



Press and Information

Court of Justice of the European Union

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Judgment in Case C-649/18

A v Daniel B and Others

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**A Member State of destination of an online sales service relating to medicinal products not subject to medical prescription may not prohibit pharmacies that are established in another Member State and sell such products from using paid referencing on search engines and price comparison websites**

*However, such a Member State of destination may, under certain conditions, limit advertising, prohibit promotional offers relating to medicinal products and require that a health questionnaire be included in the process of ordering medicinal products online*

The case concerns a dispute between, on the one hand, A, a company incorporated under Netherlands law which operates a dispensing pharmacy established in the Netherlands and a website specifically targeting French customers and, on the other, Daniel B, UD, AFP, B and L ('Daniel B and Others'), which are operators of dispensing pharmacies and associations representing the professional interests of pharmacists established in France. The subject matter of the dispute is A's promotion of its website to French customers by means of a wide-ranging and multifaceted advertising campaign. The medicinal products marketed via that site have been granted a marketing authorisation in France and are not subject to compulsory medical prescription.

The advertising campaign was based on the insertion of advertising leaflets in packages sent by other traders engaged in distance selling (so-called 'piggyback marketing') and the sending of advertisements by post. A also published, on its website, promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount was exceeded, and purchased paid search engine referencing.

Daniel B and Others brought an action before the tribunal de commerce de Paris (Commercial Court, Paris, France), seeking, in particular, compensation for the damage they consider they have suffered as a result of the unfair competition in which A allegedly engaged by unduly obtaining an advantage from failing to comply with the rules of French law on the online advertising and sale of medicinal products. That court held that, by distributing more than three million advertising leaflets outside of its pharmacy, A had solicited French clients by methods unworthy of the profession of pharmacist and engaged in acts amounting to unfair competition.

The cour d'appel de Paris (Court of Appeal, Paris), hearing the case on appeal, referred a question to the Court of Justice for a preliminary ruling, seeking to ascertain whether the Medicinal Products Directive<sup>1</sup> and the e-Commerce Directive<sup>2</sup> authorise a Member State to impose, within its territory, on pharmacists who are nationals of another EU Member State specific rules regarding the prohibition of soliciting clients through procedures and methods which are regarded as being contrary to the dignity of the profession, the prohibition of inciting patients to engage in abusive consumption of medicinal products and the obligation to observe good practices in the distribution

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<sup>1</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 (OJ 2011 L 174, p. 74).

<sup>2</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p.1).

of medicinal products by requiring that a health questionnaire be included in the process of ordering medicinal products online and prohibiting the use of paid referencing.

In its judgment delivered today, the Court starts by stating that an online sales service relating to medicinal products, such as that at issue in the present case, may constitute an information society service, within the meaning of the e-Commerce Directive.

It goes on to state that, irrespective of whether it is carried out by physical or electronic means, advertising activity such as that carried out by A constitutes an element that is ancillary to and inseparable from the online sales service. Consequently, in accordance with the e-Commerce Directive, the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription may not, so far as relates to that activity, as a general rule, restrict the free movement of information society services from another Member State, except where such a restriction is justified by certain public interest objectives. In that regard, the Court notes that a restriction arising from the application of national legislation imposing a general and absolute prohibition of any advertising used by health professionals to promote their care activities goes beyond what is necessary to protect public health and the dignity of a regulated profession. It is thus for the referring court to determine whether the prohibition at issue prevents the provider at issue in the main proceedings from carrying out any advertising outside his or her pharmacy, regardless of the medium used or the scale thereof. If that were the case, the Court states, the prohibition would go beyond what is necessary to guarantee attainment of the objectives pursued.

As regards the prohibition on making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded, the Court notes that the e-Commerce Directive does not, in principle, preclude the application of such a prohibition by the Member State of destination, where such a prohibition is intended to prevent the excessive or inappropriate use of medicinal products. The Court specifies, however, that such a prohibition must be sufficiently circumscribed and particularly targeted solely at medicinal products and not at mere para-pharmaceutical products, which it is for the national court to ascertain.

As regards the prior completion of an online health questionnaire to validate the first order for medicinal products placed by a patient on a pharmacy's website, the Court notes that that measure is liable to have a deterrent effect on patients wishing to purchase medicinal products online. Nevertheless, the Court recalls that it has previously held that an increase in the number of online interactive features, which the customer must use before being able to proceed to a purchase of a medicinal product, is an acceptable measure which is less detrimental to the free movement of goods than a prohibition of the online sale of medicinal products. Consequently, it considers that the French legislation at issue does not appear to go beyond what is necessary to ensure that the objective pursued is achieved.

As regards the prohibition on pharmacies selling such medicinal products from using paid referencing on search engines and price comparison websites, the Court considers that that prohibition is liable to restrict the possibility for a pharmacy to make itself known to potential customers residing in another Member State and to promote the online sales service that it offers those customers. That prohibition must therefore be regarded as a restriction on the freedom to provide information society services. The Court notes that, even though the French Government claimed that that measure was justified by the wish to ensure a balanced distribution of pharmacies throughout the national territory, that government did not fulfil its responsibility to adduce evidence that such a measure was appropriate and necessary to attain that objective. The Court thus holds that a **Member State of destination of an online sales service relating to medicinal products not subject to medical prescription may not prohibit pharmacies that sell such products from using paid referencing on search engines and price comparison websites**. Such a prohibition would be permissible only if it were established before the referring court that that legislation is appropriate to ensure the attainment of the objective of protecting public health and does not go beyond what is necessary in order to attain that objective.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of

EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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