

Press and Information Division

PRESS RELEASE N° 16/03

11 March 2003

Opinion of Advocate General Stix-Hackl in Case C-322/01

Reference for a preliminary ruling in the case of Deutscher Apothekerverband e.V. v 0800 DocMorris NV and Jacques Waterval

IN THE VIEW OF ADVOCATE GENERAL STIX-HACKL A NATIONAL MEASURE SUCH AS THE GERMAN PROHIBITION ON MAIL ORDER TRADE • INCLUDING BY INTERNET • IN MEDICINES REQUIRED TO BE SOLD THROUGH PHARMACIES, AND ON RELATED ADVERTISING, CAN ONLY BE JUSTIFIED UNDER THE FREE MOVEMENT OF GOODS RULES AS BEING FOR THE PROTECTION OF HEALTH AND LIFE OF HUMANS IN RESPECT OF MEDICINES THAT REQUIRE AUTHORISATION BUT HAVE NOT BEEN AUTHORISED.

In so far as the prohibition on mail order trade and related advertising concerns medicines that have been authorised or do not require authorisation, the principle of proportionality will be infringed if the health-protection goals pursued by the country of import can be secured by other means. The Advocate General suggests as examples of less severe measures controls on ordering, dispatching, transporting and taking delivery of the medicines.

The Deutsche Apothekerverband e.V. is an association whose duties include the protection and furtherance of the economic and social interests of the pharmacists' profession. Its members are the regional associations of pharmacists, which in turn represent more than 19 000 pharmacies.

0800 DocMorris N.V. is a Netherlands pharmacy established in Kerkrade, Netherlands. Jacques Waterval is a pharmacist and one of the legal representatives of DocMorris.

Since **8 June 2000**, DocMorris and Mr Waterval have been offering for sale, on the internet address "www.0800DocMorris.com", prescription and non-prescription medicines, in languages including German, for consumers in Germany. Some of the medicines in question are authorised in Germany, and most of them in another Member State.

DocMorris's internet portal is divided into headings as follows: "Pharmacy", "Health forum", "About us", "Contact" and "Help". Consumers are able, amongst other things, to obtain health advice from the advisory committee of experts at the "internet pharmacy". In addition, they can contact DocMorris and Mr Waterval direct on a free telephone number or by letter.

The individual medicines are divided into product groups on the internet site under headings such as "Painkillers", "Blood pressure reduction", "Cancer treatment", "Immuno-stimulants", "Cholesterol reduction", "Urologics/potency" and "Detoxification". Each heading first contains an introduction of a few sentences. The medicines are then listed alphabetically under their product name, the contents of the package is described and the price stated in Euros. Beside the indication as to any prescription requirement there might be there is a box. By clicking on that box, the relevant medicine is ordered. For further information about the product itself, customers can click on the product name.

A particular medicine will be treated by DocMorris and Mr Waterval as subject to prescription if it is so classified either in the Netherlands or in the Member State in which the customer lives. Delivery of such medicines does not take place until the original prescription is produced.

Delivery itself can take place in a number of ways. One possibility is for the customer personally to collect the order from the DocMorris pharmacy in Landgraaf, a town near the German/Dutch border. Another, at no extra cost, is to use a courier service recommended by DocMorris.

By its application before the Landgericht Frankfurt, the Deutsche Apothekerverband objects to medicines being offered to the public on the internet and their delivery by cross-border mail order. It takes the view that the German Arzneimittelgesetz (Medicines Law or "AMG") and the German Gesetz über die Werbung auf dem Gebiete des Heilwesens (Law on Advertising in the Field of Medicine or "HWG") do not allow such an activity.

It does not consider these prohibitions to contravene the provisions in the EC Treaty on the free movement of goods. The relevant provisions are Paragraph 43 of the AMG, which prohibits trading by mail order in medicines that are required to be sold through pharmacies, and Paragraphs 3(a) and 8 of the HWG, which prohibit the advertising of medicines which require authorisation but have not been authorised, and trading by mail order in medicines that are required to be sold through pharmacies. Paragraph 10 of the HWG prohibits the advertising of prescription-only medicines.

The Advocate General delivers her Opinion in this case today.

Opinions of the Advocates General are not binding on the Court. It is the function of the Advocates General, acting in complete independence, to propose a legal solution in cases before the Court.

In the Advocate General's view, a national prohibition on the import of medicines that are required to be sold through pharmacies by mail order through authorised pharmacies in other Member States on the basis of individual orders placed by internet constitutes a barrier to the **free movement of goods**. The decisive factor here is ultimately whether the measure • in this case, the German prohibition on trading in medicines by mail order • significantly impedes access to the market. It does for foreign pharmacies, as compared to German

pharmacies, on the German market. **The prohibition is justified as being for the protection of health and life of humans, in so far as it relates to medicines that require authorisation but have not been authorised either in the country of import i.e. Germany, or at Community level.** Such a prohibition is not disproportionate.

The position is **different**, however, for **medicines that are authorised or do not require authorisation**. It is for the country concerned to prove that here too the prohibition on mail order trade is consistent with the principle of proportionality, in other words, that it is necessary and appropriate. In the Advocate General's view, Germany has not proved this. Examples of less severe measures are controls on ordering, dispatching, transporting and taking delivery of medicines. It is for the national court to determine whether these conditions are met in an individual case.

The Advocate General goes on to examine whether a national **prohibition on advertising the possibility of sending for medicines which are required to be sold through pharmacies**, such as the one provided for under the German rules, contravenes the principle of the free movement of goods. She concludes that a prohibition on advertising the possibility of sending for medicines which require authorisation but have not been authorised is, like the prohibition on mail order trade, both necessary and appropriate, but that the same does not hold true for medicines that have been authorised or do not require authorisation.

As regards the German **prohibition on advertising medicines that are not authorised (Paragraph 3(a) of the HWG), or prescription-only medicines (Paragraph 10 of the HWG)**, the Advocate General points out that this reflects the prohibition on advertising medicines, or advertising them to the general public, in the Community directive on advertising of medicinal products, and is simply a national implementing measure. The expression "advertising to the general public" in the Directive includes DocMorris's internet presentation, as the expression is to be interpreted widely. The crucial factor is the objective impression conveyed to the consumer by the overall appearance of the homepage.

Lastly, the Advocate General observes that the Member States were not obliged to transpose the Community E-Commerce Directive until 17 January 2002, and that that Directive does not therefore apply to the facts in this case, which occurred in 2000.

Note: The Judges of the Court of Justice of the EC will now begin their deliberations in this case. Judgment will be delivered at a later date.

Unofficial document for media use; not binding on the Court of Justice.

Available in Dutch, English, French, German and Spanish.

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www.curia.eu.int at approximately 3 pm today.*

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*Pictures of the hearing are available on "Europe by Satellite",
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