

Case C-606/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 September 2021

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

17 September 2021

Applicant in the referral, original defendant, appellant, respondent in the appeal on a point of law:

Doctipharma SAS

Defendant in the referral, original applicant, respondent, appellant in the appeal on a point of law:

Union des Groupements de pharmaciens d'officine (UDGPO)

Third party:

Pictime SAS operating under the name 'Coreyre'

1. Subject matter and facts of the main proceedings:

- 1 The company Doctipharma designed the website 'www.doctipharma.fr', hosted by the company Pictime, on which internet users can purchase, from pharmacies' websites, pharmaceuticals and medicinal products sold without a prescription by taking the following steps: users complete a form that allows them to create a customer account by providing personal information that will enable them to be identified and facilitate their access to the pharmacists' websites of their choice. In order to create that account, users must nominate a pharmacist from whom they will make their purchases and to whom they will link their account. The site *www.doctipharma.fr* offers non-prescription medicinal products in the form of a pre-loaded catalogue of medicinal products which the customer can consult with a view to placing an order. Anybody can order medicinal products via this process,

on the understanding that it is the site *www.doctipharma.fr* which presents the non-prescription medicinal products offered by the pharmacies, in the form of product ranges including their price, and sends the order to the pharmacies whose site is hosted on that site. The purchase price is paid via a single payment system shared by all the pharmacies from a dedicated account. The order is finalised when the following message is displayed: ‘Thank you for your order. Your order No (...) in the amount of EUR (...) has been sent to the pharmacists. A message will be sent to your account and confirmation of the sale will be sent to the address H_pignerol@gmail.com indicating, as soon as possible, the status of your order’.

- 2 The Union des Groupements de pharmaciens d’officine (Union of Pharmacy Groups, ‘the UDGPO’) claims that the online sales process offered to pharmacies by Doctipharma allows that company to participate in e-commerce in medicinal products despite not being a pharmacist. The UDGPO submits that such sales activities are unlawful and requests that they be stopped.
- 3 By judgment of 31 May 2016, the tribunal de commerce de Nanterre (Commercial Court, Nanterre) found that the *www.doctipharma.fr* site was unlawful as far as the sale of medicinal products was concerned and essentially ordered Doctipharma to stop engaging in e-commerce in medicinal products on that site.
- 4 Doctipharma referred the matter to the cour d’appel de Versailles (Court of Appeal, Versailles), which overturned the judgment by its judgment of 12 December 2017 (<https://www.legifrance.gouv.fr/juri/id/JURITEXT000036352460>). The Court of Appeal, Versailles, took the view that the *www.doctipharma.fr* site was lawful because the internet users’ orders of medicinal products, which merely pass through the platform created by Doctipharma as technical support for the pharmacies’ sites, are received by the pharmacists themselves, and that company has no other involvement in their processing since the contested site puts the customers in direct contact with the pharmacies.
- 5 By judgment of 19 June 2019 (ECLI:FR:CCASS:2019:CO00586), the Cour de cassation (Court of Cassation) set aside the judgment of the Court of Appeal, Versailles, and remitted the case to the cour d’appel de Paris (Court of Appeal, Paris). By pleadings lodged on 19 August 2019, Doctipharma brought the matter before the referring court.

2. Provisions at issue:

A. *European Union law*

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 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products ('Directive on Medicinal Products for Human Use')):

6 Article 85c provides:

‘1. Without prejudice to national legislation prohibiting the offer for sale at a distance of prescription medicinal products to the public by means of information society services, Member States shall ensure that medicinal products are offered for sale at a distance to the public by means of information society services as defined in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services under the following conditions:

...

2. Member States may impose conditions, justified on grounds of public health protection, for the retail supply on their territory of medicinal products for sale at a distance to the public by means of information society services.

...

6. Without prejudice to Directive 2000/31/EC and the requirements set out in this Title, Member States shall take the necessary measures to ensure that other persons than those referred to in paragraph 1 that offer medicinal products for sale at a distance to the public by means of information society services and that operate on their territory are subject to effective, proportionate and dissuasive penalties.’

B. *French law*

Code de la santé publique (Public Health Code)

7 Article L-5125-25 provides:

‘ ...

Pharmacies shall be prohibited from receiving orders for medicinal products ..., as a matter of course, through the mediation of brokers and from delivering and distributing to the home such medicinal products, or other products or items ordered from them in that way.’

8 Article L-5125-26 provides:

‘The sale to the public of any medicinal products ... through brokerage firms, joint buying organisations or establishments owned or managed by persons who do not hold one of the degrees, certificates or other qualifications referred to in Article L. 4221-1 shall be prohibited.’

3. Positions of the parties:

A. *Doctipharma*

9 Doctipharma claims that its activity consists in the technical design and maintenance of a shared hosting solution for pharmacies that allows them to publish and operate their e-commerce website for non-prescription medicinal products, in accordance with the provisions governing the online sale of medicinal products. Online sales of health products are exclusively a matter for each pharmacist and the online users.

10 Doctipharma challenges the prohibition imposed on it pursuant to Articles L. 5125-25 and L. 5125-26 of the Public Health Code. It claims that the French courts are required to interpret the second paragraph of Article L. 5125-25 and Article L. 5125-26 of the Public Health Code in the light of Article 85c of the Directive on Medicinal Products for Human Use in order to determine whether the prohibition on intermediation in the sale of medicinal products provided for in those articles must be applied to its activity, which it argues is confined to the design and technical maintenance of a shared hosting solution for pharmacies that allows them to publish and operate their website.

11 It proposes that the Court of Justice be asked about the interpretation of Article 85c of the Directive on Medicinal Products for Human Use, in particular in order to ascertain whether the prohibition on its activity, pursuant to Articles L. 5125-25 and L. 5125-26 of the Public Health Code, is justified on the ground of public health protection within the meaning of Article 85c of the Directive on Medicinal Products for Human Use and to establish, conversely, whether Article 85c of the Directive on Medicinal Products for Human Use allows an activity consisting in an ‘information society service’, as Doctipharma suggests.

12 Doctipharma states that those questions are new. It submits that the solution established in the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981) is based on facts specific to that case and, in particular, on the fact that, if the application developed by Uber did not exist, drivers would not have been led to provide transport services, and that Uber

exercised decisive influence over the conditions under which that service is provided by those drivers.

- 13 The judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)*, C-649/18, EU:C:2020:764, which concerns the enforceability of the French restrictions on advertising for the sale of medicinal products as against a company established in a Member State other than France which markets such products via its website to French consumers, relates to an entirely different issue from that forming the subject matter of these proceedings. However, Doctipharma states that that judgment is relevant to these proceedings in so far as it is held therein that ‘an online sales service relating to medicinal products, such as that at issue in the main proceedings, may constitute an information society service, within the meaning of Article 2(a) of Directive 2000/31 and, therefore, may be within the scope of that directive as regards the requirements applicable to that service, which come within the “coordinated field”, within the meaning of Article 2(h) of that directive’ (paragraph 33).

B. *Pictime*

- 14 Pictime, the company which hosts the *www.doctipharma.fr* site, requests that it be exonerated and that the UDGPO be ordered to pay the costs.

C. *The UDGPO*

- 15 The form of order sought by the UDGPO was declared inadmissible.

4. Assessment of the referring court of appeal:

- 16 The proceedings concern the sale at a distance and by electronic means (or online sale) of medicinal products for human use not subject to a mandatory prescription (‘non-prescription’).
- 17 Under Article 85c of the Directive on Medicinal Products for Human Use, Member States are to ensure that medicinal products are offered for sale at a distance to the public by means of information society services as defined in Directive 98/34. Paragraph 2 of that article allows Member States to impose conditions, justified on grounds of public health protection, for the retail supply on their territory of medicinal products for sale by means of information society services.
- 18 The French Public Health Code prohibits, in essence, persons who are not pharmacists from carrying on an intermediation service between pharmacies and the public (Articles L.1525-25 and L.1525-26).
- 19 The solution in the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981), in accordance with which the ‘intermediation

service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as “an information society service” within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as “a service in the field of transport” within the meaning of Article 2(2)(d) of Directive 2006/123’ (paragraph 40), cannot be applied to the present case. That solution was established following an in-depth analysis of the facts specific to that case.

- 20 The Court of Justice in fact observed ‘that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion’ (paragraph 39). The features of that case are not present here, since the pharmacies are already professionals in the sale of medicinal products, the sale of which at a distance by electronic means is merely an extension. Furthermore, it does not appear that Doctipharma is involved in setting the price of the medicinal products sold online. Doctipharma denies that the solution proposed by it undermines the monopoly enjoyed by pharmacists in the sale of medicinal products.
- 21 The judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)*, C-649/18, EU:C:2020:764, has no bearing on the proceedings as it relates to the compatibility of the French restrictions on the advertising of medicinal products with Article 85c of the Directive on Medicinal Products for Human Use.
- 22 The Court of Cassation censured the judgment of the Court of Appeal, Versailles, because the latter had failed to draw conclusions from its own findings that the Doctipharma’s activity on its site consisted inter alia in connecting pharmacies and customers for the sale of medicinal products. It follows, according to the Court of Cassation, that Doctipharma plays the role of an intermediary and, in that way, participates in e-commerce in connection with the sale of medicinal products even though it is not a pharmacist, in breach of the prohibitions laid down in Articles L.5125-25 and L.5125-26 of the Public Health Code.
- 23 The questions which Doctipharma proposes to be submitted to the Court of Justice form the basis of an interpretation of the provisions of Articles L.5125-25 and L.5125-26 of the Public Health Code that differs from that of the Court of Cassation on the prohibition of brokerage, and more generally on the involvement of a third party in the sale of non-prescription medicinal products, based on the interpretation of Article 85c of Directive 2011/62/EC to the effect that it must be

possible for non-prescription medicinal products to be sold at a distance to the public.

24 It appears necessary to refer the questions set out below to the Court of Justice for a preliminary ruling in order to settle the dispute.

5. The questions referred for a preliminary ruling:

25 The court of appeal refers the following questions for a preliminary ruling:

- Is Doctipharma’s activity, as described in this judgment, which is conducted on and from its website *www.doctipharma.fr*, to be regarded as an ‘information society service’ within the meaning of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998?
- If so, does Doctipharma’s activity, as described in this judgment, which is conducted on and from its website *www.doctipharma.fr*, fall within the scope of Article 85c of the European Directive of 6 November 2011, as amended by the Directive of 8 June 2011?
- Is Article 85c of the Directive of 6 November 2001, as amended by the Directive of 8 June 2011, to be interpreted as meaning that the prohibition, based on an interpretation of Articles L. 5125-25 and L. 5125-26 of the Public Health Code, of Doctipharma’s activity, as described in this judgment, which is conducted on and from its website *www.doctipharma.fr*, constitutes a restriction justified by public health protection?
- If not, is Article 85c of the Directive of 6 November 2011, as amended by the Directive of 8 June 2011, to be interpreted as meaning that it allows Doctipharma’s activity, as described in this judgment, which is conducted on and from its website *www.doctipharma.fr*?
- In that situation, is the prohibition of Doctipharma’s activity, based on the interpretation by the Cour de cassation (Court of Cassation) of Articles L. 5125-25 and L. 5125-26 of the Public Health Code, justified by public health protection within the meaning of Article 85c of the Directive of 6 November 2001, as amended by the Directive of 8 June 2011?
- If not, is Article 85c of the Directive of 6 November 2001, as amended by the Directive of 8 June 2011, to be interpreted as allowing the activity of an ‘information society service’ offered by Doctipharma?