Distribution Law Center
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CASE CARD | 25 October 2021

Javico (C-306/96)

Prohibition of re-import

1. CASE SUMMARY

A. Summary of facts

YSLP, a supplier of luxury cosmetics based in France, enjoyed an individual exemption for the selective distribution of its products within the EU. YSLP concluded with Javico, an independent distributor based in Germany – which is not part of YSLP's distribution network within the EU – two contracts for the distribution of its products, one covering Russia and Ukraine and the other Slovenia.

The distribution contracts between YSLP and Javico provided that the products were intended for sale solely in Russia, Ukraine and Slovenia, and that in no circumstances the products could leave these territories. After discovering products sold to Javico in the United Kingdom, Belgium and the Netherlands, YSLP terminated the contracts and instituted proceedings before the Commercial Court (*Tribunal de Commerce*) of Nantere. The Commercial Court upheld the termination of the contracts. Javico appealed to the Court of Appeal (*Cour d'appel*) of Versailles, which considered that the validity of the provisions in the distribution agreements should be appraised in the light of Article 101 TFEU.

B. Legal analysis

B.1 - Article 101(1) TFEU – a prohibition on re-imports is not a by object restriction but may have restrictive effects

In response to the first preliminary question, the European Court of Justice ('ECJ') first outlines the framework of analysis which includes references to the *Société Technique Minière* and *Consten and Grundig* cases. (§10-12)

The ECJ reaffirms that the type of restrictions in vertical agreements that may be caught by the prohibition of Article 101(1) TFEU includes:

- agreements intended to deprive a reseller of his commercial freedom to choose his customers by requiring him to sell only to customers established in the contract territory; (§13) and
- agreements which require a reseller not to resell contract products outside the contract territory. (§14)

However, for such agreements to be effectively caught by Article 101(1) TFEU, they also must be capable of affecting trade between Member States. (§15-16) According to the ECJ, the existence of an effect depends

essentially on the position of the parties on the relevant product market. (§17)

The ECJ then considers whether these principles can be transferred to distribution agreements making export outside the EU compulsory and, hence, prohibit re-importation. (§18) The ECJ confirms that such distribution agreements that are intended to apply outside the EU are to enable the producer to penetrate a market outside the EU, and thus are not designed to exclude parallel imports and to prevent marketing within the EU. According to the ECJ, this interpretation is supported by the fact that the prohibition of selling outside the contract territory also covers all other non-EU countries. (§19)

Although distribution agreements that are intended to apply outside the EU do not have the object of restricting competition in the EU, the ECJ does not exclude that they may have such an effect. (§20-22) The ECJ confirms that it is for the national courts to establish any effect, but, nevertheless, indicates which elements should be taken into consideration during such an appraisal:

- the structure of the relevant product market; (§23) and
- any significant price difference between products sold inside and outside the EU (§24).

If a national judge were to establish that a contested distribution agreement has the effect of restricting competition, it should then assess whether that agreement can appreciable effect trade between Member States. (§25) In that respect, the ECJ explains that trade between Member states cannot be appreciably affected if the products intended for markets outside the EU account for only a very small percentage of the relevant product market in the EU. (§26-28)

B.2 - Article 101(3) TFEU – exemption not applicable to distribution of products outside the EU

With regard to the second preliminary question, the ECJ first explains that the individual exemption issued by the Commission to YSLP relates only to standard selective distribution contracts for the sale of products in the EU. (§29-30) Because the distribution agreements at issue concerned the distribution of products outside the EU, they cannot benefit from the individual exemption granted. (§31) For the same reasons, the exemption under Regulation 1983/83 (applicable at the time) is also considered to be irrelevant. (§32) The ECJ concludes that exemption decisions must be interpreted restrictively so as to ensure that their effects are not extended to situations which they are not intended to cover. (§33)

2. QUOTES

"*Similarly, the Court has held that an agreement which requires a reseller not to resell contractual products outside the contractual territory has as its object the exclusion of parallel imports within the Community […].*" (§14)

"*[…] anti-competitive conduct may not be struck down under Article 85(1) of the Treaty unless it is capable of affecting trade between Member States.*" (§15)

"*[…] an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States.*" (§20)

"*Although the contested provisions of those agreements do not, by their very nature, have as their object the prevention, restriction or distortion of competition within the common market within the meaning of Article 85(1), it is, however, for the national court to determine whether they have that effect.*" (§22)

"*It must be explained here that the individual exemption decision issued by the Commission to YSLP relates only to standard selective distribution contracts drawn up by YSLP for the retail sale of its products in the Community.*" (§30)

"*Article 85(1) of the EC Treaty precludes a supplier established in a Member State of the Community from imposing on a distributor established in another Member State to which the supplier entrusts the distribution of his products in a territory outside the Community a prohibition of making any sales in any territory other than the contractual territory, including the territory of the Community, either by direct marketing or by re-exportation from the contractual territory, if that prohibition has the effect of preventing, restricting or distorting competition within the Community and is liable to affect the pattern of trade between Member States. This might be the case where the Community market in the products in question is characterised by an oligopolistic structure or by an appreciable difference between the prices charged for the contractual product within the Community and those charged outside the Community and where, in view of the position occupied by the supplier of the products at issue and the extent of the supplier's production and sales in the Member States, the prohibition entails a risk that it might have an appreciable effect on the pattern of trade between Member States such as to undermine attainment of the objectives of the common market.*" (§1 of the operative part)

"*Provisions intended to prevent a distributor from selling directly in the Community and re-exporting to the Community contractual products which the distributor has undertaken to sell in non-member countries do not escape the prohibition laid down in Article 85(1) of the Treaty on the ground that the Community supplier of the products concerned distributes those products within the Community through a selective distribution network covered by an exemption decision under Article 85(3) of the Treaty.*" (§2 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 1983/83

4. RELEVANT LITERATURE

For more information on vertical agreements on re-imports into the EU, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.144 – 3.145 and §6.41 – 6.49.

5. PRACTICAL SIGNIFICANCE

The preliminary ruling of the ECJ in the *Javico* case is an important judgment because the ECJ assesses to what extent important principles governing distribution agreements that concern trade within the EU are applicable to distribution agreements concerning exports outside the EU or imports/re-imports from outside the EU.

In particular with regard to the applicability of the hardcore restrictions (Article 4 of Regulation 330/2010) to distribution agreements concerning exports outside the EU or imports/re-imports from outside the EU, the Vertical Guidelines (§47, footnote 5) refer to the judgment of the ECJ in the *Javico* case and repeat that an agreement in which the reseller gives to the producer an undertaking that it will sell the contract products on a market outside the EU cannot be regarded as a by object restriction.