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## **CJEU, C-649/18: The Court of Justice sheds some light on the national limitations to e-commerce between different Member States, concerning medicines not subject to medical prescription**

On 1 October 2020, the Court of Justice of the European Union ('CJEU') ruled in case C-649/18 on the interpretation of Article 34 TFEU, Article 85c of Directive 2001/83/EC, as amended by Directive 2011/62/EU of 8 June 2011 ('Directive 2001/83'), and Article 3 of Directive 2000/31/EC of 8 June 2000 ('e-Commerce Directive').

### **Background**

**The dispute in the main proceedings:** A., a Dutch company active in the pharmaceutical field, operates a pharmacy established in the Netherlands and marketing online medicinal and para-pharmaceutical products through several websites, one of which specifically directed at French consumers. Those products have been granted a marketing authorisation in France and are not subject to medical prescription.

A. had an advertising campaign carried out for the online sale of the products directed at French consumers, which included the insertion of advertising leaflets in packages sent by other traders engaged in distance selling. A. also published on a website promotional offers consisting in a discount on the price of an order of medicinal products once a certain amount is exceeded, and purchased paid search engine referencing.

An action for unfair competition was brought before the Commercial Court of Paris, (the 'CCP') by associations that represent the professional interests of pharmacists in France (Daniel B, UD, AFP, B and L, 'Daniel B and Others'). The claimants argued that A. had breached the French legislation on the online advertising and sale of medicinal products<sup>1</sup>, thus obtaining an undue advantage from this conduct. The CCP concluded that the action did amount to unfair competition, taking into consideration the fact that as part of its campaign, A. had distributed more than three million leaflets, hence soliciting French clients by methods unworthy of the profession of pharmacist and in breach of French legislation.

A. appealed the ruling before the Paris Court of Appeal (the 'CA' or the 'Referring Court'), arguing that French legislation did not apply and that French provisions constituted barriers to the principle of the application of the rules of the country of origin, pursuant to Art. 3 of e-Commerce Directive and Article 85c of Directive 2001/83, as well as to the principle of free movement of goods under Art. 34 TFEU.

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<sup>1</sup> Article R. 4235-22 of the French Public Health Code provides that "**pharmacists are prohibited from soliciting clients through procedures and methods contrary to the dignity of the profession**". Article R. 4235-64 provides that "**a pharmacist shall not, by any process or means whatsoever, induce patients to engage in abusive consumption of medicinal products**".

Article 7.1 of the Decree on best practice in the dispensing of medicinal products includes specific rules on e-commerce, namely: "(...) (2) **Certain personal data concerning the patient are necessary in order for the pharmacist to ensure that the order is appropriate to the patient's state of health and for him or her to detect possible contra-indications. Thus, prior to validating the first order, the pharmacist must obtain via an online questionnaire information on the patient's age, weight, height, sex, current treatments, history of allergic reaction, contra-indications and, where appropriate, pregnancy or breastfeeding. (...)**". Besides, Section 1 of the Decree on technical rules provides that "**paid referencing on search engines or price comparison websites shall be prohibited**".

The Referring Court asked whether the e-Commerce Directive must be interpreted as precluding the application of the French legislation in the case at hand.

### **The ruling**

The CJEU divided the question into four parts, namely evaluating if the e-Commerce Directive does preclude national legislation, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, which:

- (1) **prohibits pharmacies selling those medicinal products from soliciting clients through certain procedures and methods**, in particular through the extensive sending of leaflets for advertising purposes;
- (2) **prohibits such pharmacies from making promotional offers consisting in a discount on the total price** of an order of medicinal products once a certain amount is exceeded;
- (3) **requires such pharmacies to include a health questionnaire** in the process of ordering medicinal products online;
- (4) **prohibits such pharmacies from using paid referencing on search engines** and price comparison websites.

Preliminary, the CJEU explained that the e-Commerce Directive provides that an online sales service relating to medicinal products may constitute an information society service, within the meaning of Art. 2(a) and, therefore, may fall within the scope of the e-Commerce Directive.

Moreover, under Art. 3(4), **Member States may**, in respect of an information society service, **take measures that derogate from the principle of the freedom to provide information society services from another Member State**, as provided in Art. 3(2), **where the conditions set out in Art. 3(4) (a) and (b) are satisfied**.

Those measures must (i) pursue one of the objectives referred to in the provision at issue (e.g. interests of public policy, protection of public health) and (ii) be appropriate to ensure the attainment of the objectives under (i) and not go beyond what is necessary in order to attain the latter.

In the light of the above, the CJEU held that, as for point (1), the importance of the relationship of trust between a health professional and the patient and the protection of the dignity of a regulated profession may be considered to fall within the protection of public health. As such, French legislation - which prohibits a provider from carrying out an advertising campaign outside the pharmacy and by means of physical and electronic media - appears to be appropriate to ensure that the goals of protecting the dignity of the profession of pharmacist and of protecting public health are reached.

However, a general and absolute prohibition of any advertisements provided by a national law goes beyond what is necessary to protect public health and the dignity of a regulated profession. It is for the Referring Court to determine whether the actual prohibition prevents the provider from carrying out any form of advertising outside his or her pharmacy. Should that be the case, the prohibition would go beyond what is necessary to guarantee the objectives pursued.

As for point (2), promotional offers may encourage consumers to purchase and, in some circumstances, to over-consume medicinal products. Thus, the fact that French law prohibits such offers must be regarded as appropriate for reaching the goal of protecting public health. It will be for the Referring Court to evaluate how the prohibition is applied and whether that goes beyond what is necessary to protect public health.

As for point (3), the CJEU noted that the objective of ensuring the provision of individual advice to patients in order to protect them from misuse of medicinal products falls within the protection of public health. As such, the equivalent rule under French legislation, foreseeing an online health questionnaire to be filled-in before the first order for medicinal products placed on a pharmacy's website is appropriate and proportionate for the purpose of protecting the patient's health.

Finally, as for point (4) above, according to the Court, the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality throughout the national territory is capable of justifying a restriction on trade between Member States, as it contributes to the protection of health and life. It is for the Member States to adduce evidence of the appropriateness and necessity of a measure adopted in derogation of a fundamental freedom. The CJEU held that in the case at hand the burden of proof was not satisfied. It will be for the national Court to examine whether any evidence that may be adduced allows to conclude that the means chosen are appropriate and proportionate for reaching the objectives pursued.

This ruling shows that limitations to e-commerce between different Member States, concerning over the counter pharmaceutical products, can be introduced at national level, provided that the measures can be considered appropriate and proportional, having regard to the aims that are to be reached.

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