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Judgment of the Court in Case C-517/23 | Apothekerkammer Nordrhein

### **Member States may authorise advertising measures to promote the purchase of unspecified prescription-only medicinal products in the form of price reductions or payments of an exact amount**

*Member States may also prohibit advertising measures to promote the purchase of that type of medicinal product where they offer vouchers for the subsequent purchase of non-prescription medicinal products and health and care products*

DocMorris, a Netherlands mail-order pharmacy, has since 2012 run various advertising campaigns for its customers in Germany promoting the purchase of prescription-only medicinal products.

These took the form, in some cases, of price reductions and payments of an exact amount applied in relation to unspecified prescription-only medicinal products and, in other cases, of a reward of between €2.50 and €20 giving rise to a payment, the exact amount of which was not however known in advance. In addition, DocMorris offered, in order to promote the purchase of prescription-only medicinal products, vouchers for the subsequent purchase of other products, namely non-prescription medicinal products and health and care products.

At the request of the Professional Association of Pharmacists of the North Rhine region, the Regional Court, Cologne, adopted interim measures prohibiting DocMorris' advertising campaigns.

However, as most of those interim measures were subsequently annulled, <sup>1</sup> DocMorris seeks before the German courts damages of approximately €18.5 million from the Professional Association of Pharmacists. According to DocMorris, the interim measures were unjustified from the outset.

The German Federal Court of Justice asked the Court of Justice whether German law, which permitted advertising measures entailing a price reduction or payments of an exact amount while prohibiting other advertising measures, was compatible with Directive 2001/83 on the Community code relating to medicinal products for human use. <sup>2</sup>

Bringing about complete harmonisation in the field of advertising of medicinal products, the directive provides, on the one hand, that Member States are to prohibit the advertising to the general public of prescription-only medicinal products. On the other hand, non-prescription medicinal products may, subject to certain conditions and restrictions, be advertised to the general public.

Nevertheless, not all advertising measures for unspecified medicinal products are automatically covered by the scope of the directive. In order for that directive to apply, that measure must be designed to promote the prescription, supply, sale or consumption of medicinal products. If that is not the case, then the directive does not apply.

In that regard, the Court finds that the directive does not apply to **advertising measures that promote the purchase of unspecified prescription-only medicinal products by offering price reductions, payments of an**

**exact amount or a reward the amount of which was not known in advance.** These advertising measures concern, in fact, only the choice of the pharmacy and do not promote the consumption of those medicinal products. Indeed, when the patient receives a medical prescription, the only choice that remains to be made, with regard to the prescription-only medicinal product, is that of the pharmacy from which he or she will buy that medicinal product.

**The directive does not therefore preclude such advertising measures, where they take the form of a specific sum of money or a sum of money to be calculated in a specific way, from being lawful under German law.**

**That being said, on the basis of other provisions of EU law, a Member State may prohibit, on grounds of consumer protection, as appears to be the case in Germany, advertising measures promoting the purchase of unspecified prescription-only medicinal products that offer a reward the exact amount of which the customer does not know in advance.** <sup>3</sup> Indeed, such a prohibition prevents consumers from overestimating the amount of the reward.

**As regards vouchers offered for the subsequent purchase of non-prescription medicines or health and care products, the Court considers that the directive applies, since those vouchers encourage the consumption of non-prescription medicinal products.**

Therefore, according to the Court, **the directive does not preclude a prohibition, in national law, of such advertising measures.** Given that the consumer may choose between the purchase of non-prescription medicines and the purchase of other products such as health and care products, **vouchers treat non-prescription medicinal products in the same way as those other products, thereby distracting the consumer from the objective evaluation of the need to take those medicinal products.**

**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 an EU 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 and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>1</sup> Following the judgment of the Court of 19 October 2016, *Deutsche Parkinson Vereinigung*, [C-148/15](#) (see also [PR No 113/16](#)).

<sup>2</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, as amended by [Directive 2011/62/EU](#) of the European Parliament and of the Council of 8 June 2011.

<sup>3</sup> Inasmuch as it makes it more difficult for pharmacies established in another Member State to compete with traditional pharmacies located in Germany on price, such a prohibition restricts, where the advertising measure is implemented solely by means of physical media, the free movement of goods (Article 34 TFEU). Where the advertising is carried out in a multifaceted manner, both via the website of the pharmacy concerned and by means of physical media, and seeks to attract consumers to the website of the pharmacy in question to purchase its products online, such a prohibition constitutes a restriction on the freedom to provide information society services within the meaning of [Directive 2000/31/EC](#) on electronic commerce. Such an obstacle or restriction is, however, justified by the protection of consumers.