

## CLIENT ALERT

### European Court of Justice Further Supports Internet Sales

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Yesterday, 13 October 2011, the European Court of Justice ("ECJ") issued a decision on the general and absolute ban on internet sales in a selective distribution network. In line with recent case-law, the ECJ supported the internet as a sales channel and rejected arguments that

- the need to provide individual advice to the customer,
- to ensure his protection against the incorrect use of products or,
- the manufacturer's strategy to maintain the prestigious image of his products,

suffice to impose an outright ban of internet sales on distributors.

Even though interpreting Regulation No 2790/1999 – which has been replaced by Regulation No 330/2010 last year – the ruling gives important guidance on the limits manufacturers can impose on internet sales. It largely supports the Commission's hard stance against restrictions of online sales.

#### Background

The decision was taken in a preliminary proceeding brought before the ECJ by the Cour d'appel of Paris in a case initiated by Pierre Fabre Dermo-Cosmethique ("Pierre Fabre"), a company active in the manufacturing and marketing of cosmetics and personal care products.

Distribution contracts for Pierre Fabre's products stipulated that the sales of products must be made exclusively in a physical space, in which a qualified pharmacist must be present, that way de-facto excluding online sales. The French Competition Authority – after having opened an investigation into the general distribution practices in the cosmetics and personal care products sector – ordered Pierre Fabre to remove all terms from its selective distribution contracts that are equivalent to a ban on internet sales.

Pierre Fabre appealed that order and the question whether European law forbids a general and absolute ban on selling goods online to end-users was brought before the ECJ.

When answering that question, the first aspect discussed by the ECJ was whether the contractual clauses at issue amount to a restriction of competition by object (similar to the U.S. concept of *per se* illegality, with the consequence that the French Competition Authority would not have to prove that potential harm to competition has in fact materialized). In that respect, the ECJ has always held that in the context of selective distribution systems, certain restrictions can be imposed on distributors, as long as those restrictions pursue a legitimate aim in a proportionate manner. When drawing the line for such legitimate aims, the ECJ emphasized that neither the protection of customers against the incorrect use of products nor the manufacturer's intention to maintain the prestigious image of the products at issue can be validly invoked by manufacturers.

Having established the restriction by object, the ECJ turned to the justification. It denied Pierre Fabre the possibility to rely on the argument that the ban of internet sales is permitted by what was enshrined in Article 4(c) of Regulation No 2790/1999 (and is now enshrined in Article 4(c) of Regulation No 330/2010), allowing the prohibition of sales from unauthorized places of establishment. The ECJ held that this provision has to be construed narrowly and cannot encompass a place from which internet sales services are provided.

The final question left was whether there is a justification under the general rules of the EC Treaty, *i.e.* under Art. 101 (3). The ECJ – lacking sufficient information before it – did not deem itself to be in the position to decide this and referred the question back to the Cour d'appel of Paris. Given the guidance of the ECJ, it would however come as a surprise should that court hold a ban on online sales to be justified in that particular case.

The ECJ's ruling is ultimately in line with recent case-law especially in the area of free movement of goods (see eg. Case C-108/09 *Ker-Optika*) drawing narrow lines for restrictions on sales based on the protection of customers against the incorrect use of products and it also bolsters the Commission's stance which during the re-draft of Regulation No 2790/1999 had opposed the enactment of far-reaching permissions to restrict online sales.

The judgment of the European Court of Justice is available [online](#).

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