



The protection of health does not justify restricting discounts on the sale of medicinal products on the Internet

Judgment of the Court of Justice of the European Union of 19 October 2016, Case C-148/15, Deutsche Parkinson Vereinigung eV

A very important judgment

In the context of pharmaceutical law, business initiatives often run into barriers that are raised under the generic argument of public health protection. Invoking the argument of health protection has often been an easy solution to restrict private initiatives, used by those who are unable to support their positions using more specific reasoning or by those who do not want to reveal the true motives of their actions.

Against these generic arguments, so far it could be alleged that the purpose of Community law regarding medicinal products is indeed to safeguard public health; but that, European case law has repeatedly asserted that this should be carried out by “employing means that do not block the development of the pharmaceutical industry or the exchange of medicinal products within the Community”. The judgment that we are hereby commenting will moreover make it possible to demand more rigour from those seeking to justify their actions on the principle of health protection.

German regulation on prices and margins

In this case, the CJEU analysed issues relating to the sale of medicinal products on the Internet and German legislation on prices, margins and discounts on medicinal products. The events that led to this matter being brought before the Court were relatively simple: Deutsche Parkinson (DPV) is an association the objective of which is to assist patients suffering from Parkinson's disease. In 2009, DPV reached an

agreement with DocMorris, a Dutch pharmacy specialising in online sales, based on which the members of DPV would obtain bonuses when purchasing on the DocMorris website medicinal products for the treatment of Parkinson's disease that had been prescribed to them.

In Germany, the question was raised as to whether this bonus system infringed national regulations which provide for a system of fixed prices and fixed margins for the sale by pharmacies of prescription-only medicinal products. These regulations also apply to medicinal products that pharmacies established in another Member State of the European Union supply to end consumers residing in Germany, when purchased online. Furthermore, German regulations prohibit discounts from being offered to the public when prescription-only medicinal products are being supplied.

DocMorris considered that these regulations represented an unacceptable barrier to the intra-Community trade of medicinal products and filed several appeals. When the case reached the Court of Düsseldorf, it decided to refer the matter to the CJEU for its opinion.

The Court of Düsseldorf focused the debate on establishing whether a system of fixed prices for prescription-only medicinal products constitutes a measure having equivalent effect to a quantitative restriction on intra-Community trade; and, if so, whether said measure could be justified on the grounds of the protection of health and human life.



Knowing that the position of the German government was that the fixed-price system was the only way of securing a standard supply of medicinal products to the entire German population, particularly in rural areas, the Court of Düsseldorf also asked the CJEU what could be required to conclude that the measure was justified.

Measures having equivalent effect to a quantitative restriction

Firstly, the CJEU reiterated that the free movement of goods is a fundamental principle of Community law, which translates into the prohibition of quantitative restrictions on imports between Member States, in addition to all measures having an equivalent effect.

When analysing whether a national rule should be considered as a measure having an equivalent effect or not, it must first be established whether the measure applies to imported products and national products in the same way. Given that the system of fixed prices applies to all products, there was a possibility that the CJEU might have ruled that the referred German regulations should simply be accepted.

However, the CJEU concluded that German regulations do not affect the sale of national medicinal products and the sale of medicinal products from other Member States in the same way, as for pharmacies operating online, price competition is much more important than for traditional pharmacies. The Court asserted that the fixed-price system places particular constraints on pharmacies from other countries in terms of accessing the German market and being competitive on that market.

As a result, the CJEU ruled that the fixed-price system constitutes a measure having equivalent

effect and that it could only be maintained when justifying that it was necessary in order to protect public health.

Conditions for invoking the argument of protection of public health

In response to this issue, the Court reiterated that if the measures adopted to protect public health restrict intra-Community trade, they will only be acceptable if they are appropriate in fulfilling its objective and that they do not go beyond what is necessary to do so.

Furthermore, the judgment asserted that the State is responsible for proving that both criteria (appropriateness and proportionality) are being met and the Courts should only accept restrictions on free movement if the State provides accurate data that supports its position. In their assessment of the issue, the Courts must examine objectively, through statistical or ad hoc data or by other means, and they must not allow the State to employ the generic argument of protection of public health. The CJEU asserted that the existence of a genuine risk to human health must not be measured according to the yardstick of general conjecture, but on the basis of relevant scientific research.

On the other hand, the CJEU ruled that encouraging price competition is not contrary to the principle of the protection of public health, per se, as, according to the CJEU, the effective protection of public health demands that medicinal products be sold at reasonable prices.

Based on the foregoing, the CJEU established that the German fixed-price system cannot be justified on grounds of the protection of public health.