

## Court of Justice of European Union Clarifies Advertising Rules for Medicinal Products Not Subject to Medical Prescription or Reimbursement

On 22 December 2022, the Grand Chamber of the Court of Justice of the European Union (**CJEU**) handed down its judgment in Case C-530/20, *EUROAPTIEKA SIA* (ECLI:EU:C:2022:1014), in response to a request for a preliminary ruling from the Latvian Constitutional Court on the interpretation of certain provisions of Directive 2001/83/EC on the Community code relating to medicinal products for human use (the **Directive**) concerning the advertising of medicinal products (the **Judgment**; available [here](#)).

### **Facts**

EUROAPTIEKA SIA (**EUROAPTIEKA**) is a network of pharmacies operating in Latvia. In March 2016, EUROAPTIEKA announced a promotion on its website and in its monthly magazine, offering a 15% reduction on the purchase price of any medicinal product where at least three products were purchased. In April 2016, the Latvian Public Health Inspectorate banned EUROAPTIEKA from advertising that promotion (the **Decision**).

The Decision was taken pursuant to subparagraph 18.12 of Decree No 378 of the Latvian Council of Ministers, which prohibits the advertising to the general public of a medicinal product “*by justifying the need to purchase that medicinal product on the basis of its price, by announcing a special clearance sale, or by indicating that the medicinal product is sold as a bundle together with other medicinal products (including at a reduced price) or other types of product*” (the **Latvian Measure**).

In January 2020, EUROAPTIEKA brought a constitutional appeal against the Decision. In support of its appeal, it argued that, since the Directive only applies to advertising relating to *specified* medicinal products, and since it brought about complete harmonisation in the field of advertising of medicinal products, the Directive precludes the Latvian Measure which prohibits advertising for medicinal products *in general*. The Constitutional Court of Latvia asked the CJEU to determine:

- (i) whether the dissemination of information to the general public which encourages the purchase of medicinal products, without reference to a specific medicinal product, by justifying the need for such a purchase on the basis of the price of those medicinal products or by announcing special or bundled discounts must be regarded as “advertising of medicinal products” within the meaning of Title VIII of the Directive;
- (ii) whether Article 90 of the Directive precludes the Latvian measure, to the extent the latter extends the list of prohibited methods of advertising and imposes stricter restrictions than those in Article 90 of the Directive on the advertising to the general public of medicinal products which are not subject to medical prescription and not reimbursed; and

- (iii) whether the Latvian measure can be considered to restrict advertising of medicinal products in order to encourage the rational use of such products, within the meaning of Article 87(3) of the Directive.

### **Analysis of CJEU**

#### *First question*

The CJEU approached the first question by determining, as a first step, that the concept of “advertising of medicinal products” within the meaning of Article 86(1) of the Directive does not cover only the advertising of a specific medicinal product, but also extends to the advertising of unspecified medicinal products.

First, the wording of Article 86(1) systematically refers to “medicinal products” in the plural.<sup>1</sup>

Second, Articles 86 to 88 of the Directive are intended to apply to any activity seeking to promote the prescription, supply, sale or consumption of medicinal products. Therefore, it cannot be deduced from Article 89 of the Directive, which imposes certain conditions on the advertising to the general public of a (specific) medicinal product, that the concept of “advertising of medicinal products” in Article 86(1) is limited to the advertising of a specific product.<sup>2</sup>

Third, advertising relating to non-specified products (such as advertising of an entire class of medicinal products intended to treat the same pathology) may relate, at least in part, to medicinal products subject to medical prescription or reimbursement. The CJEU noted that Articles 88(1)(a) and 88(3) of the Directive, which prohibit the advertisement of medicinal products subject to medical prescription or reimbursement, would be deprived of their effectiveness to a large extent by allowing any advertising that does not refer to a specific medicinal product within that class to escape those prohibitions.<sup>3</sup> Furthermore, advertising relating to non-specified medicinal products not subject to medical prescription or reimbursement may, in the same way as advertising in respect of a single specific product, be excessive and ill-considered and, therefore, inconsistent with the purpose of the Directive to safeguard public health.<sup>4</sup>

The CJEU also explained that past judgments, in particular in Cases C-190/20, *DocMorris* and C-649/18, *A (Advertising and sale of medicinal products online)*, do not detract from the conclusion that Article 86 of the Directive covers the advertising of unspecified medicinal products.<sup>5</sup> In *A*, the CJEU held that the advertising of online sales services relating to medicinal products could not be regarded as advertising of medicinal products, and thus could not be covered by the Directive. In *DocMorris*, the advertising campaigns at issue did not seek to influence the consumers’ choice of a given medicinal product but the choice, at a later stage, of the pharmacy from which that customer would purchase that medicinal product (with the consequence that the campaign was outside the scope of the Directive).

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<sup>1</sup> Judgment, paras. 31-33.

<sup>2</sup> Judgment, paras. 35-38. See also, CJEU, Case C-249/09, *Novo Nordisk*, paras. 22, 24 and 25.

<sup>3</sup> Judgment, paras. 44-45.

<sup>4</sup> Judgment, para. 46.

<sup>5</sup> Judgment, para. 49-51.

As a second step, the CJEU found that the activities referred to in the Latvian Measure appear (subject to the verification of the referring court) to have a promotional purpose and, therefore, fall within the concept of “advertising of medicinal products”, within the meaning of Article 86(1) of the Directive.<sup>6</sup>

*Second and third questions*

The CJEU's analysis proceeded on the uncontroversial basis that the Directive achieved complete harmonisation as regards the advertising of medicinal products. Consequently, the only conditions which EU Member States can place on advertising for medicinal products are those laid down by that Directive. However, as the CJEU has previously held, the fact that Article 90 of the Directive does not contain specific rules concerning certain types of advertising material does not preclude EU Member States from prohibiting those types of advertising on the basis of another provision of the Directive.<sup>7</sup>

In this case, the CJEU held that Latvia could validly adopt a national measure prohibiting types of advertisements other than those listed in Article 90 of the Directive, where such types of advertisements are of such a nature as to encourage the irrational use of medicinal products, contrary to the requirement of Article 87(3) of the Directive.<sup>8</sup> Given that the types of advertisements covered by the Latvian Measure concerned medicinal products not subject to medical prescription or reimbursement, the CJEU (briefly) stated that Article 88(2) of the Directive does preclude national measures aimed at advertisements promoting the irrational use of such medicinal products.<sup>9</sup>

As regards the third question, the CJEU reiterated the established position that advertising that distracts the consumer from an objective evaluation of the need to take such medicine encourages the irrational and excessive use of that medicine.<sup>10</sup> Furthermore, such irrational and excessive use may also arise as a result of advertising material that treats medicinal products in the same way as other consumer goods, by referring to promotional offers or bundled sales of medicinal products and other products.<sup>11</sup> The CJEU concluded that prohibitions such as those laid down in the Latvian Measure generally meet the essential aim of safeguarding public health by discouraging irrational use.

Finally, the CJEU recalled the importance of price competition for the effective protection of the health and life of humans.<sup>12</sup> Nevertheless, it concluded that the file before the court indicated that the Latvian Measure was without prejudice to the possibility, recognised under Latvian law, for companies that trade in medicinal products to grant discounts and price reductions when selling medicinal products and other health products.

**Brussels, 23 December 2022**

**Van Bael & Bellis**

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<sup>6</sup> Judgment, paras. 52-54.

<sup>7</sup> Judgment, paras 60-62. See also CJEU, Case C-374/05, *Gintec*, paras. 51, 55, and 59.

<sup>8</sup> Judgment, para. 64.

<sup>9</sup> Judgment, para. 63.

<sup>10</sup> Judgment, para. 67.

<sup>11</sup> Judgment, para. 68.

<sup>12</sup> Judgment, para. 71.