



## Online sale of medicinal products, it is possible to learn from the obvious

### *Judgment of the National High Court of 6 July 2021 and the concept of online*

#### Introduction

This Judgement is surprising due to the striking nature of the facts. A foundation located outside the EU was offering (via its website) information on treatments for the voluntary termination of pregnancy, as well as the provision of the medicines needed for such purpose, upon payment of a certain amount in concept of "donation". The medicines were not authorized in Spain.

Those with experience in regulatory matters may have to read twice this account of events. No legal training is necessary to figure out the outcome of the case: the website was closed in Spain. It may seem a case with an obvious solution, a mere anecdote. However, the Court's response to the foundation's defense offers interesting insights.

#### On the delimitation of "online sale"

The Spanish authorities closed the website on the grounds that it was carrying out online sales of prescription drugs through intermediaries, an activity which is prohibited under Spanish law. In addition, the products sold were illegal as they were not authorized in Spain. The foundation claimed that it did not sell medicines online, but that it only provided telemedicine services, which included the delivery of drugs.

In view of this position, the Court offers an objective criterion to distinguish the provision of

telemedicine services from the online sale of medicines. This criterion can be used to draw the line between the sale, dispensing and physical delivery of medicines, which is crucial for analyzing new business models for medicines. The Judgement states that, irrespective of its purpose or the activity in which it is framed, the fact that a payment was required for the delivery of a medicinal product qualifies the transaction as an online sale of medicines.

Thus, it can be concluded that a sale take place where and when the order and the payment converge, regardless of where and how the delivery is made. If the order and payment are made online, the sale is online, even if the delivery is made at a pharmacy office. If the order is made online but the payment is made by the customer when collecting the product at the pharmacy office, then it may be argued that the sale is not online but physical taking place at the pharmacy.

In this context, it is worth recalling the judgement 152/2003 of the Constitutional Court which states that: "there is a clear difference between the legal concept of sale (...) and the delivery of the sold product in a pharmacy office". Soon, when the Supreme Court resolves a pending cassation appeal on this matter, we will know which is the final position taken by the Spanish judiciary with respect to the distinction between sale, delivery and dispensing of medicinal products.