

Member States cannot impose uniform retail prices for prescription-only medicinal products, highest EU Court says

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EU law precludes national legislation setting fixed retail prices for prescription medicinal products, as it unreasonably restricts imports

On 19 October 2016, the European Court of Justice issued a ruling concluding that the German system of fixed prices at pharmacy retail level for prescription medicinal products is contrary to EU law, since it constitutes an unjustified restriction of the free movement of such products between Member States.¹ The Court found that by preventing pharmacies located in other Member States from engaging in price competition with local pharmacies, the system makes it harder for such pharmacies to access and compete on the German market.

Facts

The German Law on medicinal products (*Arzneimittelgesetz*) requires all pharmacies supplying prescription medicinal products in Germany to apply uniform retail prices.²

In 2009, a German organisation providing support to Parkinson's patients entered into an agreement with Dutch online pharmacy DocMorris under which the organisation's members would be granted bonuses for each mail order of prescription medicines they placed with DocMorris. In a challenge brought against the agreement, the Düsseldorf Regional Court held that such a bonus scheme infringes the fixed-price system, as it enables the pharmacy to circumvent the legally prescribed price. On appeal, the Higher Regional Court took the view that the fixed-price system could be contrary to the EU free movement rules and stayed proceedings in order to refer the question to the Court of Justice.

The Court's holding

In its judgment, the Court concluded that the German fixed-price system for the retail supply of prescription medicinal products constitutes an unjustified restriction of the free movement of such products between Member States and as such infringes EU law.³

¹ Judgment in Case C-148/15, *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*.

² Pursuant to the Regulation on the pricing of medicinal products (*Arzneimittelpreisverordnung*), retail prices are set by reference to the price set by each manufacturer, to which fixed wholesaler and pharmacy margins are then added.

³ Article 34 of the Treaty on the Functioning of the European Union (TFEU) in particular. That Article prohibits any national measure having an equivalent effect to a quantitative restriction on imports between the Member States.

The Court based its conclusion on the finding that fixed retail prices make it harder for pharmacies established in Member States other than Germany to compete with local pharmacies and could prevent them from entering the German market altogether. The Court noted that price is the main element of competition for foreign pharmacies typically supplying their German customers via mail-order, since they are worse placed than traditional pharmacies to provide customers with individualised advice and emergency supplies.

The Court went on to find that such a restriction of pharmacies' free movement rights cannot be justified by reference to the need to protect public health. The Court rejected Germany's claim that fixed retail prices ensure the uniform supply of medicinal products throughout German territory, including to underpopulated areas. In the Court's view, rather the opposite is true: greater price competition between pharmacies would encourage their establishment in less populated areas with a view to charging higher prices there.

Similarly, the Court disagreed with the contention that local pharmacies would no longer be able to perform essential services, such as safety checks and emergency supplies, if foreign pharmacies were allowed to undercut their prices. According to the Court, it is precisely by providing and improving those services that local pharmacies can continue to compete with mail-order pharmacies. In the Court's view the same applies to activities like maintaining a given stock and selection of medicinal products.

Finally, the Court noted that price competition would ultimately benefit patients by enabling them to obtain prescription medicinal products at lower prices.

Implications

In Germany

Following the Court's judgment, foreign mail-order pharmacies are no longer obliged to sell prescription medicinal products to their German customers at the uniform retail prices set by German law. Rather, they can grant discounts and bonuses to their customers. In contrast, German pharmacies will still be bound to sell prescription-only medicinal products at the fixed price.

Once the incompatibility with EU law of the legislation at hand is declared by a German court, the national legislator will need to amend it in order to bring it into line with the EU rules on the free movement of goods. The most likely route is the implementation of a system of maximum, as opposed to fixed, pharmacy margins similar to the one that Germany had in place until 2004. The legislator could also decide to deregulate pharmacy margins completely or to ban mail-order pharmacies from supplying prescription medicinal products in Germany altogether.⁴ In fact, the German pharmacy trade association commented on this judgment by saying that the German legislator now must ban online sales of prescription medicines to ensure that German pharmacies can discharge their obligation to serve all patients in Germany.

In the EU as a whole

The implications of the Court's judgment are not limited to Germany but are EU-wide. Indeed, the Court's interpretation of the EU free movement rules in the ruling is binding on all national courts. This means that all the Member States in which fixed retail prices for medicinal products are legally prescribed will need to adopt less intrusive forms of price regulation, such as the setting of maximum retail margins.

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⁴ Cf. The Court's judgment in Case C-322/01 of 11 December 2003, *Deutscher Apothekerverband e.V. v 0800 DocMorris NV und Jacques Waterval* (EU:C:2003:664).