

Advertising by Mail-Order Pharmacies: Free Movement Rules of e-Commerce Directive Apply, Says European Court of Justice

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Summary

The European Court of Justice has for the first time interpreted the substantive free movement rules set out in the EU e-Commerce Directive (Directive 2000/31/EC). The judgment relates to several French advertising restrictions that had been applied to a mail-order pharmacy established in another EU Member State. The Court assessed the extent to which the French measures restricted the freedom to provide services under the e-commerce rules.

On October 1, the European Court of Justice (ECJ) ruled in [Case C-649/18](#) that an EU Member State cannot restrict a mail-order pharmacy established in another Member State from using paid referencing on search engines and price-comparison websites to promote its service unless the Member State clearly establishes that the restriction is appropriate and does not go beyond what is necessary to protect public health. The ECJ also found that several other advertising restrictions imposed by France restricted the freedom to provide services under the EU e-commerce rules but added that those restrictions may be justified provided that certain conditions are fulfilled, which is for the national referring court to verify. This is the first case where the ECJ interprets the substantive free movement rules set out of the EU e-Commerce Directive (Directive 2000/31/EC).

The case involved Shop-Apotheke, a mail-order pharmacy established in the Netherlands, that was promoting its online sales service and the parapharmaceutical and non-prescription medicinal products it sells to French consumers by using different online and physical advertising practices. The Paris Court of Appeal had referred a question on appeal to the ECJ, asking whether the French measures at issue were in accordance with EU law.

Assessment under the e-Commerce Directive

The ECJ confirmed that an online sales service, such as that provided by Shop-Apotheke, constitutes an information society service within the meaning of the e-Commerce Directive. It also confirmed the existence of a procedural notification obligation: The e-Commerce Directive requires that a Member State wishing to impose certain restrictions on an information society service provider established in another Member State first inform the Member State of establishment and the European Commission.

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On substance, the ECJ considered that advertising practices, such as those used by Shop-Apotheke, should be assessed solely under the e-Commerce Directive, irrespective of whether they are carried out by physical or electronic means. The ECJ further stated that the Member State of destination cannot, in principle, restrict the free movement of information society services from another Member State, except where such a restriction is justified by certain public interest objectives.

The ECJ noted that each of the French measures amounted to such a restriction. It then assessed whether the measures were necessary and proportionate to achieve a public interest objective. It noted that the intensive use of advertising or the choice of aggressive advertising messages may harm public health and the dignity of the health profession (in this case the pharmacist profession), and a prohibition of such advertising may be adequate. However, a restriction that amounts to a general and absolute prohibition of any advertising by health professionals to promote their activities goes beyond what is necessary to protect such objectives. It is for the national referring court to determine whether the prohibition at issue amounted to an absolute prohibition of any advertising by Shop-Apotheke.

The ECJ noted on the prohibition to advertise promotional offers consisting of a discount on the total price of an order once a certain amount is exceeded that the e-Commerce Directive does not, in principle, preclude the Member State of destination from applying such a prohibition where it is intended to prevent the excessive consumption or inappropriate use of medicinal products. The ECJ clarified that such a prohibition must be sufficiently circumscribed and targeted solely at medicinal products and not at parapharmaceutical products, which is for the national referring court to assess.

The ECJ moreover found that the obligation to complete a health questionnaire before a consumer places the first order on the pharmacy's website can have a deterrent effect on consumers wishing to purchase medicinal products online. Such a questionnaire is nevertheless adequate to protect the health of the patient and does not appear to go beyond what is necessary to achieve the objective pursued.

Finally, the ECJ considered that the prohibition of using paid referencing on search engines and price comparison websites at issue restricts the possibilities for a mail-order pharmacy to make itself known to potential customers in another Member State and to promote its online sales service. The ECJ found that France had not provided any evidence that the prohibition was justified to ensure a balanced distribution of pharmacies throughout the national territory, and it therefore did not fulfill its responsibility to show that the prohibition was appropriate. The ECJ concluded that the Member State of destination cannot prohibit mail-order pharmacies established in other Member States from using such paid referencing to promote their service and the products they sell unless it is duly established before the referring court that it is appropriate to protect public health and does not go beyond what is necessary to achieve that objective.

Impact on the Swiss market for medicinal products?

As Switzerland is not part of the EU, and has no treaty with the EU covering e-services or the



regulation of medicinal products (and, *ceterum censeo*, still lacks an Institutional Framework Agreement with the EU), the aforementioned decision of the ECJ will likely not affect the way foreign mail-order pharmacies may promote their services in Switzerland. Note, however, that (i) the sole promotion for a pharmacy (that is, promotional activities that do not mention certain medicinal products) is allowed under Swiss law, but (ii) promotion by physical or electronic means targeted at Swiss customers for medicinal products not authorized in Switzerland is explicitly prohibited. As the Swiss marketing authorization includes specific national features characterizing the authorized products, notably a patient information leaflet in the three official Swiss languages, and respective packaging, the promotion of medicinal products supplied from abroad normally falls under said prohibition.