Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Medicinal products for human use subject to a medical prescription – Directive 2001/83/EC – Scope – Advertising by a mail-order pharmacy intended to influence not the customer's choice of a particular medicinal product, but the choice of pharmacy – Prize competition – Free movement of goods – National legislation – Prohibition on offering, advertising or granting advantages and other promotional gifts in the field of therapeutic products – Selling arrangements falling outside the scope of Article 34 TFEU)

In Case C-190/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 20 February 2020, received at the Court on 5 May 2020, in the proceedings

**DocMorris NV**

v

**Apothekerkammer Nordrhein,**

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– DocMorris NV, by A. Feissel and K. Wodarz, Rechtsanwältinnen,

– Apothekerkammer Nordrhein, by M. Douglas, Rechtsanwalt,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

* Language of the case: German.

– the European Commission, by A. Sipos and M. Noll-Ehlers, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 87(3) of 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 (OJ 2001 L 311, p. 67), as amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 (OJ 2012 L 299, p. 1; 'Directive 2001/83').

2 The request has been made in proceedings between DocMorris NV, a company incorporated under Netherlands law operating a mail-order pharmacy established in the Netherlands, and the Apothekerkammer Nordrhein (Professional Association of Pharmacists, North Rhine region, Germany) concerning an advertising leaflet distributed by DocMorris to its customers in Germany for a 'Grand Prize Draw', stipulating, as a condition for participation, that a prescription for a medicinal product subject to a medical prescription be submitted.

### Legal context

#### *EU law*

#### *Directive 98/34*

3 The first paragraph of Article 1 of 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 (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'), provided:

'For the purposes of this Directive, the following meanings shall apply:

…

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.'

#### *Directive 2000/31/EC*

4 Article 1(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), is worded as follows:.

‘1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts …’

5 Article 2(a) of that directive defines ‘information society services’ as services within the meaning of the point 2 of the first paragraph of Article 1 of Directive 98/34.

***Directive 2001/83***

6 In Title VIII, entitled ‘Advertising’, of Directive 2001/83, Article 86 of that directive provides:

‘1. For the purposes of this Title, “advertising of medicinal products” shall include any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products; it shall include in particular:

– the advertising of medicinal products to the general public,

– advertising of medicinal products to persons qualified to prescribe or supply them,

– visits by medical sales representatives to persons qualified to prescribe medicinal products,

– the supply of samples,

– the provision of inducements to prescribe or supply medicinal products by the gift, offer or promise of any benefit or bonus, whether in money or in kind, except when their intrinsic value is minimal,

– sponsorship of promotional meetings attended by persons qualified to prescribe or supply medicinal products,

– sponsorship of scientific congresses attended by persons qualified to prescribe or supply medicinal products and in particular payment of their travelling and accommodation expenses in connection therewith.

2. The following are not covered by this Title:

– the labelling and the accompanying package leaflets, which are subject to the provisions of Title V,

– correspondence, possibly accompanied by material of a non-promotional nature, needed to answer a specific question about a particular medicinal product,

– factual, informative announcements and reference material relating, for example, to pack changes, adverse-reaction warnings as part of general drug precautions, trade catalogues and price lists, provided they include no product claims,

– information relating to human health or diseases, provided that there is no reference, even indirect, to medicinal products.'

7 Article 87(3) of that directive provides:

'The advertising of a medicinal product:

– shall encourage the rational use of the medicinal product, by presenting it objectively and without exaggerating its properties,

– shall not be misleading.'

8 Under Article 88(1) to (3) of that directive:

'1. Member States shall prohibit the advertising to the general public of medicinal products which:

(a) are available on medical prescription only, in accordance with Title VI;

…

2. Medicinal products may be advertised to the general public which, by virtue of their composition and purpose, are intended and designed for use without the intervention of a medical practitioner for diagnostic purposes or for the prescription or monitoring of treatment, with the advice of the pharmacist, if necessary.

3. Member States shall be entitled to ban, on their territory, advertising to the general public of medicinal products the cost of which may be reimbursed.'

### *German law*

9 The first sentence of Paragraph 7(1) of the Gesetz über die Werbung auf dem Gebiete des Heilwesens (Heilmittelwerbegesetz) (Law on the advertising of medicinal products; 'the HWG'), in the version applicable to the main proceedings, provides:

'It shall be prohibited to offer, announce or grant monetary advantages and other promotional gifts (goods or services) or accept them as a healthcare professional, unless:

1. those monetary advantages or promotional gifts are of minor objects of low value … Monetary advantages and other promotional gifts in respect of medicinal products are prohibited if they are granted in breach of the pricing rules applicable under the [Arzneimittelgesetz (Law on medicinal products)].

2. those monetary advantages and promotional gifts
   (a) are granted as a specific sum of money or as a sum of money to be calculated in a specific way …

   …

The monetary advantages and promotional gifts in respect of medicinal products provided for in subparagraph (a) shall be prohibited if they are granted in breach of the pricing provisions applicable on the basis of the Law on medicinal products. …

…'

## The dispute in the main proceedings and the question referred for a preliminary ruling

10 DocMorris operates a mail-order pharmacy established in the Netherlands, which supplies medicinal products subject to a medical prescription to customers in Germany. In March 2015, it distributed throughout Germany an advertising leaflet for a 'Grand Prize Draw' promising, as the first prize, a voucher for an electric bicycle worth EUR 2 500 and, as the second to tenth prizes, an electric toothbrush. In order to take part in the prize draw, it was sufficient to send to DocMorris, in a pre-paid envelope, an order form for a medicinal product subject to a medical prescription, together with that medical prescription.

11 On 16 June 2015, the Professional Association of Pharmacists of the North Rhine region, responsible for monitoring, in that region, compliance with pharmacists' professional obligations, brought an action against DocMorris before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany), seeking an injunction prohibiting the advertising in question, on the ground that it was anticompetitive.

12 Following the dismissal of its action by the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main), the Professional Association of Pharmacists of the North Rhine region brought an appeal against that decision before the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), which upheld that appeal. DocMorris then brought an appeal on a point of law before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany), by which that company seeks reinstatement of the judgment delivered at first instance.

13 The referring court notes that only advertising of a particular product falls within the scope of the HWG, as opposed to general advertising for an undertaking. However, advertising for the entire range of products of a pharmacy, such as that at issue in the main proceedings, could also be regarded as advertising focused on a product. Furthermore, in that court's view, it follows from Article 86(1) and Article 88(1) to (3) of Directive 2001/83 that that directive covers not only advertising relating to certain particular medicinal products, but also the advertising of medicinal products in general.

14 The referring court is uncertain whether the prohibition in principle of promotional gifts laid down in the first sentence of Paragraph 7(1) of the HWG is compatible with the objectives and provisions of Directive 2001/83. According to that court, such a prohibition could be justified under Article 87(3) of that directive, since it seeks to prevent the risk that, when deciding to use a medicinal product, the consumer might be influenced by the prospect of promotional gifts connected with the purchase of that medicinal product. In that regard, it takes the view that the patient's decision to obtain a medicinal product subject to a medical prescription from a domestic or foreign mail-order pharmacy instead of from a brick-and-mortar pharmacy that can provide – objectively required – advice should be based on objective reasons and not be subject to such incentives.

15 The referring court notes, however, that Directive 2001/83 does not contain any specific provision relating to the advertising of a medicinal product in the form of a competition including a prize draw. Furthermore, it is apparent from the judgment of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776) that mail-order pharmacies established in other Member States cannot be prohibited from engaging, with respect to conventional pharmacies established in the territory of the Member State concerned, in price competition designed to compensate for the restriction on their supply of services, on the ground that it is impossible to provide patients with individual advice on site.

16 Due to the legal framework applicable in Germany for the sale of medicinal products subject to a medical prescription, and, in particular, the fact that the health insurance bodies bear the main cost of such medicinal products, in the referring court's view, there is no price competition between conventional pharmacies established in Germany comparable to that which exists in other commercial sectors. Mail-order pharmacies established in other Member States thus practise another form of price competition by offering their customers monetary advantages in the form of vouchers or bonuses.

17 In those circumstances, the Bundesgerichthof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with the provisions of Title VIII and, in particular, with Article 87(3) of Directive [2001/83] if a national provision (in this case the first sentence of Paragraph 7(1) of [the HWG]) is interpreted as prohibiting a mail-order pharmacy established in another Member State from using a prize competition to attract customers if participation in the prize competition is linked to the submission of a prescription for a medicinal product for human use subject to a medical prescription, the prize offered is not a medicinal product but another object (in this case an electric bike worth EUR 2 500 and electric toothbrushes), and there is no risk that irrational and excessive use of that medicinal product is encouraged?'

## Consideration of the question referred for a preliminary ruling

18 By its question, the referring court asks, in essence, whether the provisions of Title VIII of Directive 2001/83, and in particular Article 87(3) of that directive, preclude national legislation which prohibits a pharmacy which sells medicinal products by mail order from organising an advertising campaign in the form of a prize competition allowing participants to win everyday items other than medicinal products, participation in that competition being conditional on the submission of an order form for a medicinal product for human use subject to a medical prescription, together with that prescription.

19 In that regard, it should be noted that that question is based on the premiss that Directive 2001/83 is applicable to the dispute in the main proceedings.

20 Title VIII of Directive 2001/83, regarding the advertising of medicinal products, which includes Article 87(3) of that directive, is intended to regulate the content of the advertising message and the manner of advertising for particular medicinal products, but does not govern the advertising of mail order services relating to medicinal products (see, to that effect, judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)*, C-649/18, EU:C:2020:764, paragraphs 49 and 50).

21 The question referred concerns the prohibition of a prize competition which is intended to encourage customers to buy, from a particular pharmacy, not a particular medicinal product but any medicinal product which has been prescribed to them by their doctor. In other words, as the Professional Association of Pharmacists of the North Rhine region stated in its written observations, an advertising campaign such as that carried out in the present case by DocMorris is not intended to influence the customer's choice of a given medicinal product, but the choice of the pharmacy from which that customer purchases that medicinal product, a choice which takes place following that of the medicinal product. It is therefore an advertisement not for a specific medicinal product but for the entire range of medicinal products subject to a medical prescription offered for sale by the pharmacy in question.

22 It follows that an advertising campaign such as that at issue in the main proceedings does not fall within the scope of the provisions of Title VIII of Directive 2001/83.

23 However, in accordance with the Court's settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. Consequently, even if, formally, the referring court has limited its question to the interpretation of a particular provision of EU law, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 50 and the case-law cited).

24 In the present case, contrary to what several interested parties have submitted in their answers to the Court's question for written response, which was sent to the parties to the proceedings and to other interested parties pursuant to Article 23 of the Statute of the Court of Justice of the European Union, it should be noted that the information provided in the order for reference does not show that the interpretation of Directive 2000/31 is relevant to the resolution of the dispute in the main proceedings.

25 As is apparent from Articles 1 and 2 thereof, that directive covers 'Information Society services', defined in Article 2(a), by reference to point 2 of the first paragraph of Article 1 of Directive 98/34, the latter provision defining them as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

26 The question referred concerns an advertising campaign for services relating to the sale of medicinal products provided not by electronic means but by mail order. It is apparent from the advertising leaflet at issue in the main proceedings, reproduced in the request for a preliminary ruling, that, in order to participate in the prize competition at issue in the main proceedings, the customer was required to submit an order to DocMorris by sending to that pharmacy, in a pre-paid envelope, an order form drawn up on paper, together with the prescription for the medicinal product ordered, without the need, therefore, for that order to be made via an online sales website.

27 In that regard, as the European Commission noted, in essence, in its written observations, the present case differs from that which gave rise to the judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764), which concerned an advertising campaign for online sales services relating to medicinal products not subject to a compulsory medical prescription, carried out both by means of physical media and via the website of the pharmacy concerned.

28 It follows from the foregoing considerations that the prohibition on the organisation of prize competitions designed to promote services for the sale of medicinal products supplied by mail order has not been harmonised at EU level, and that the determination of the relevant rules remains within the competence of the Member States, subject to compliance with, inter alia, the fundamental freedoms enshrined in the FEU Treaty.

29 It must be noted, in that regard, that national legislation which prohibits the organisation of a competition intended to promote the sale of medicinal products, such as that at issue in the main proceedings, may relate to both the freedom to provide services, in so far as such legislation applies to pharmacies whose activities include, inter alia, the retail sale of medicinal products and restricts their means of publicising their services, including sale by mail order, and the free movement of goods, since it regulates a certain form of marketing of medicinal products, it being common ground that they fall within the concept of 'goods' for the purposes of the provisions of the FEU Treaty on the free movement of goods (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraphs 57 and 60).

30 Where a national measure relates both to the free movement of goods and to the freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms where it is shown that one of them is entirely secondary in relation to the other and may be considered together with it (judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 58 and the case-law cited).

31 In the present case, the HWG does not concern the practising of the profession of pharmacist or the provision of mail order services as such, but covers a certain form of advertising campaign for medicinal products offered for sale. Furthermore, in circumstances such as those in the main proceedings, the dissemination of advertisements concerning the mail order supply of medicinal products, while not intended to promote particular medicinal products, constitutes a secondary factor in relation to the promotion of the sale of those medicinal products, which is the ultimate objective of the advertising campaign.

32 Since the free movement of goods aspect prevails, in the present case, over the freedom to provide services, it is necessary to refer to the provisions of the FEU Treaty which concern the first of those freedoms (see, by analogy, judgment of 25 March 2004, *Karner*, C-71/02, EU:C:2004:181, paragraph 47).

33 The free movement of goods is a fundamental principle of the FEU Treaty which is expressed in the prohibition, set out in Article 34 TFEU, of quantitative restrictions on imports between Member States and all measures having equivalent effect (judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 20).

34 According to the Court's settled case-law, the prohibition, laid down in Article 34 TFEU, of measures having equivalent effect to quantitative restrictions covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, imports between

Member States (see, in particular, judgments of 11 July 1974, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 22 and the case-law cited).

35 In that regard, it must be borne in mind that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law cited in the preceding paragraph of the present judgment, on the twofold condition, first, that those provisions apply to all relevant traders operating within the national territory and, secondly, that they affect in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see, to that effect, judgments of 24 November 1993, *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, paragraph 16, and of 21 September 2016, *Etablissements Fr. Colruyt*, C-221/15, EU:C:2016:704, paragraph 35 and the case-law cited).

36 The Court has found provisions restricting, inter alia, the opportunities for an undertaking to advertise to be 'provisions governing selling arrangements' within the meaning of the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905) (see, to that effect, judgment of 25 March 2004, *Karner*, C-71/02, EU:C:2004:181, paragraph 38 and the case-law cited).

37 It should be recalled that the purpose of the first sentence of Paragraph 7(1) of the HWG, which underlies the prohibition of the advertising campaign at issue in the main proceedings, is to regulate the offer of monetary advantages or other promotional gifts with monetary value in the field of the sale of medicinal products. It follows that such a provision of national law must be regarded as 'governing selling arrangements' within the meaning of the case-law of the Court.

38 However, as is apparent from the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), such a selling arrangement can fall outside the scope of Article 34 TFEU only if it satisfies the two conditions set out in paragraph 35 of the present judgment.

39 As regards the first of those conditions, it should be noted that, in the present case, the HWG applies without distinction to all pharmacies which sell medicinal products on German territory, whether they are established in the territory of the Federal Republic of Germany or in another Member State.

40 As regards the second condition, it should be recalled that the Court has repeatedly held that national provisions prohibiting certain types of advertisements in specific sectors affected in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States, and therefore constituted selling arrangements that fall outside the scope of Article 34 TFEU (see, to that effect, judgments of 15 December 1993, *Hünermund and Others*, C-292/92, EU:C:1993:932, paragraphs 21 and 22; of 9 February 1995, *Leclerc-Siplec*, C-412/93, EU:C:1995:26, paragraphs 21 to 24, and of 25 March 2004, *Karner*, C-71/02, EU:C:2004:181, paragraph 42). That was true, in particular, of a rule of professional conduct prohibiting pharmacists from advertising, outside their pharmacy, quasi-pharmaceutical products which they were authorised to sell (judgment of 15 December 1993, *Hünermund and Others*, C-292/92, EU:C:1993:932, paragraphs 22 to 24).

41 It is true that the Court has held that it cannot be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States (see, to that effect, judgments of 9 July 1997, *De Agostini and TV-Shop*, C-34/95 to C-36/95, EU:C:1997:344, paragraph 42, and of 8 March 2001, *Gourmet International Products*, C-405/98, EU:C:2001:135, paragraph 19).

42 However, as is apparent from paragraph 21 of the present judgment, a prohibition such as that established by the HWG is concerned not with the promotion of a particular product, in this case a medicinal product, but with that of the sale by mail order of all kinds of medicinal products, both from Germany and from other Member States.

43 It follows that the two conditions for applying the case-law arising from the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), as referred to in paragraph 35 of the present judgment, are fully satisfied, in respect of a selling arrangement such as that at issue in the main proceedings.

44 That conclusion does not contradict the considerations set out in paragraph 24 of the judgment of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776), to which the referring court refers. A prohibition of competitions designed to promote the sale of medicinal products has far less significant consequences for mail-order pharmacies than the total prohibition on price competition, as referred to in that judgment. Furthermore, such a prohibition also affects conventional pharmacies, which would also have had an interest in promoting the sale of their medicinal products by means of promotional competitions.

45 In the light of the foregoing considerations, the answer to the question referred is that, first, Directive 2001/83 must be interpreted as not applying to national legislation which prohibits a pharmacy which sells medicinal products by mail order from organising an advertising campaign in the form of a prize competition allowing participants to win everyday items other than medicinal products, participation in that competition being subject to the submission of an order for a medicinal product for human use subject to a medical prescription, together with that prescription, and secondly, Article 34 TFEU must be interpreted as not precluding such national legislation.

## Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **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 2012/26/EU of the European Parliament and of the Council of 25 October 2012, must be interpreted as not applying to national legislation which prohibits a pharmacy which sells medicinal products by mail order from organising an advertising campaign in the form of a prize competition allowing participants to win**

**everyday items other than medicinal products, participation in that competition being subject to the submission of an order for a medicinal product for human use subject to a medical prescription, together with that prescription.**

**2. Article 34 TFEU must be interpreted as not precluding such national legislation.**

[Signatures]