

European Court Moves to Protect Online Selling

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Following are links to the decision of the European Court in the Pierre Fabre case (referral from the French Court of Appeal) ([English version](#), [French version](#)), which concerned an absolute ban on selling products other than in the physical presence of a qualified pharmacist - hence an absolute ban on Internet sales.

The court's judgment is fairly terse, but in common with the view of the Advocate General, does leave open the possibility that an individual exemption under Article 101(3) might be available for an absolute ban on Internet sales in a selective distribution agreement.

The court gives no indication of the circumstances in which such an exemption might be available. Conversely, the court makes it clear that such an exemption is not given under Article 4(c) of the Vertical Restraints Block Exemption (exemption for ban on selling contract products in a selective distribution agreement from an unauthorised location), and also confirms that maintenance of a prestigious brand image cannot constitute a legitimate reason for restricting competition. Presumably for the purposes of guiding the French court which made the referral, the European court also restates that the need to provide advice to the consumer has not been accepted as justification for a ban on Internet sales in the context of non-prescription drugs and contact lenses.

In summary, whilst the court does expressly leave open the possibility of an individual exemption for an express or implied internet sales ban, it certainly does not go out of its way to demonstrate how the referring court might feel able to hold that an exemption was applicable, and indeed provides examples of analogous cases where similar provisions were held not to be justifiable. No great surprises here, therefore, and probably a step further away from the Advocate General's opinion as to whether the case for an exemption of such a provision could ever be made out.

Whilst the French courts have historically been more receptive than many to the idea of selective distribution, it would indeed take a very brave court of appeal to find grounds for an exemption to be applicable when the case goes back to Paris.

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