/2010 ; VRBER) 《纵向限制指南》(VRGL)

适用于纵向协议.....

两个或多个经营者之间

根据本协议目的在不同水平的生产或经销
链间经营

关于产品购买和出售条件

适用于所有行业(保留汽车特殊规则)

不适用于竞争者间的纵向协议

除了零售层面的双轨销售

23.4.2010

EN

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II

(Non-legislative acts)

REGULATIONS

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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices⁽¹⁾, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union^(*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3)

⁽¹⁾ OJ 36, 6.3.1965, p. 533.

^(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

of the Treaty to categories of vertical agreements and concerted practices⁽²⁾ defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

⁽²⁾ OJ L 336, 29.12.1999, p. 21.

VRBER/VRGL的基本特点

更加广泛的集体豁免…

… 有限的核心限制清单 (cf. 第4条 4 VRBER), 以及…

… 有限的被排除限制清单 (cf. 第5条 VRBER)

低于30%市场份额门槛的安全港 (cf. 第 3 条 VRBER)

超出上述市场份额门槛也不自动推定非法

COMMISSION NOTICE
Guidelines on Vertical Restraints
(Text with EEA relevance)

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如果符合《纵向协议集体豁免条例》的条件，那么通常竞争将迫使公司为消费者提供最优质和最合理的价格，而且预计纵向限制可带来效率

在特殊情况下，如果消费者受到损害，欧盟委员会和成员国消费者服务机构

（NCA）仍然可通过不适用《纵向协议集体豁免条例》，禁止限制性协议

如超过30%的市场份额，根据《欧盟运行条约》第101条进行个案评估

COMMISSION NOTICE
Guidelines on Vertical Restraints
(Text with EEA relevance)

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核心限制

《纵向协议集体豁免条例》第4条：严重限制竞争的协议，协议整体上都不能适用集体豁免

不可分割性

如果产生效率的证据确凿，也不排除可以个案豁免，但可能性很低（被处以罚款的风险很高）

转售价格维持（RPM）

固定或限定最低转售价格

针对买家的销售限制

注意“核心限制”与“被排除的限制”的区别

销售限制

销售限制：值得关注的是市场分割和价格歧视

原则上，买方/经销商可自由进行转售，不限制地点和转销对象：

被动销售：回应主动提出的要求

被动销售限制是核心限制（主要例外是选择性分销）

主动销售：积极接触顾客的销售

主动销售限制是核心限制，除了有独家经营的保护区

界定相关市场

为了实施欧盟竞争法，考虑到市场界定问题，委员会发布了《关于相关市场界定的通告》，对委员会使用的规则、标准和证据提供指南

《纵向限制指南》(VRGL)处理了在纵向限制情况下出现的具体问题

9. 12. 97 EN Official Journal of the European Communities C 372/5

COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)
(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement⁽¹⁾. Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved⁽²⁾ face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

⁽¹⁾ The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

⁽²⁾ For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration, in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainant, for investigations within the meaning of Article 85, the parties to the Agreement.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

相关产品市场包括基于特征、价格和用途，
买方认为可进行互换的所有产品或服务

通常，市场不会基于经销形式进行定义

供应商生产原装设备及为该设备提供维修
和更换零件的案例

相关地域市场包括以下区域，该区域的有
关企业参与相关产品或服务的供应和需求，
以及，该区域的竞争条件完全是同质的，
另外，该区域不同于相邻地域（特别由于其
竞争条件明显不同于那些区域）。

地理批发市场通常比零售市场更广泛

零售市场可能比最终消费者搜索区域更宽
广

网络销售限制

《纵向协议集体豁免条例》和《纵向限制指南》适用于涉及产品和服务的在线和线下销售，以及买卖协议

《纵向协议集体豁免条例》规定的核心限制特别适用于线下和在线销售：

没有新的核心限制类型

《纵向限制指南》澄清了什么是核心在线销售限制，并提供了示例

对适用于在线销售的主动销售和被动销售间的差别（仅与独家分销有关）以及哪些限制被认为是核心销售限制进行澄清

核心在线销售限制

一旦指定分销商，他们可免费拥有网站并在网上进行销售，以使消费者受益于网络

由近期 Pierre Fabre 的判决所确定

分销商没有义务根据其他分销商或供应商的网站所显示的消费者的IP地址去确定客户

分销商没有义务根据消费者的IP地址终止在线购买请求

分销商没有义务因为打算在线而非线下销售产品而为该产品支付更多

非核心在线销售限制

供应商可自由的选择分销商/分销形式，并防止任何可能的搭便车行为

供应商可决定不出售给仅网上销售的分销商，并可要求其指定的分销商必须拥有一个或多个实体店

供应商可要求线下和在线销售，在响应时间/人员专业技能等方面具有同等条件

供应商可要求其分销商不使用第三方平台

对于非核心限制，可根据效果为基的方法去分析这些限制

Pierre Fabre的裁定

案例研究

在案例C-439/09中，2011年10月13日 欧盟法院的判决

参考巴黎上诉法院的初步裁定

背景：

Pierre Fabre Dermo-Cosmétique的废除诉讼违背了法国竞争委员会2008年10月29日的决定，涉及Pierre Fabre（在选择性分销合同中）对之前授权的分销商推行的禁令（关于通过网络出售其化妆品和个人护理产品）

СЪДЪТ НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
SODINI DVŮR EVROPSKÉ UNIE
DEN EUROPEISKE UNIONEN DOMSTOL
GERICHTSHOF DER EUROPAÏSCHEN UNIE
EUROOPA LIIDU KOHUS
ΑΡΧΑΙΕΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHEITHIÚNAIS AN AONTAIS EORPAIGH
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA
EIROPAS SAVENĪBAS TIESA

EUROPOS SĄJUNGOS TEISINGUMO TEISMAS
AZ EURÓPAI UNIÓ BÍRSÁGA
IL-QORTI TAL-GUSTIZZJA TAL-UNJONI EWROPEA
HOE VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTITIE A UNIUNII EUROPENE
SÚDNY DVOR EVROPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL


LUXEMBOURG

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 court
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. Šereš, Administrator,

* Language of the case: French.

EN

涉及的产品有：

未被归类为药品的化妆品和个人护理产品

市场份额：

2007年，Pierre Fabre 集团在法国市场占20%

有争议的协议：

各类品牌的经销合同规定仅可在实体店(且必须有合格的药剂师)进行销售

特殊要求排除实际上所有形式的网络销售

PIERRE FABRE DERMOCOSMETIQUE

- 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.

成员国法院提出的问题：

有关通过网络向最终用户出售契约货品的一般和绝对禁令，强行施加给选择性分销网络条件中的授权分销商，是否事实上依据目的其构成了第81(1)条[欧盟运行条约第101条(1)]得“核心”限制，该条款并不在2790/1999号规则提供的集体豁免的范围之内，但是否可能符合条款[欧盟运行条约第101条(3)]中的个案豁免条件？

JUDGMENT OF 13. 10. 2011 – CASE C-439/09

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

“构成选择性分销体系的协议[.....]必然影响竞争[.....]。但是[.....]有合法的要求, 如专业贸易维护能够对有关高品质和高技术含量产品提供专业服务, 其可证明能够减少价格竞争从而有利于除价格以外其他因素的竞争。选择性分销系统不受欧盟运行条约第101条(1)的限制, 在某种程度上可根据定性性质的客观标准选择代理商, 该标准为所有潜在代理商奠定了一致标准且不带有歧视成分, 必要问题是保证产品特征(如网络)质量, 确保其正确使用, 最后奠定的该标准不能超越必要限度。”

对照段落 39至41的裁定

PIERRE FABRE DERMO-COSMÉTIQUE

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*

“欧盟运行条约第101条(1) 可理解为, 在选择性分销系统中, 合同条款要求化妆品和个人护理产品在实体店内进行销售, 且应有合格的药剂师, 致使出现有关使用网络进行销售的禁令, 相当于根据内容的单个和具体检查该合同条款的目的以及其形成的法律和经济背景在该规定内按目的进行限制, 显而易见的是, 考虑到产品的性质争议, 该条款不是客观合理的。”

对照段落47的裁定

JUDGMENT OF 13. 10. 2011 – CASE C-439/09

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.

“集体豁免[...] 并不适用于事实上包括禁止使用网络形式销售契约产品的条款的选择性分销合同, 但是, 该类合同在满足欧盟运行条约第101条(3)所要求的条件时, 也可能会成功抗辩, ”

对照段落59的裁定

JUDGMENT OF 13. 10. 2011 – CASE C-439/09

- 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

电子书

案例研究

主要特点：

横向协议案件

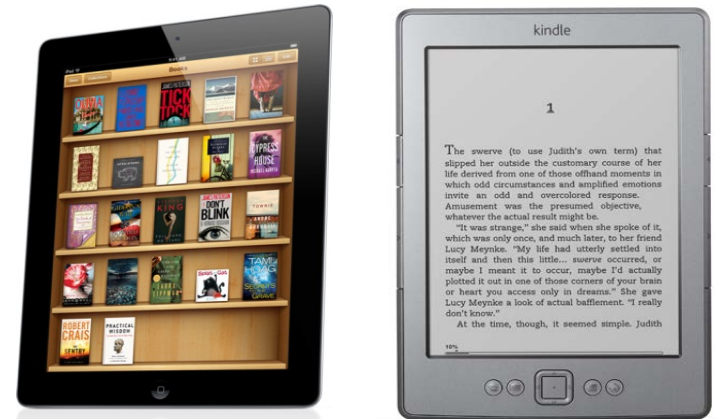
提高零售价为目的的一致行为

零售价最惠国条款作为承诺机制

两个涉及承诺的决定：

阿歇特出版公司、哈伯柯林斯、霍尔茨布林克出版集团/麦克米伦出版公司、西蒙与舒斯特公司、苹果公司（2012）

企鹅兰登书屋（2013）



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EUROPEAN COMMISSION
Competition DG

CASE COMP/AT.39847-E-BOOKS

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 12/12/2012

This text is made available for information purposes only. A summary of this decision will be published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].

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2年冷却期

冷却期期间：零售商对整个产品目录的
产品不具有打折的自主权

5年内禁止价格最惠国条款

苹果公司承诺：

与出版商终止代理协议

5年内禁止价格最惠国条款

November 8, 2012

COMMITMENTS OF HARPERCOLLINS

CASE COMP/39.847 – EBOOKS

In accordance with Article 9 of Council Regulation (EC) No 1/2003 (“Regulation 1/2003”), HarperCollins offer the following commitments (the “Commitments”) to address the preliminary competition concerns identified by the European Commission (the “Commission”) in Case COMP/39.847 *Ebooks*, in its Preliminary Assessment dated August 13, 2012 (the “Preliminary Assessment”), and to enable the Commission to adopt a decision confirming that the Commitments meet its concerns (the “Commitments Decision”).

Nothing in these commitments may be construed as implying that HarperCollins agrees with the concerns expressed in the Preliminary Assessment. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action and will close the proceedings opened on 1 December 2011 in relation to HarperCollins' arrangements for the Sale of E-books. For the avoidance of all doubt, HarperCollins strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 EEA Agreement or any other aspect of European Union or EEA competition law. These Commitments are thus without prejudice to HarperCollins' position should the Commission or any other party conduct proceedings or commence other legal action against HarperCollins and are offered without any admission of liability.

I. DEFINITIONS

“Agency Agreement” means an agreement between an E-book Publisher and an E- book Retailer under which the E-book Publisher Sells E-books to consumers through the E- book Retailer, which under the agreement acts as an agent of the E- book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E- books. For the avoidance of doubt, the amount that HarperCollins shall be entitled to receive in respect of each E-book Sold under an Agency Agreement shall be based on the Retail Price set by HarperCollins for that E- book, net of VAT.

“Apple” means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California; and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and

“电子书的各单独出版社和各零售商可自由选择他们喜欢的业务关系形式，但限制或消除竞争的任何形式的共谋是完全不能接受的。苹果公司和四个出版社提出的承诺将在该新兴的快速发展的市场中恢复正常的竞争，以使电子书的买家和读者受益。”



Joaquín Almunia
EU Commission Vice-President
in charge of Competition Policy
负责竞争政策的欧盟委员会副主席

酒店预订

案例研究



European
Commission

OFFICE OF FAIR TRADING

Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents

31 January 2014

OFT1514dec

Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals

Date of issue: 20.12.2013

Bonn, 20 December 2013: Today the Bundeskartellamt prohibited HRS from continuing to apply its 'best price' clause (most favoured nation clause) and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014 as far as the clause affects hotels in Germany.

Andreas Mundt, President of the Bundeskartellamt: *"Only at first view do most favoured customer clauses used by online booking portals seem to benefit consumers. Ultimately the clauses prevent the offer of lower hotel prices elsewhere. Most favoured customer clauses thus restrict competition between existing online portals. Moreover, they make the market entry of new platforms considerably more difficult because they prevent new platforms from offering hotel rooms at lower prices. For these reasons we have now also initiated proceedings against the online hotel portals Booking and Expedia because of similar clauses in their hotel contracts."*

The most favoured customer clauses in the contracts concluded between the HRS online platform and its hotel partners oblige the hotels to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available on the Internet also via the HRS portal. Since March 2012 the hotels are even prohibited from offering guests better conditions if they book in directly at the hotel's reception desk.

HRS may file an appeal against the order with the Düsseldorf Higher Regional Court and apply for interim relief against the immediate enforceability of the order. The proceedings against Booking and Expedia were initiated because the contracts concluded by these companies with hotel partners contain similar clauses.



德国案例

2013年12月德国联邦卡特尔局的禁止决定

一家小酒店对HRS(一个大型在线旅行社或在线旅行代理)的投诉

焦点: 平价条款

被调查的条款: 关于HRS强加的预定、取消和房间供应情况的价格、条件的平价条款

英国案例

2014年1月31日英国公平贸易办公室(OFT)的承诺和决定

一家小型在线旅行代理对Bookings公司、艾派迪和洲际酒店集团的投诉

焦点: 转售价格维持(RPM)

被调查的条款: 洲际酒店集团(可能是通过其他酒店)对Bookings公司、艾派迪(并不排除在线旅行代理施加的平价条款的存在)制定的打折限制

德国案例

产品市场:

结合搜索功能, 比较和预定酒店房间的
酒店门户网站

地域市场:

不大于全国市场

英国案例

产品市场:

通过在线旅游代理和酒店网站在线供
应仅提供住宿的酒店

具有开放性: 包括离线酒店预订

地域市场:

可能至少为国家市场(具有开放性)

平价条款和转售价格维持可能导致的竞争损害

阻碍了可为终端顾客提供较低房价的在线旅行代理商间的竞争

阻碍了降低酒店佣金的在线旅行代理商间的竞争

阻碍了新的门户网站(如创新服务)进入市场

减少了酒店间的竞争