

/ Online pharmacies and fixed prices

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The ECJ is currently looking at whether the German system of fixed prices for medicinal products is in line with European law after the question was referred by Düsseldorf Higher Regional Court. The response to this question in Advocate General Maciej Szpunar's Opinion, published today, is a clear "no". The German system of fixed prices for drugs is hanging in the balance.

Background

The dispute underlying the request for a preliminary ruling involved an advert by Deutsche Parkinson Vereinigung e.V., a registered association, for a bonus system offered by Dutch mail-order pharmacy DocMorris. The claimant, the German Centre for Protection against Unfair Competition, regarded the bonus system the defendant association was promoting as incompatible with the German law requiring fixed prices and wanted to prohibit it from carrying out the advertising.

Under the current legal situation, pharmacies in Germany are obliged to keep to the system of fixed uniform prices when dispensing prescription-only medicinal products; discounts are not allowed. These rules apply equally to German pharmacies and to foreign online pharmacies dispensing the products to German consumers. The Joint Panel of the Senior German Federal Courts had examined whether this obligation to charge uniform prices constitutes a barrier to the free movement of goods applying in the EU and stated that there was no breach of EU law in a decision given on 22 August 2012.

Findings of the published Opinion

Advocate General Maciej Szpunar now obviously views this matter differently. In his Opinion published today he states that while the German fixed prices rules are simply selling arrangements, they have a far more adverse effect on pharmacies located outside Germany than pharmacies in Germany and therefore represent indirect discrimination requiring justification.

The Advocate General believes that such a justification, especially on the grounds of public health, has not been sufficiently demonstrated. In the light of the German legislator's argument that it wishes to ensure a consistent supply of medicinal products with the rules on fixed pricing, the Advocate General states that he does not regard the measure in question, i.e. fixed prices, as capable of achieving this aim. He says that emergency supplies of drugs are already ensured by the German Act Promoting the Guarantee of Emergency Chemists' Services. He says that it is not clear to him how the disputed rules on fixed pricing rules are supposed to have any additional influence that would ensure a consistent supply of medicinal products. He maintains that the German legislator is not able to invoke the precautionary principle, either. The Advocate General

adds that the required uncertainty is not given since the existence or extent of the risk to human health is in itself not uncertain, but merely the viability or effectiveness of the measure envisaged.

Assessment

The Advocate General's statements are not binding on the ECJ. It is certainly conceivable that the court may decide other than suggested by the Advocate General in the end. This has been the case in other proceedings in the past. Nevertheless, the Opinion acts as a pointer for the pending decision of the ECJ which is now eagerly awaited. If the ECJ actually decides in line with the Advocate General's Opinion, this would be likely pull the rug from under German system of fixed prices for medicinal products as it now stands.

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