



Liberalisation of discounts offered by pharmaceutical companies to pharmacies

The Official Journal of the Spanish Parliament of 27 October publishes the final text of the Finance Law for 2016

Maximum rate eliminated

As of 1 January 2016, the maximum discount rate of 10% that distributors and pharmaceutical companies were allowed to offer pharmacies on medicinal products financed by Spain's National Healthcare System (SNS) will disappear.

In this respect, it is important to recall that the general rules governing competition fully apply to the sale of medicinal products to pharmacies. The elimination of the maximum limit does not mean that selling at a loss is allowed. According to the Unfair Competition Act, sales below acquisition cost are considered unfair if they are part of a strategy designed to eliminate a competitor or group of competitors from the market.

Types of discounts

The law continues establishing that discounts may only be offered for early payment or purchase volume. Moreover, in order for such discounts to be admissible, they must not encourage the purchase of a product in prejudice of a competitor's product. The wording of this clause is rather unfortunate, because anyone who offers a discount obviously does so with the aim of encouraging customers to purchase their product. In any case, the most reasonable interpretation in our view is that a discount may not be offered on the condition that the pharmacy purchases all or practically all its needs of a product from one company.

Invoices, credit notes and monthly register

The obligation to itemise discounts on invoices remains included in the law. To our understanding, this does not preclude the possibility of *rappel* discounts issuing a credit note to be paid after the sale, the amount of which may be calculated according to the purchase volume for a given period.

In addition to the corresponding invoices, discounts affecting medicinal products financed by the NHS must be recorded in a monthly register telematically connected with the Spanish Ministry of Health. The Law does not indicate the purpose of such register.

What about medical devices?

Once again, it seems that this category has been overlooked by legislators. At first glance, the Law allows discounts to pharmacies without limiting them to medicinal products, so there is nothing preventing the offering of a discount on government-financed medical devices. However, the Law only refers to financed medicinal products in the provision regulating the monthly register. Therefore, it could be possible to offer unlimited discounts on government-financed medical devices without the obligation to enter them in the telematically connected monthly register. Some may interpret the Law as allowing only discounts on financed medicinal products, but this would be a forced and highly debatable interpretation.