

## Advertising by Pharmacies

**CJEU case C-649/18, French, Italian & German regulations and the French discussions on updating its legal framework**

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The Court of Justice of the European Union (CJEU) is currently hearing a case regarding the French regulation of advertising by pharmacies from another Member State. The ruling will have implications beyond France, as other Member States also restrict or forbid advertising by pharmacies.

- ▶ The current framework in France is too strict – it has led to a de facto ban on any kind of advertising by pharmacies.
- ▶ In comparison, the existing regulations in Italy and Germany do not impose an absolute ban but allow for limited advertising by pharmacies while safeguarding the legitimate objectives of the restrictions such as the professional integrity of pharmacists and the prevention of the misuse of medicinal products.
- ▶ The CJEU should follow its decision in the Vanderborght case where it regarded a total ban on the advertising of dental care services as an unjustified restriction of the freedom to provide services. The Court should analogously also regard total bans on advertising by pharmacies as an unjustified restriction of the free movement of goods.
- ▶ Such a ruling would stimulate the discussion in France about easing the current restrictions on advertising by pharmacies, especially regarding EU pharmacies established outside France, as it is currently more difficult for them to make consumers in France aware of their existence.

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## 1 Introduction

Pharmacies in Europe are regularly charged with a duty to ensure a proper supply of medicinal products to the population. For this, they are often given a monopoly on the selling of prescription medicinal products to patients. Depending on the country, a further distinction can generally be made regarding non-prescription medicinal products: some can only be sold in a pharmacy, others can also be sold elsewhere.

Prescription medicinal products are goods that can adversely affect the health of a patient directly. It is proportionate to make the sale of such medicinal products subject to the condition of a medical prescription and only allow them to be sold in a pharmacy.

And yet, the pharmacy market is also subject to competition, especially regarding non-prescription medicinal products. In order to compete, a pharmacy, as any other business, has an interest in distinguishing itself from competing pharmacies. Pharmacists, unlike other liberal professions, are also merchants. They are (1) in competition with other pharmacies regarding non-prescription medicinal products which may only be sold in a pharmacy and (2) in general competition regarding those products which can also be sold elsewhere, e.g. in drugstores. Hence, pharmacies must be allowed to draw attention to themselves by means of advertising. However, advertising by pharmacies is usually limited in Europe.

Advertising here is understood to be any sort of information that pharmacies deliver to make themselves known to consumers. It plays an essential role in the functioning of the EU internal market because restrictions applicable to pharmacies on advertising in another Member State functionally limit cross-border activity and hence the free flow of goods and services.

The Court of Justice of the European Union (CJEU) is currently hearing a case on French regulations on advertising by pharmacies.<sup>1</sup> The Advocate General presented his opinion on the issue on 27 February 2020.<sup>2</sup> In this case, a French Court<sup>3</sup> had asked for a preliminary ruling of the CJEU concerning the question whether EU law<sup>4</sup> allows a Member State to impose, within its territory, specific rules<sup>5</sup> on pharmacists who are nationals of another EU Member State operating in its territory. The French, Greek, Spanish and Dutch Governments, as well as the EU Commission submitted observations on this case, reflecting their interest in the issue at stake.<sup>6</sup>

The Advocate General splits the examination of the relevant French provisions into (1) those restricting physical advertising, (2) those restricting digital advertising and (3) those requiring patients ordering

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<sup>1</sup> CJEU, Case [C-649/18](#), Request for a preliminary ruling from the Cour d'appel de Paris (France) lodged on 15 October 2018 — A v Daniel B, UD, AFP, B, L. All online sources quoted were last assessed 21 July 2020.

<sup>2</sup> Opinion of Advocate General Saugmandsgaard Øe, 27 February 2020, C-649/18, <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:62018CC0649>. The Opinion of the Advocate General is referred to hereinafter using the European Case Law Identifier (ECLI): EU:C:2020:134.

<sup>3</sup> Cour d'appel de Paris.

<sup>4</sup> In particular Art. 34 TFEU; Art. 85c 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; and the internal-market clause in Article 3 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 for electronic commerce.

<sup>5</sup> These are (1) the prohibition of soliciting clients through procedures and methods which are regarded as being contrary to the dignity of the profession; (2) the prohibition of inciting patients to misuse medicinal products; and (3) the obligation to observe good practices in the distribution of medicinal products.

<sup>6</sup> EU:C:2020:134, para. 23.

online to fill in a questionnaire. This cepInput will focus on physical advertising by pharmacies<sup>7</sup> as this aspect is not yet regulated by secondary EU law. This aspect is of particular relevance as, for physical advertising, pharmacies based in the EU will have to comply with the national regulations in the Member State of destination – unlike digital advertising, to which the national regulations in the Member State of establishment apply.

This cepInput will first highlight the French legal framework – required to understand the importance of the CJEU case – and then look at its reform (Chapter 2). This is followed by a summary of the CJEU case and Opinion of the Advocate General (Chapter 3). An analysis of the current legal frameworks for advertising by pharmacies in other EU Member States, namely Italy and Germany, will show that it is generally possible to allow advertising while also safeguarding patient safety (Chapter 4). This is followed by an assessment of the Opinion of the Advocate General, recommendations to the CJEU as well as conclusions for the reform discussions in France (Chapter 5).

## 2 The French framework for advertising by pharmacies and the discussion on reform

### 2.1 The French framework for advertising by pharmacies

In France, advertising by pharmacies is regulated<sup>8</sup> in the French Public Health Code<sup>9</sup> (FPHC). It is comprised of two parts: (1) the legislative part<sup>10</sup> in which acts that have legislative rank due to the involvement of Parliament are codified and (2) the regulatory part<sup>11</sup> – for “matters other than those coming under the scope of statute law”<sup>12</sup> – in which decrees issued by the government are codified. Provisions of the FPHC apply to all pharmacies established in France.<sup>13</sup>

Advertising by pharmacies is regulated by provisions that are primarily laid down in the regulatory part of the FPHC<sup>14</sup> (See Tab. 1 below). First, the Code of Conduct for pharmacists – i.e. 77 articles drafted by the French Chamber of Pharmacists<sup>15</sup> (FCP)<sup>16</sup> and codified in the regulatory part of the FPHC<sup>17</sup> – prohibits, inter alia, the soliciting of clients by procedures and methods contrary to the “dignity of the profession”<sup>18</sup>, and inciting patients to misuse medicinal products.<sup>19</sup> This code also provides that any information or advertising should be “truthful” and formulated “with tact and balance”.<sup>20</sup> Second, the

<sup>7</sup> EU:C:2020:134, para. 38-100.

<sup>8</sup> Ordre National des Pharmaciens (2015), Information, Communication et Publicité en Officine, état des lieux, p. 16. <http://www.ordre.pharmacien.fr/Communications/Publications-ordinales/Information-communication-et-publicite-en-officine-Au-30-juin-2015>; Conseil d’Etat, Arrêt N° 181718 du 12 juin 1998, FR:CESSR:1998:181718.19980612, <https://www.conseil-etat.fr/ressources/decisions-contentieuses/arianeweb2>.

<sup>9</sup> “Code de la santé publique”.

<sup>10</sup> “Partie législative”, Code de la santé publique, Art. L.1110-1 et seq.

<sup>11</sup> “Partie réglementaire”, Code de la santé publique, Art. R.1110-1 et seq.

<sup>12</sup> Constitution of 4 October 1958, Art. 37, <https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>.

<sup>13</sup> Autorité de la concurrence (2019), [Avis n° 19-A-08](#) relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée, § 143 ; Ordre National des Pharmaciens (2015), Information, Communication et Publicité en Officine, état des lieux, p. 20.

<sup>14</sup> Code de la santé publique, Art. L. 5125-31 and L. 5125-32 provide the legal basis for the Government to issue through a decree the conditions under which advertising in favour of pharmacies may be carried out.

<sup>15</sup> “Ordre National des Pharmaciens”.

<sup>16</sup> Code de la santé publique, Art. L.4235-1.

<sup>17</sup> Code de la santé publique, Art. R.4235-1 et seq.

<sup>18</sup> Code de la santé publique, Art. R.4235-22.

<sup>19</sup> Code de la santé publique, Art. R.4235-64.

<sup>20</sup> Code de la santé publique, Art. R.4235-30.

regulatory part of the FPHC – apart from and in addition to the Code of Conduct for pharmacists – also provides for rules on advertising by pharmacies with regard to retail distribution.<sup>21</sup> These provisions regulate, inter alia, the content and occasion for press releases<sup>22</sup>; prohibit advertising by pharmacies in health education leaflets intended for the public<sup>23</sup> and prohibit granting material benefits to customers or using means to encourage customer loyalty to a given pharmacy<sup>24</sup>. The aim of these restrictions is to promote the homogeneous distribution of pharmacies throughout the national territory.<sup>25</sup>

The FCP includes all pharmacists carrying out their profession in France.<sup>26</sup> It is a public service organisation and is required by law to, inter alia, ensure compliance by French pharmacists with their professional duties, and to protect the integrity and independence of the profession.<sup>27</sup> To that extent, complaints against pharmacists are addressed to disciplinary chambers which issue administrative decisions – first instance and appeal that can be annulled before the Council of State<sup>28</sup> – on compliance with the FPHC provisions regulating the professional and ethical duties of pharmacists.<sup>29</sup>

**TAB. 1: French provisions on advertising by pharmacies**

FPHC	Legislative Part
Art. L.4235-1	<i>A Code of Conduct for pharmacists should be drafted by the FCP and issued by a decree after consultation of the Council of State.</i>
Art. L.5125-31	<i>Advertising by pharmacies is only permitted under the conditions provided for by regulation.</i>
Art. L.5125-32 (6)	<i>The conditions under which advertising by pharmacies may be carried out are laid down in a decree issued by the Government after consultation of the Council of State.</i>
Art. L.5424-2 (8)	<i>Financial sanctions for non-compliance with the rules on advertising by pharmacies.</i>
	Regulatory Part
Art. R.4235-1 to R.4235-77	Code of Conduct for pharmacists.
Art. R. 5125-26 to R.5125-29	Rules on advertising by pharmacies (retail distribution).

Source: own table, based on French Public Health Code.

## 2.2 Discussions on reform of the French framework

Advertising by pharmacies is not only an issue of EU law but also plays a role in the discussion on the pharmacy sector in France. French provisions on advertising by pharmacies are regarded as confusing

<sup>21</sup> Code de la santé publique, Art. R.5125-26 to R.5125-29.

<sup>22</sup> Code de la santé publique, Art. R.5125-26.

<sup>23</sup> Code de la santé publique, Art. R.5125-27.

<sup>24</sup> Code de la santé publique, Art. R.5125-28.

<sup>25</sup> Conseil d’État, Arrêt du 12 juin 1998, n°181718, <https://juricaf.org/arret/France-CONSEILDETAT-19980612-181718>. In this ruling the Council of State has considered that excessive competition between pharmacies, encouraged by excessive advertising, would be likely to affect the harmonious distribution of pharmacies throughout the territory and the guaranteed easy access for the whole population to the services they offer (that the legislator intended to ensure, in the interests of public health).

<sup>26</sup> Ordre National des Pharmaciens (2019), <http://www.ordre.pharmacien.fr/Qui-sommes-nous/Qu-est-ce-que-l-Ordre/The-French-Chamber-of-Pharmacists>.

<sup>27</sup> Code de la santé publique, Art. L.4231-1.

<sup>28</sup> “Conseil d’État”, the highest administrative Court in France.

<sup>29</sup> Ordre National des Pharmaciens (2019), Chambres de Discipline, <http://www.ordre.pharmacien.fr/Nos-missions/Assurer-le-respect-des-devoirs-professionnels/Les-chambres-de-discipline>.

because they are spread over the FPHC.<sup>30</sup> In addition, they are also regarded as too restrictive: the only possibility for advertising by pharmacies is through a press release, which itself is strictly regulated.<sup>31</sup> Also, it is prohibited for pharmacy networks<sup>32</sup> to advertise.<sup>33</sup> The provisions are interpreted strictly by the FCP disciplinary chambers.<sup>34</sup>

There is broad agreement among most stakeholders that the current framework is too strict. In particular, the French Competition Authority<sup>35</sup> (Competition Authority) – which conducts, inter alia, sector-specific inquiries to enhance market competition – considers these provisions as a hindrance to competition among pharmacists.<sup>36</sup> Specifically, the Competition Authority has stressed that the applicable framework is “vague and inaccurate” and that advertising by pharmacies is “too strictly regulated”.<sup>37</sup> To that extent, in the view of the Competition Authority, the strict interpretation of “dignity of the profession” and of the prohibition on “soliciting clients” has led to a de facto prohibition of every kind of advertising by pharmacists.<sup>38</sup> The Competition Authority regards a lack of competition between pharmacies as being to the detriment of the consumer<sup>39</sup> and therefore recommends the easing of restrictions<sup>40</sup>, as well as a clear differentiation between advertising for medicinal products and advertising by pharmacies, both physical and online.<sup>41</sup> The Competition Authority also stresses that the current framework does not allow pharmacies to make their websites known nor to communicate about their services, to the detriment of both foreign and national pharmacies.<sup>42</sup>

The recommendations of the Competition Authority match the position of the Council of State, which stresses that the strict framework for advertising by health professionals is neither in line with the expectations of the public nor with the rise of the digital economy.<sup>43</sup> It recommends enabling pharmacists to communicate information of an objective and informative nature, by any medium.<sup>44</sup>

The French Chamber of Pharmacists (FCP) is also in favour of modernising the rules on advertising by pharmacies.<sup>45</sup> This aspect was considered in the review process of the Code of Conduct for pharmacists

<sup>30</sup> Autorité de la concurrence (2019), [Avis n° 19-A-08](#) relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée, § 377.

<sup>31</sup> Code de la santé publique, Art. R.5125-26.

<sup>32</sup> Networks or groups of pharmacies bring together several pharmacies. They enable pharmacists to create better marketing strategies, as well as to obtain lower prices from distributors.

<sup>33</sup> Code de la santé publique, Art. R.5125-29.

<sup>34</sup> Autorité de la concurrence (2019), [Avis n° 19-A-08](#) relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée, § 390, 441.

<sup>35</sup> “Autorité de la concurrence”. It is “the competition regulator in France, an independent body serving competitiveness and the consumer”, see <https://www.autoritedelaconcurrence.fr/en/missions>.

<sup>36</sup> Autorité de la concurrence (2013, 2019), Avis n° 13-A-24, Avis n° 19-A-08, <https://www.autoritedelaconcurrence.fr/fr/liste-des-decisions-et-avis>.

<sup>37</sup> Autorité de la concurrence (2019), [Avis n° 19-A-08](#) relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée, § 373.

<sup>38</sup> Ibid., § 389.

<sup>39</sup> Ibid., § 404.

<sup>40</sup> Ibid., § 443.

<sup>41</sup> Ibid., § 451.

<sup>42</sup> Ibid., § 247.

<sup>43</sup> See the website of the Conseil d’État (2018), Règles applicables aux professionnels de santé en matière d’information et de publicité, <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes/regles-applicables-aux-professionnels-de-sante-en-matiere-d-information-et-de-publicite>.

<sup>44</sup> Conseil d’État (2018), Règles applicables aux professionnels de santé en matière d’information et de publicité, p.101, proposal 3, <https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000394.pdf>.

<sup>45</sup> Ordre National des Pharmaciens (2016), La Lettre n° 72, <http://lalettre.ordre.pharmacien.fr/accueil-lettre-72/De-nouvelles-regles-pour-les-officines>.



– last updated in 1995 – initiated by the FCP in 2015.<sup>46</sup> The FCP proposed a first draft decree updating the Code of Conduct as well as “amending provisions on advertising / communication / information by pharmacies”.<sup>47</sup> The Competition Authority issued a negative opinion on this proposal, considering, inter alia, that it may then be admissible to advertise but in an “unreadable and often inconsistent manner”.<sup>48</sup> The FCP drafted a second decree in 2018, updating the Code of Conduct for pharmacists and other provisions of the FPHC that would then include a sub-section entitled “Rules on information and advertising”.<sup>49</sup> Among other provisions in this new sub-section of an amended Code of Conduct, pharmacies would then be allowed to provide information on their services by any medium.<sup>50</sup> Since then, stakeholders have been waiting for the Government to issue a decree updating the current regulations.

Altogether, the current framework is too strict – it has led to a de facto prohibition of every kind of advertising by pharmacies. Competition needs to be enhanced without endangering the duty to ensure a proper supply of medicinal products to the population. The limitations on advertising should be eased and a proportionate form of advertising by pharmacies allowed, especially regarding non-prescription medicinal products. This would benefit the consumer – as the Competition Authority rightly states that the current lack of competition between pharmacies is to the detriment of the consumer.

### 3 The CJEU case C-649/18 and the Opinion of the Advocate General

#### 3.1 The CJEU case

The CJEU case involves a Dutch-based pharmacy that undertook a large-scale physical advertising campaign, targeting French consumers, to promote its electronic services in the online sale of non-prescription medicinal products. This ceInput will focus on the physical advertising which is not yet regulated by secondary EU law and in relation to which pharmacies have to comply with the national regulations of the Member State of destination, – unlike digital advertising, to which the national regulations of the Member State of establishment apply. The advertising campaign included the distribution of around 3 million brochures<sup>51</sup> and a discount applicable, inter alia, for non-prescription medicinal products, if the total amount of an order exceeded a certain threshold. However, in France, the French Public Health Code<sup>52</sup> (FPHC) prohibits pharmacists from soliciting clients by procedures and methods contrary to the dignity of the profession as well as from inciting patients to misuse medicinal products.<sup>53</sup> On this basis, several French-based pharmacies, and associations representing the professional interests of pharmacies, sued the Dutch-based pharmacy. They argued that the non-

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<sup>46</sup> Ordre National des Pharmaciens (2016), Communiqué de Presse du 6 Septembre 2016, <http://www.ordre.pharmacien.fr/content/download/292681/1507457/version/3/file/CP+code+d%C3%A9ontologie+Vdef.pdf>

<sup>47</sup> Ordre National des Pharmaciens (2016), [projet de code](http://www.ordre.pharmacien.fr/content/download/292681/1507457/version/3/file/CP+code+d%C3%A9ontologie+Vdef.pdf) de déontologie des pharmaciens et [propositions de modifications](http://www.ordre.pharmacien.fr/content/download/292681/1507457/version/3/file/CP+code+d%C3%A9ontologie+Vdef.pdf) des articles relatifs à la publicité / communication / information des officines, <http://www.ordre.pharmacien.fr>.

<sup>48</sup> Autorité de la concurrence (2017), Avis n° 17-A-10 relatif à un projet de décret portant code de déontologie des pharmaciens et modifiant le code de la santé publique, §105, <https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/17a10.pdf>.

<sup>49</sup> Ordre National des Pharmaciens (2018), [Projet de code de déontologie des pharmaciens](http://www.ordre.pharmacien.fr/content/download/429835/2023742/version/1/file/2018-10-01-projet-code-deontologie-adopte-par-CN-oct-MAJ.pdf), pp.13 et seq. <http://www.ordre.pharmacien.fr/content/download/429835/2023742/version/1/file/2018-10-01-projet-code-deontologie-adopte-par-CN-oct-MAJ.pdf>.

<sup>50</sup> Ibid., p.14.

<sup>51</sup> Either with the delivery of commercial partners' products or directly to consumers.

<sup>52</sup> “Code de la santé publique”. The French Public Health Code is available on <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072665>.

<sup>53</sup> Code de la Santé Publique, Art. R.4235-22 and Art. R.4235-64.

compliance with French provisions on advertising by pharmacies led to unfair competition. They claimed compensation for loss suffered due to non-compliance by the Dutch-based pharmacy.<sup>54</sup>

The Court of First Instance ruled that the creation of the website is governed by Dutch-law but that French provisions prohibiting pharmacists from (1) soliciting clients by procedures and methods contrary to the “dignity of the profession”<sup>55</sup> and from (2) inciting patients to misuse medicinal products<sup>56</sup> apply to all businesses selling non-prescription medicinal products to French consumers. Those provisions prohibit, inter alia, the distribution of brochures by a pharmacy<sup>57</sup> offering a discount for non-prescription medicinal products.<sup>58</sup>

The Dutch-based pharmacy appealed claiming, inter alia, that these French provisions should not apply. The Court of Appeal referred the case to the CJEU and requested a preliminary ruling on the compliance of such rules with EU primary and secondary law.<sup>59</sup> In the view of the Dutch Government, the French regulation amounted to a de facto ban on advertising by pharmacies, whereas the French and Greek Governments regard it simply as a strict framework for the modalities for advertising.<sup>60</sup>

### 3.2 The Opinion of the Advocate General on physical advertising

In his Opinion, the Advocate General first looks at whether existing European secondary law is applicable to the issue under consideration. He refers to both the Directive on electronic commerce (eCommerce Directive)<sup>61</sup> and the Directive on the Community code relating to medicinal products for human use (Community code)<sup>62</sup>. The former regulates the development of information society services within the EU; the latter regulates the production, distribution and use of medicinal products. Physical advertising, such as that in the present case, neither constitutes an e-service, nor does it fall within the coordinated field of the eCommerce Directive.<sup>63</sup> The Advocate General therefore concludes that the eCommerce Directive is not applicable to physical advertising of online services.<sup>64</sup> He also concludes that the provisions of the Community code<sup>65</sup> on advertising and information are not applicable because they harmonise provisions on the advertising of medicinal products but not specifically advertising by pharmacies.<sup>66</sup>

<sup>54</sup> EU:C:2020:134, para. 17.

<sup>55</sup> Code de la santé publique, Art. R.4235-22.

<sup>56</sup> Code de la santé publique, Art. R.4235-64.

<sup>57</sup> Either with the delivery of commercial partners’ products or directly to consumers.

<sup>58</sup> EU:C:2020:134, para. 19.

<sup>59</sup> In particular: Art. 34 TFEU; Art. 85c of European 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); and the internal-market clause in Article 3 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 for electronic commerce.

<sup>60</sup> EU:C:2020:134, para. 96 and 97.

<sup>61</sup> 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'), <http://data.europa.eu/eli/dir/2000/31/oj>.

<sup>62</sup> 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, <http://data.europa.eu/eli/dir/2001/83/2019-07-26>.

<sup>63</sup> Art. 2 lit. h of Directive 2000/31/EC on electronic commerce. The “coordinated field” refers to national requirements that apply to online activities, regarding taking up of the activity and the pursuit of the activity of an information society service. It excludes “requirements applicable to services not provided by electronic means”.

<sup>64</sup> EU:C:2020:134, para. 44-46.

<sup>65</sup> Art. 86 to 100 of Directive 2001/83/EC on the Community code relating to medicinal products for human use.

<sup>66</sup> EU:C:2020:134, para. 53.



Secondly, the Advocate General considers whether the French provisions are in conformity with EU primary law, i.e. the internal market freedoms. He concludes that the free movement of goods [Art. 28 et seq. TFEU] is pertinent because advertising for the online sale of medicinal products by a pharmacy primarily concerns “goods” whereas “services” [Art. 56 et seq. TFEU] are just accessory aspects.<sup>67</sup>

The Advocate General leaves it to the referring French Court to check whether the French provisions are “measures having equivalent effect to a quantitative restriction” which are generally prohibited [Art. 34 TFEU].<sup>68</sup> He states that restrictions which (1) “apply to all relevant traders operating within the national territory” and (2) “affect in the same manner (...) the marketing of domestic products and of those from other Member States” are not equivalent to a quantitative restriction.<sup>69</sup> However, according to the Advocate General, the prohibition of advertising sent by post could have a greater effect on the marketing of non-domestic products than on that of domestic products.<sup>70</sup> In this regard, he takes the view that the CJEU has already recognised the importance of advertising for gaining access to the national markets of other Member States, by qualifying national provisions that prohibit advertising or other forms of promoting, as measures having equivalent effect to a quantitative restriction.<sup>71</sup>

The Advocate General states that even if French provisions qualified as measures having equivalent effect to a quantitative restriction, this could be justified by the protection of public health [Art. 36 TFEU]. To that extent, both the protection of the dignity of the pharmacy profession and the prevention of excessive consumption of medicinal products would aim to protect public health.<sup>72</sup> In his view, the French rules in question are able and necessary to fulfill these objectives and are thus in line with the free movement of goods.<sup>73</sup>

For these reasons, the Advocate General recommends the CJEU to find that Art. 34 TFEU does not preclude a Member State from prohibiting the advertising of services for the online sale of medicinal products by a pharmacy established in another Member State<sup>74</sup>, provided that such legislation is necessary and proportionate to achieve the objective of protecting the dignity of the profession of pharmacist, which it is for the national court to verify.<sup>75</sup>

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<sup>67</sup> EU:C:2020:134, para. 64.

<sup>68</sup> EU:C:2020:134, para. 73-82.

<sup>69</sup> EU:C:2020:134, para. 70. See accordingly: CJEU, Judgment of 24 November 1993, Keck and Mithouard, Joined cases C-267/91 and C-268/91, [EU:C:1993:905](#), para. 16.

<sup>70</sup> EU:C:2020:134, para. 73-82.

<sup>71</sup> EU:C:2020:134, para. 74-75.

<sup>72</sup> EU:C:2020:134, para. 84.

<sup>73</sup> EU:C:2020:134, para. 90-100.

<sup>74</sup> Advertising being intended to mean the large-scale sending of brochures included in the packages of business partners active in online sales, and the offer of price discounts where the order exceeds a certain amount.

<sup>75</sup> EU:C:2020:134, para. 151.

## 4 Legal frameworks in Italy and Germany

### 4.1 The Italian framework for advertising by pharmacies

Advertising by pharmacies is regulated by two specific rules: the Pharmacist's Code of Ethics<sup>76</sup> and the Pharmacy Advertising Regulation<sup>77</sup>, both issued by the Order of Pharmacists<sup>78</sup>. The current regulations distinguish between advertising of medicinal products and advertising of the pharmacies themselves. They generally prohibit any act aimed at soliciting demand for medicinal products with or without a medical prescription. It is also forbidden to include the name of the pharmacy, the name of the pharmacist and the address of the pharmacy in advertising aimed at the sale of pharmaceutical products without a medical prescription or for self-medication as well as any promotional act by a pharmacy aimed at hoarding customers.<sup>79</sup> In any case, pharmacists must ensure clear, correct and complete health information about pharmaceutical products, with or without medical prescription.<sup>80</sup>

Advertising by a pharmacy is allowed only in the form of informative announcements, aimed at informing citizens of the existence of a pharmacy: the announcements must communicate to the public true and correct data and information relating to the services provided, the activities carried out and the specific services offered to the customers in the pharmacy. Advertising the professional capabilities of the individual pharmacist<sup>81</sup> expressed by any means is prohibited. Generally speaking, the Italian legislation requires every form of informative announcement to be “truthful”, visually recognizable as advertisement and not misleading.<sup>82</sup> Initiatives aimed at promoting prevention and health education are permitted.<sup>83</sup> Informative announcements by pharmacies, using any means of transmission, are permitted in compliance with the principles of fairness, truthfulness and transparency, and must not be equivocal, misleading or disparaging, for the protection and interest of citizens. They must be carried out according to the needs of health protection.<sup>84</sup>

Pharmacists may disseminate information announcements to the public<sup>85</sup> and distribute pharmacy publications and documentation relating to the health service in which they can only mention their

<sup>76</sup> “Codice Deontologico del Farmacista”. It is a code of conduct with regulatory effectiveness (so-called soft law) which a pharmacist must comply with when exercising his/her profession. The Codice Deontologico del Farmacista is available at: <http://www.ordfarmacistips.it/codice.asp>

<sup>77</sup> “Regolamento della Pubblicità della Farmacia”. For pharmacists, the Pharmacy's Advertising Regulations have the same binding force as the Code of Ethics, and is available at: [https://www.ordinefarmacisti.ag.it/files/regolamento\\_publicita.pdf](https://www.ordinefarmacisti.ag.it/files/regolamento_publicita.pdf)

<sup>78</sup> The Order is a non-economic public body representing all pharmacists enrolled in the Register of Pharmacists. The Order monitors the correctness of the professional activity of its members and adopts, if necessary, disciplinary measures in case of non-compliance with the Code of Ethics (Codice Deontologico).

<sup>79</sup> Art. 1 Regolamento della Pubblicità della Farmacia.

<sup>80</sup> Art. 15.1. Codice Deontologico del Farmacista.

<sup>81</sup> Meaning the knowledge or professional skills of an individual pharmacist.

<sup>82</sup> Art. 4-5 [Decreto Legislativo 2 agosto 2007, n. 145](#), Attuazione dell'articolo 14 della direttiva 2005/29/CE che modifica la Direttiva 84/450/CEE sulla pubblicità ingannevole. [Decreto Legislativo 206/2005](#) (“Consumer Code”) also applies.

<sup>83</sup> Art. 2 Regolamento della Pubblicità della Farmacia, Art. 23.5. Codice Deontologico del Farmacista.

<sup>84</sup> Art. 23.4. Codice Deontologico del Farmacista.

<sup>85</sup> Examples: (1) signs, telephone directories, city guides – texts must exclude any typographical differentiation between the different pharmacies, while on telephone directories the advertisement can only be made in the municipality where the pharmacy is located; (2) envelopes, bags, calendars – these items can only contain name, company name, address, telephone number, opening hours and details about departments or services available in the pharmacy; (3) audio-visual and informatics devices, that show information about the activities, contacts and opening hours of the pharmacy on a screen – these must be located inside a pharmacy unless they indicate the opening hours of the neighbouring pharmacies: in this case they may only contain name, address, telephone number, opening hours, details about departments or services available in the pharmacy and health information of public interest.

name and the name, address and telephone number of their pharmacy.<sup>86</sup> The display of any communication relating to the individual pharmacy in surgeries, medical and veterinary clinics, hospitals and health facilities in general is prohibited.<sup>87</sup> Furthermore, the pharmacy may not authorise any reference to its business name in advertisements by other companies.<sup>88</sup>

It is allowed to grant discounts on all products and medicines sold in pharmacies and paid for directly by customers (with the sole exception of medicines paid for by the National Healthcare Service), giving adequate prior information and with the same conditions for all customers<sup>89</sup>. However, it is not permitted to set up customer loyalty systems that discriminate between customers in the application of discounts on the purchase of medicines (e.g. loyalty cards) nor to apply promotional methods such as "3x2" sales to the sale of medicines.<sup>90</sup> It is also permitted to disseminate without restriction information material on the location of a pharmacy and the services that the pharmacy offers.

## 4.2 The German framework for advertising by pharmacies

The regulation of advertising by pharmacies in Germany is based on three pillars: (1) competition law, such as the Federal Unfair Competition Act<sup>91</sup>; (2) specific law on advertising, such as the Federal Drug Advertising Act<sup>92</sup>, as well as (3) specific law on pharmacies.

Certain restrictions arise from the Federal Unfair Competition Act, such as the need to include the identity and address of the advertiser on brochures.<sup>93</sup> The main impact of competition law, however, comes from the ability to impose sanctions on the infringement of market conduct rules<sup>94</sup> contained in other legislation,<sup>95</sup> such as the Federal Drug Advertising Act, the Federal Pharmacy Act<sup>96</sup>, the Federal Pharmacy Operating Regulation<sup>97</sup> and the Federal Pharmaceutical Price Ordinance<sup>98</sup>.<sup>99</sup> Breaches of such pharmaceutical regulations may then constitute breaches of competition law, which can be sanctioned accordingly.<sup>100</sup>

The Federal Drug Advertising Act is usually also applicable to advertising by pharmacies.<sup>101</sup> It includes a plethora of regulations on advertising, e.g. specific rules for television and internet advertising as well as formal requirements. It regulates the content of the advertising, e.g. regarding recommendations, medical histories and pictorial presentations.<sup>102</sup>

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<sup>86</sup> Art. 3 Regolamento della Pubblicità della Farmacia.

<sup>87</sup> Art. 23.3. Codice Deontologico del Farmacista.

<sup>88</sup> Art. 5 Regolamento della Pubblicità della Farmacia.

<sup>89</sup> Art. 11 Law Decree N° 1, 24 January 2012.

<sup>90</sup> Circolare Ordine dei Farmacisti N° 7930, 27 March 2012.

<sup>91</sup> Gesetz gegen den unlauteren Wettbewerb – UWG.

<sup>92</sup> Gesetz über die Werbung auf dem Gebiete des Heilwesens – HWG.

<sup>93</sup> See Section 5a, para. 3, No. 2 Federal Unfair Competition Act.

<sup>94</sup> Marktverhaltensregeln.

<sup>95</sup> Koeber, C. (2017), „Wettbewerbsrecht in der Apotheke“, p. 11.

<sup>96</sup> Gesetz über das Apothekenwesen.

<sup>97</sup> Verordnung über den Betrieb von Apotheken.

<sup>98</sup> Arzneimittelpreisverordnung.

<sup>99</sup> Koeber, C. (2017), „Wettbewerbsrecht in der Apotheke“, p. 11.

<sup>100</sup> Koeber, C. (2017), „Wettbewerbsrecht in der Apotheke“, p. 12 and 81 et seq.

<sup>101</sup> Koeber, C. (2017), „Wettbewerbsrecht in der Apotheke“, p. 14.

<sup>102</sup> See for example section 11, para. 1, no. 2, 3 and 5 Federal Drug Advertising Act.

State pharmacy law<sup>103</sup> also includes regulations on advertising by pharmacies. These can usually be found in the Codes of Conduct for pharmacists<sup>104</sup> which are based on laws of the German States (“Länder”)<sup>105</sup> relating to Chambers and Medical Professions. Pharmacists in Germany are grouped into pharmacy “chambers”<sup>106</sup> set up at state level<sup>107</sup>. These are public-law corporations<sup>108</sup> which, in accordance with the principles of self-administration, represent the professional interests of pharmacists and monitor the fulfilment of professional duties.<sup>109</sup>

The Federal Constitutional Court has already ruled that restrictions on advertising by pharmacists under such Codes of Conduct are in line with German constitutional law.<sup>110</sup> Yet, a total ban on advertising would not be proportional and therefore unconstitutional.<sup>111</sup> The Codes of Conduct for pharmacists generally use wording – such as “exaggerated” – which serves as an indication of whether advertising is permitted or prohibited. The question of whether an advertisement qualifies as prohibited is decided on a case-by-case basis.<sup>112</sup> Whether advertising by means of brochures appears “exaggerated” can only be decided on the basis of the combination of advertising medium and advertising message, taking into account their design and frequency.<sup>113</sup> Decisive for the admissibility of advertising is that the relationship of trust between the pharmacist and the consumer is not disturbed and the professional image of the pharmacist is not damaged.<sup>114</sup> There is no indication that certain advertising media – such as brochures – would generally be able to diminish public confidence in the professional integrity of pharmacists.<sup>115</sup> Nor does the possibility of a discount for non-prescription medicinal products in principle constitute a violation of the Federal Drug Advertising Act.<sup>116</sup>

### 4.3 Conclusion

In Italy and Germany, advertising by pharmacies is restricted in order to, inter alia, safeguard the professional integrity of pharmacists and prevent the misuse of medicinal products. As shown, the existing regulations in these two Member States do not, however, impose an absolute ban on advertising like that in France. Instead, they allow for limited advertising by pharmacies whilst also safeguarding the legitimate objectives mentioned above.

<sup>103</sup> Law enacted by the sixteen states of Germany under their own competence to legislate.

<sup>104</sup> Berufsordnungen.

<sup>105</sup> Kammer- und Heilberufsgesetze.

<sup>106</sup> Apothekenkammern.

<sup>107</sup> Landesapothekenkammern.

<sup>108</sup> Körperschaften des Öffentlichen Rechts.

<sup>109</sup> Kurz, C. (2019), „Gesetzeskunde für Apotheker“, p. 168.

<sup>110</sup> See Federal Constitutional Court, Judgement of 22 Mai 1996, Compatibility of advertising bans with the professional freedom of pharmacists, 1 BvR 744/88, [https://www.bundesverfassungsgericht.de/e/rs19960522\\_1bvr074488.html](https://www.bundesverfassungsgericht.de/e/rs19960522_1bvr074488.html), para. 85 and 88. The judgement is referred to hereinafter using the European Case Law Identifier (ECLI): BVerfG:1996:rs19960522.1bvr074488.

<sup>111</sup> See BVerfG:1996:rs19960522.1bvr074488, para. 91.

<sup>112</sup> See for example BVerfG:1996:rs19960522.1bvr074488, para. 92.

<sup>113</sup> See also BVerfG:1996:rs19960522.1bvr074488, para. 92.

<sup>114</sup> See also Götting/Hetmank, in: Fezer/Büscher/Obergfell (ed.), Lauterkeitsrecht: UWG, 3rd Edition 2016, UWG, § 3a, para. 131.

<sup>115</sup> See also BVerfG:1996:rs19960522.1bvr074488, para. 92.

<sup>116</sup> See Section 7, para. 1, No. 2, lit. a) of the Federal Drug Advertising Act. See also Reinhart, in: Fezer/Büscher/Obergfell (ed.), Lauterkeitsrecht: UWG, 3rd Edition 2016, Lebensmittel-, Kosmetik- und Heilmittelwerbung (S 4), para. 509.

## 5 Conclusions

### 5.1 Assessment of the Advocate General's Opinion and recommendations to the CJEU

In conclusion, the main findings in the Advocate General's Opinion are assessed as follows: (1) no secondary EU law regarding advertising by pharmacies, (2) correct choice of the applicable fundamental freedom (internal market freedom) and (3) the assessment of national measures.

(1) The Advocate General is correct in concluding that both the eCommerce Directive and the Community Code are not applicable in the present case. The former regulates the development of information society services within the EU; the latter regulates the production, distribution and use of medicinal products. The eCommerce Directive is not applicable because physical advertising of online services neither constitutes an e-service nor does it fall in the coordinated field of that directive. The provisions on advertising in the Community code are not applicable because they harmonise provisions on the advertising of medicinal products but not specifically advertising by pharmacies.

(2) The Advocate General is also correct in concluding that the free movement of goods [Art. 28 et seq. TFEU] is pertinent because advertising for the online sale of medicinal products by a pharmacy primarily concerns "goods" whereas "services" [Art. 56 et seq. TFEU] are just accessory aspects. According to the established case law, if an entire performance process cannot be uniformly assigned to one fundamental freedom, the perspective of the persons concerned is considered.<sup>117</sup> Here, the sale of goods – non-prescription medicinal products – to a customer is the decisive aspect from the perspective of both the pharmacy and the customer.

(3) The Advocate General is finally correct in concluding that it is for the national court to assess if a national regulation in this field is a "measure having equivalent effect to a quantitative restriction" [Art. 34 TFEU]. He is also correct in concluding that a national court must also assess the possible justification of a measure having equivalent effect to a quantitative restriction [Art. 36 TFEU]. For this, the national court needs to objectively assess whether the evidence – provided by the national authority responsible for the regulation – reasonably allows the finding that the national regulation is objectively pursuing legitimate objectives, such as the protection of health, and whether those objectives can be attained by measures which are less restrictive for the free movement of goods.

Nevertheless, the CJEU should use the opportunity to clarify the conditions under which such restrictions on advertising by pharmacies are to be qualified as measures covered by Art. 34 TFEU and to what extent a justification of such measures is possible regarding Art. 36 TFEU. To that extent, the CJEU should follow its ruling in the Vanderborght case.<sup>118</sup> There the CJEU had to rule on the question of whether Belgian legislation prohibiting outright all forms of advertising for oral and dental care services was, inter alia, infringing the freedom to provide services [Art. 56 TFEU]. The CJEU regarded the national legislation as an imposition of a general and absolute prohibition of any advertising relating to the provision of oral and dental care services. It ruled that such a total ban restricts the ability of persons engaged in that activity to make themselves known to their potential customers and

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<sup>117</sup> Schroeder, in: Streinz (ed.), "EUV/AEUV", 3rd Edition 2018, Art. 34 TFEU, para. 12.

<sup>118</sup> CJEU, Judgement of 4 May 2017, Vanderborght, C-339/15, [EU:C:2017:335](#).

to promote the services they propose to offer. Such a prohibition therefore constitutes an unjustified restriction of the freedom to provide services.<sup>119</sup>

The same is true in the present case: The French regulation amounts to a de facto prohibition of any kind of advertising by pharmacies. Yet, the objectives pursued by the regulation, i.e. the protection of the professional integrity of pharmacists and prevention of the misuse of medicinal products, can be attained through the use of less restrictive measures, supervising, closely if necessary, the form and manner of an advertisement without imposing a de facto prohibition of all forms of advertising.<sup>120</sup> This is proven by the situation in Italy and Germany, where the existing regulation does not impose an absolute ban on advertising as in France but rather allows for limited advertising by pharmacies which does not undermine the professional integrity of pharmacists or the prevention of the misuse of medicinal products.

## 5.2 The reform discussion in France

The CJEU case highlights French restrictions on advertising by pharmacies. Indeed, advertising by pharmacies is currently subject to a de facto prohibition under the provisions of the FPHC. Pharmacies which do not benefit from having a physical presence in France are particularly affected by these restrictions. They cannot make themselves “visible” to potential consumers. Yet, the ability to advertise is essential to the functioning of the internal market for non-prescription medicinal products, since a de facto prohibition on advertising precludes access to national markets within the EU. A level-playing field would enable competition, strengthen the functioning of the EU internal market and thus benefit consumers. Allowing the sale of non-prescription medicinal products by pharmacies across the EU without enabling those pharmacies to advertise physically in order to reach potential consumers is detrimental to the internal market.

The process of renewing the French Code of Conduct for pharmacists that began in 2015 could be accelerated by a CJEU ruling that calls for proportionality when restricting advertising by pharmacies based in other EU Member States. To that extent, advertising is necessary for a functioning EU internal market. It should therefore be authorised under the condition that it includes only true statements and does not support the misuse of non-prescription medicinal products.

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<sup>119</sup> CJEU, Judgement of 4 May 2017, Vanderborght, C-339/15, [EU:C:2017:335](#), para. 72, 76.

<sup>120</sup> See accordingly, CJEU, Judgement of 4 May 2017, Vanderborght, C-339/15, [EU:C:2017:335](#), para. 75 on advertising by dentists.



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