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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

1 October 2020 (*)

(Reference for a preliminary ruling – Medicinal products for human use not subject to compulsory medical prescription – Online sales – Advertising for a pharmacy’s website – Limitations – Prohibition on discounts where the order exceeds certain amounts and the use of paid referencing – Obligation to require a patient to complete a health questionnaire prior to validation of his or her first order on a pharmacy’s website – Protection of public health – Directive 2000/31/EC – Electronic commerce – Article 2(a) – Information society service – Article 2(h) – Coordinated field – Article 3 – Country-of-origin principle – Derogations – Justification – Protection of public health – Protection of the dignity of the profession of pharmacist – Prevention of the abusive consumption of medicinal products)

In Case C-649/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d’appel de Paris (Court of Appeal, Paris, France), made by decision of 28 September 2018, received at the Court on 15 October 2018, in the proceedings

A

v

Daniel B,

UD,

AFP,

B,

L,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Third Chamber, L.S. Rossi, J. Malenovský (Rapporteur) and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2019,

after considering the observations submitted on behalf of:

- A, by K. Nordlander, advokat, and A. Robert, lawyer,
- Daniel B, L, B, AFP and UD, by M. Guizard and S. Beaugendre, lawyers,
- the French Government, by A.-L. Desjonquères, R. Coesme and E. Leclerc, acting as Agents,
- the Greek Government, by V. Karra, A. Dimitrakopoulou and E. Tsaousi, acting as Agents,
- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the Netherlands Government, by K. Bulterman and L. Noort, acting as Agents,
- the European Commission, by F. Thiran, A. Sipos and S.L. Kalèda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 34 TFEU, Article 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 (OJ 2001 L 311, p. 67), as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 (OJ 2011 L 174, p. 74) ('Directive 2001/83'), and 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, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

2 The request has been made in the context of proceedings between, on the one hand, A, a company incorporated under Netherlands law which operates a dispensing pharmacy established in the Netherlands and a website specifically targeting French customers and, on the other, Daniel B, UD, AFP, B and L ('Daniel B and Others'), which are operators of dispensing pharmacies and associations representing the professional interests of pharmacists established in France, regarding A's promotion of that website to French customers by means of a wide-ranging and multifaceted advertising campaign.

Legal context

EU law

Directive 98/34/EC

3 Point 2 of 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'), provides the following:

'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

4 Recitals 18 and 21 of Directive 2000/31 state:

'(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; ...

...

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; The coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting ...'

5 Article 1(1) and (2) of that directive reads 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, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.'

6 Article 2(a) of that directive defines 'information society services' as services within the meaning of Article 1(2) of Directive 98/34.

7 Article 2(h) of Directive 2000/31 provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:

...

(h) “coordinated field”: requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

– requirements applicable to goods as such,

– requirements applicable to the delivery of goods,

– requirements applicable to services not provided by electronic means.’

8 Article 3 of that directive, entitled ‘Internal market’, provides:

‘1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors,

- (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
 - (iii) proportionate to those objectives;
- (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
 - notified the [European] Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

...’

9 Article 8(1) of that directive provides that ‘Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession’.

Directive 2001/83

10 Article 85c of Directive 2001/83, which is in Title VIIa, entitled ‘Sale at a distance to the public’, reads as follows:

‘1. Without prejudice to national legislation prohibiting the offer for sale at a distance of prescription medicinal products to the public by means of information society services, Member States shall ensure that medicinal products are offered for sale at a distance to the public by means of information society services as defined in Directive [98/34] under the following conditions:

- (a) the natural or legal person offering the medicinal products is authorised or entitled to supply medicinal products to the public, also at a distance, in accordance with national legislation of the Member State in which that person is established;
- (b) the person referred to in point (a) has notified the Member State in which that person is established of at least the following information:

...

- (c) the medicinal products comply with the national legislation of the Member State of destination in accordance with Article 6(1);

- (d) without prejudice to the information requirements set out in Directive [2000/31], the website offering the medicinal products contains at least:

...

2. Member States may impose conditions, justified on grounds of public health protection, for the retail supply on their territory of medicinal products for sale at a distance to the public by means of information society services.

...

6. Without prejudice to Directive [2000/31] and the requirements set out in this Title, Member States shall take the necessary measures to ensure that other persons than those referred to in paragraph 1 that offer medicinal products for sale at a distance to the public by means of information society services and that operate on their territory are subject to effective, proportionate and dissuasive penalties.'

11 Title VIII, entitled 'Advertising', and Title VIIIa, entitled 'Information and advertising' of Directive 2001/83 contain, respectively, Articles 86 to 88 and Articles 88a to 100 of that directive.

12 Article 88(1)(a) of Directive 2001/83 provides:

'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.'

Directive (EU) 2015/1535

13 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1) repealed and replaced Directive 98/34 as of 7 October 2015.

14 Article 1(1)(b) of Directive 2015/1535 states:

'For the purposes of this Directive, the following definitions apply:

...

(b) "service", means 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.'

15 Under the second paragraph of Article 10 of Directive 2015/1535, references to Directive 98/34 are to be construed as references to Directive 2015/1535.

French law

The Public Health Code

16 Under Article R. 4235-22 of the Public Health Code, 'pharmacists are prohibited from soliciting clients through procedures and methods contrary to the dignity of the profession'.

17 Article R. 4235-64 of that code provides that 'a pharmacist shall not, by any process or means whatsoever, induce patients to engage in abusive consumption of medicinal products'.

The Decree on best practice in the dispensing of medicinal products

18 Point 7.1, entitled ‘Pharmaceutical advice’, which is in Section 7, entitled ‘Supplementary rules applicable to the electronic commerce of medicinal products’, of the annex to the Decree of 28 November 2016 on best practice in the dispensing of medicinal products in dispensing pharmacies, mutual pharmacies and emergency mining pharmacies referred to in Article L. 5121-5 of the Public Health Code (JORF of 1 December 2016, text No 25; ‘the Decree on best practice in the dispensing of medicinal products’) states:

‘An electronic commerce website for medicinal products shall be designed in such a way that no medicinal product can be dispensed without an interactive exchange being possible between the patient and the pharmacist of the pharmacy concerned before the order is validated. An automated response to a question asked by the patient is therefore not sufficient to ensure information and advice appropriate to the patient’s particular case.

Certain personal data concerning the patient are necessary in order for the pharmacist to ensure that the order is appropriate to the patient’s state of health and for him or her to detect possible contra-indications. Thus, prior to validating the first order, the pharmacist must obtain via an online questionnaire information on the patient’s age, weight, height, sex, current treatments, history of allergic reaction, contra-indications and, where appropriate, pregnancy or breastfeeding. The patient must attest to the veracity of that information.

The questionnaire shall be completed at the time of the first order, during the process of validating the order. If the questionnaire has not been completed and sent, no medicinal product may be dispensed. The pharmacist must then validate the questionnaire, confirming that he or she has acquainted himself or herself with the information provided by the patient, before validating the order.

An opportunity to update the questionnaire shall be provided with each order.

...’

The Decree on technical rules

19 Section 1, entitled ‘Functional aspects of websites for the electronic commerce in medicinal products’, of the annex to the Decree of 28 November 2016 on the technical rules applicable to websites for the electronic commerce in medicinal products provided for in Article L. 5121-39 of the Public Health Code (JORF of 1 December 2016, text No 26; ‘the Decree on technical rules’) provides that ‘paid referencing on search engines or price comparison websites shall be prohibited’.

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

20 A, a company incorporated under the law of the Netherlands, is registered in the Netherlands to carry on the business of operating a dispensing pharmacy. That company also sells medicinal products online and para-pharmaceutical products through several websites, one of which is specifically directed at French consumers. The medicinal products marketed via that site have been granted a marketing authorisation in France and are not subject to compulsory medical prescription.

21 Thus A carried out an advertising campaign for the online sale of medicinal products directed at French consumers. That campaign included the insertion of advertising leaflets in packages sent by other traders engaged in distance selling (so-called ‘piggyback marketing’) and the sending of

advertisements by post. A also published, on the abovementioned website, promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount was exceeded, and purchased paid search engine referencing.

22 Daniel B and Others brought an action against A before the tribunal de commerce de Paris (Commercial Court, Paris, France), seeking, in particular, compensation for the damage they consider to have suffered as a result of the unfair competition in which A allegedly engaged by unduly obtaining an advantage from failing to comply with the French legislation on the online advertising and sale of medicinal products.

23 A takes the view, for its part, that those rules do not apply to it since it is duly established in the Netherlands to operate as a dispensing pharmacy and sells its products to French consumers via electronic commerce.

24 By judgment of 11 July 2017, the tribunal de commerce de Paris (Commercial Court, Paris) ruled that the creation of a website targeted at French consumers was governed by Netherlands law. However, according to that court, Articles R. 4235-22 and R. 4235-64 of the Public Health Code are applicable to companies established in other Member States which sell medicinal products via the internet to French patients. By distributing more than three million advertising leaflets outside of its pharmacy, A had solicited French clients by methods unworthy of the profession of pharmacist and in breach of those provisions. The tribunal de commerce de Paris (Commercial Court, Paris) concluded that the failure to comply with those provisions, which conferred on A an economic advantage over other market operators, amounted to unfair competition.

25 A appealed against that decision to the cour d'appel de Paris (Court of Appeal, Paris, France), arguing that Articles R. 4235-22 and R. 4235-64 of the Public Health Code do not apply to it. Those provisions, it argued, constitute barriers to the principle of the application of the rules of the country of origin, laid down in Article 3 of Directive 2000/31 and Article 85c of Directive 2001/83, and to the free movement of goods guaranteed under Article 34 TFEU, which are not justified by the protection of public health.

26 Before the cour d'appel de Paris (Court of Appeal, Paris), Daniel B and Others sought confirmation of the decision of the tribunal de commerce de Paris (Commercial Court, Paris) in so far as it applied French law to the advertising of medicinal products and in so far as it classified as 'an act of unfair competition' the extensive advertising carried out by A, on the ground that it was contrary to the dignity of the profession of pharmacist and that its content promoted the abusive consumption of medicinal products. Daniel B and Others seek to have that decision varied as to the remainder, arguing that the Public Health Code and the Decree on best practice in the dispensing of medicinal products also govern the use of paid referencing by A. Daniel B and Others claim that the restrictions on advertising medicinal products online resulting from the Public Health Code are justified by the objective of protecting the dignity and honour of the profession of pharmacist. Those restrictions, they submit, are proportionate to the pursuit of that objective, which is itself linked to the protection of public health.

27 In those circumstances, the cour d'appel de Paris (Court of Appeal, Paris) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'... [Does] EU law, in particular:

– Article 34 [TFEU];

- Article 85c of ... Directive [2001/83], [and]
- the internal-market clause in Article 3 of Directive [2000/31]

[allow] a Member State of the [European] Union to impose, within its territory, specific rules on pharmacists who are nationals of another EU Member State operating in its territory concerning:

- the prohibition of soliciting clients through procedures and methods which are regarded as being contrary to the dignity of the profession, pursuant to the present version of Article R. 4235-22 of the [Public Health Code];
- the prohibition of inciting patients to engage in abusive consumption of medicinal products, pursuant to the present version of Article R. 4235-64 of the [Public Health Code];
- the obligation to observe good practices, as defined by the public authorities of the Member State, in the distribution of medicinal products, which also requires that a health questionnaire be included when medicinal products are ordered online and which prohibits the use of paid referencing pursuant to the present version of the [Decree on best practice in the dispensing of medicinal products and the Decree on technical rules] ?'

Consideration of the question referred

Preliminary observations

28 As is apparent from the wording of the question referred, the question concerns, in essence, the conformity of national legislation with EU law, applied by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State.

29 In order to answer that question, it is appropriate, in the present case, to have regard primarily to the provisions of Directive 2000/31.

30 First of all, in accordance with Article 1(1) and (2) of that directive, read together, the objective of the directive is to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States by approximating, to the extent necessary, certain national provisions applicable to those services.

31 Next, Article 2(a) of that directive, read together with Article 1(1)(b) of Directive 2015/1535, defines 'information society services' as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services', on the basis that, as follows from recital 18 of Directive 2000/31, those services span a wide range of economic activities which take place online, such as, in particular, the online sale of goods.

32 Lastly, as regards, more specifically, online sales services relating to medicinal products, it follows from Article 1(5) of Directive 2000/31 that such sales are not among the activities excluded from the application of that directive (see, by analogy, judgment of 2 December 2010, *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 27). For its part, Article 85c of Directive 2001/83 on the sale at a distance of medicinal products to the public by means of information society services refers, inter alia, to the provisions of Directive 2000/31 and does not prohibit the sale at a distance of medicinal products not subject to medical prescription, which alone are the subject of the case at issue in the main proceedings.

33 It follows that an online sales service relating to medicinal products, such as that at issue in the main proceedings, may constitute an information society service, within the meaning of Article 2(a) of Directive 2000/31 and, therefore, may be within the scope of that directive as regards the requirements applicable to that service, which come within the ‘coordinated field’, within the meaning of Article 2(h) of that directive.

34 Furthermore, under Article 3(4) of Directive 2000/31, Member States may, in respect of a given information society service falling within the coordinated field, take measures that derogate from the principle of the freedom to provide information society services, where the two cumulative conditions set out in Article 3(4)(a) and (b) are satisfied (see, to that effect, judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraphs 83 and 84). Thus, an interpretation of Article 3(4) of that directive, to the effect that Member States may justify, on the basis of primary law, a requirement that does not meet the conditions laid down in that provision would deprive that provision of any practical effect by ultimately undermining the harmonisation in this area intended by that directive (see, by analogy, judgment of 16 June 2015, *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 37). In those circumstances, there is no need to assess the national legislation at issue in the main proceedings by reference to primary law, in particular Article 34 TFEU.

Admissibility

35 First, the French Government claims that the question referred is inadmissible in so far as it concerns the interpretation of the provisions of Directive 2000/31. It argues that the provisions of a directive cannot be relied on by a private individual against another private individual in the context of a dispute of a horizontal nature for the purpose of preventing the application of national legislation that is contrary to those provisions. Thus, in its view, that aspect of the question referred is hypothetical.

36 In that regard, it should be recalled that it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, inter alia the relevance of the questions that it submits to the Court. Consequently, where those questions concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (see, to that effect, judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 31).

37 Questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 32).

38 Admittedly, in the case of a dispute between private persons, the Court has consistently held that a directive cannot of itself impose obligations on private persons and cannot therefore be relied upon as such against private persons. However, the Court has also repeatedly held that Member States’ obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their

jurisdiction, the courts (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited).

39 In applying national law, national courts called upon to interpret that law are thus *inter alia* required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

40 In those circumstances, it is in no way obvious that the question referred, in so far as it relates to Directive 2000/31, raises a hypothetical problem.

41 Secondly, A claims that the French Republic has failed to fulfil its obligation under the second indent of Article 3(4)(b) of Directive 2000/31 to notify the restrictive measures at issue in the main proceedings.

42 In that regard, it should be noted that, where national legislation which imposes various prohibitions or obligations on a provider of information society services thereby restricts the freedom to provide services, the Member State concerned must, pursuant to that provision, have previously notified the Commission and the Member State on whose territory the service provider in question is established of its intention to adopt the restrictive measures concerned (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 85).

43 The Court has, moreover, previously held that that notification obligation constitutes an essential procedural requirement which justifies the unenforceability of non-notified measures restricting the freedom to provide an information society service against individuals (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 94).

44 However, as is clear from the case-law cited in paragraph 37 of the present judgment, questions relating to EU law enjoy a presumption of relevance. That presumption cannot be rebutted by the mere fact that one of the parties to the main proceedings contests a certain fact which must be verified by the referring court and not by the Court of Justice (see, to that effect, judgments of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 26, and of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraph 38).

45 It follows from the foregoing that the question referred for a preliminary ruling is admissible.

Substance

46 In the light of the clarifications set out in paragraphs 28 to 34 above and in order to provide the referring court with an answer which will be helpful in resolving the dispute before it, it is appropriate to understand its question as asking, in essence, whether Directive 2000/31 must be interpreted as precluding the application of national legislation, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, which:

- prohibits pharmacies selling those medicinal products from soliciting their clients through certain procedures and methods, in particular through the extensive sending of post and leaflets for advertising purposes outside their pharmacy;

- prohibits such pharmacies from making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded;
- requires such pharmacies to include a health questionnaire in the process of ordering medicinal products online;
- prohibits such pharmacies from using paid referencng on search engines and price comparison websites.

The first part of the question referred

47 By the first part of its question, the referring court seeks to ascertain, in essence, whether Directive 2000/31 must be interpreted as precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from soliciting their clients through certain procedures and methods, in particular through the extensive sending of post and leaflets for advertising purposes outside their pharmacy.

48 In the present case, it is apparent from the order for reference that the service provider at issue in the main proceedings is carrying out a wide-ranging and multifaceted advertising campaign for its online sales services, both by means of physical media, such as, inter alia, postal mail and leaflets, and via its internet site.

49 In order to answer the first part of the question, it is important to note at the outset that Titles VIII and VIIIa of Directive 2001/83 regarding the advertising of medicinal products do not apply.

50 As the Advocate General noted in point 52 of his Opinion, Articles 86 to 100 of Directive 2001/83, which form those titles, are intended to regulate the content of the advertising message and the manner of advertising for particular medicinal products, but do not govern advertising of online sales services relating to medicinal products.

51 It is therefore necessary to ascertain, in the first place, whether the advertising activity, as described in paragraph 48 above, falls within the scope of Directive 2000/31, depending on whether that activity is carried out by means of physical or electronic media.

52 In that regard, Article 3(1) of Directive 2000/31 provides that each Member State is to ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in that Member State which fall within the ‘coordinated field’, within the meaning of Article 2(h) of that directive.

53 According to Article 2(h) of Directive 2000/31, the ‘coordinated field’ covers only requirements applicable to services that are provided by electronic means and, in particular, as is apparent from recital 21 of that directive, requirements relating to online advertising.

54 However, the advertising at issue in the main proceedings is partly carried out by means of physical media.

55 Nevertheless, it should be pointed out that such advertising is intended, as a whole and irrespective of the process by which it is actually carried out, to attract potential consumers to a pharmacy’s website and to promote the sale of its products online.

56 Such advertising by the provider thus appears to be an activity that is ancillary to and inseparable from its online sales service relating to medicinal products, which is its main economic activity.

57 In those circumstances, it would be artificial to consider the part of the advertising carried out online as falling within the ‘coordinated field’ and to exclude from that field the part of the advertising carried out by means of physical media.

58 Moreover, that interpretation is consistent with Article 2(h)(i) of Directive 2000/31, which provides that the ‘coordinated field’ concerns requirements relating to the pursuit of the activity of an information society service, such as requirements concerning inter alia the behaviour of the service provider, requirements regarding the quality or content of the service ‘including those applicable to advertising’.

59 It follows from the foregoing that, irrespective of whether it is carried out by physical or electronic means, advertising activity such as that at issue in the main proceedings constitutes an element that is ancillary to and inseparable from the online sales service and, as such, falls, in its entirety, within the ‘coordinated field’, within the meaning of Directive 2000/31.

60 In those circumstances, it is important to note, in the second place, that the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription may not, so far as relates to that activity, as a general rule, pursuant to Article 3(2) of Directive 2000/31, restrict the free movement of information society services from another Member State.

61 In the present instance, a prohibition, such as that at issue in the main proceedings, imposed by a Member State, is such as to restrict the possibility for a pharmacy established in another Member State to make itself known to potential customers in that first Member State and to promote the online sales service relating to its products that it offers to those customers.

62 Therefore, such a prohibition must be regarded as a restriction on the freedom to provide information society services.

63 That said, in the third place, pursuant to Article 3(4)(a) of Directive 2000/31, Member States may, in respect of a given information society service, take measures that derogate from Article 3(2) of that directive, provided, first, that those measures are necessary in the interests of public policy, the protection of public health, public security or the protection of consumers; secondly, that those measures are taken against an information society service which actually undermines those objectives or constitutes a serious and grave risk to those objectives; and, thirdly, that those measures are proportionate to those objectives.

64 As regards the conditions of necessity and proportionality laid down in Article 3(4)(a) of Directive 2000/31, account must be taken, as the Advocate General noted in point 122 of his Opinion, of the case-law relating to Articles 34 and 56 TFEU, for the purposes of assessing whether the national legislation at issue complies with EU law, in so far as those conditions largely overlap with the requirements that must be fulfilled by any obstacle to the fundamental freedoms guaranteed in those articles of the TFEU.

65 In that regard, the French Government claims that the prohibition on pharmacies selling medicinal products online not subject to medical prescription – from soliciting their clients through procedures and methods such as those at issue in the main proceedings, implemented extensively

and intensively, is justified on the basis of the protection of the dignity of the profession of pharmacist.

66 In view of the importance of the relationship of trust which must prevail between a health professional and his or her patient, the protection of the dignity of a regulated profession, which is also reflected in Article 8(1) of Directive 2000/31, is capable of constituting an overriding reason in the public interest, relating to the protection of public health, capable of justifying a restriction on the freedom to provide services (see, to that effect, judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraphs 67 and 68).

67 In that regard, the Court has previously held, in particular, that the extensive use of advertising or the selection of aggressive promotional messages may undermine the protection of health and compromise the dignity of a health profession (see, by analogy, judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraph 69).

68 Since the prohibition at issue in the main proceedings thus has the objective of protecting public health, referred to in Article 3(4)(a) of Directive 2000/31 and, moreover, in Article 85c(2) of Directive 2001/83, it is necessary, next, to assess whether that prohibition is appropriate to ensure the attainment of that objective.

69 In that regard, legislation prohibiting a provider, such as that at issue in the main proceedings, from carrying out an extensive and intensive advertising campaign, including outside the pharmacy and by means of physical and electronic media, appears to be appropriate to ensure the attainment of the objective of protecting the dignity of the profession of pharmacist and, ultimately, the objective of protecting public health.

70 As the Spanish Government rightly maintains, such a practice carries the risk of medicinal products being equated with ordinary consumer goods, such as those subject to ‘piggyback marketing’. In addition, the large-scale distribution of advertising leaflets conveys a commercial and mercenary image of the profession of pharmacist which may alter the public perception of that profession.

71 As regards whether a prohibition such as that at issue in the main proceedings is necessary, it must be noted that the health and life of humans rank foremost among the assets and interests protected by the TFEU and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion (judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 71).

72 That said, the Court has previously held that, notwithstanding that measure of discretion, a restriction arising from the application of national legislation imposing a general and absolute prohibition of any advertising used by health professionals to promote their care activities goes beyond what is necessary to protect public health and the dignity of a regulated profession (see, to that effect, judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335, paragraphs 72 and 75).

73 In the light of that case-law, it is for the referring court to determine whether the prohibition at issue in the main proceedings prevents the provider at issue in the main proceedings from carrying out any advertising outside his or her pharmacy, regardless of the medium used or the scale thereof. If that were the case, the prohibition would go beyond what is necessary to guarantee attainment of the objectives pursued.

74 It follows from all the foregoing considerations that the answer to the first part of the question referred is that Directive 2000/31 must be interpreted as not precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from soliciting their clients through certain procedures and methods, in particular through the extensive sending of post and leaflets for advertising purposes outside their pharmacy, provided, however, that it does not result in the provider in question being prevented from carrying out any advertising outside his or her pharmacy, regardless of the medium used or the scale thereof, which it is for the referring court to ascertain.

The second part of the question referred

75 By the second part of its question, the referring court seeks to ascertain, in essence, whether Directive 2000/31 must be interpreted as precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded.

76 In the present case, a prohibition, such as that at issue in the main proceedings, imposed by a Member State, is liable to restrict the possibility for a pharmacy established in another Member State to attract interested persons residing in that first Member State and to make the online sales service it offers there more attractive.

77 It follows that such a prohibition must be regarded as a restriction on the freedom to provide information society services within the meaning of Article 3(2) of Directive 2000/31.

78 It is therefore necessary, in accordance with Article 3(4)(a) of that directive, to examine whether that prohibition pursues one of the objectives referred to in that provision and whether it is appropriate to ensure the attainment of that objective and does not go beyond what is necessary in order to attain that objective.

79 First of all, the French Government states that the prohibition at issue in the main proceedings is intended to prevent the excessive or inappropriate use of medicinal products.

80 In that regard, it is clear from the case-law that such an objective contributes to achieving a high level of protection of public health (see, to that effect, judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraphs 32 to 34).

81 Next, since promotional offers, such as those at issue in the main proceedings, are liable to induce interested persons to purchase and, in some circumstances, to over-consume medicinal products, the prohibition of such offers must be regarded as appropriate for obtaining the objective of protecting public health.

82 Lastly, as regards whether that prohibition is necessary, A takes the view that it amounts to considering any price discount as being liable to encourage abusive consumption of medicinal products since it does not set a threshold above which a promotional offer must be regarded as leading to over-consumption. Furthermore, that prohibition also applies to para-pharmaceutical products.

83 In that regard, and in so far as the Court does not have sufficient information regarding the possible existence of more precise conditions governing the application of the prohibition on promotional offers and, in particular, regarding whether that prohibition relates only to the promotion of medicinal products or also to the promotion of para-pharmaceutical products, it is for the referring court to ascertain how the prohibition at issue is applied in practice and whether such application goes, in some circumstances, beyond what is necessary to protect public health.

84 It follows from the foregoing considerations that the answer to the second part of the question referred is that Directive 2000/31 must be interpreted as not precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded, provided, however, that such a prohibition is sufficiently circumscribed and particularly targeted solely at medicinal products and not at mere para-pharmaceutical products, which it is for the national court to ascertain.

The third part of the question referred

85 By the third part of its question, the referring court asks, in essence, whether Directive 2000/31 must be interpreted as precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which requires that pharmacies selling such medicinal products include a health questionnaire in the process of ordering medicinal products online.

86 In the present case, the national legislation concerned makes validation of the first order for medicinal products placed by a patient on a pharmacy's website subject to prior completion of an online health questionnaire.

87 In that regard, it should be noted that, under Article 2(h)(i) of Directive 2000/31, the 'coordinated field' covers requirements related to the pursuit of the activity of an information society service, such as requirements concerning inter alia the content of the service, including those applicable to contracts.

88 Since the measure at issue in the main proceedings governs the conditions under which a contract for the online sale of medicinal products not subject to medical prescription may be concluded and the manner in which the pharmacist's sales and advice activity must be carried out online, it must be regarded as falling within the 'coordinated field', within the meaning of Directive 2000/31.

89 Consequently, Article 3(2) of Directive 2000/31, under which the Member State of destination of an online sales service relating to medicinal products may not, in principle, restrict the free movement of information society services from another Member State, applies.

90 However, a measure such as that at issue in the main proceedings is clearly liable to have a deterrent effect on patients wishing to purchase medicinal products online and therefore constitutes such a restriction.

91 It is therefore necessary to examine, in accordance with Article 3(4)(a) of that directive, whether such a measure pursues one of the objectives referred to in that provision and whether it is

appropriate to ensure the attainment of that objective and does not go beyond what is necessary in order to attain that objective.

92 First of all, for the purposes of justifying that measure, the French Government relies on the objective of ensuring the provision of individual advice to patients in order to protect them from misuse of medicinal products.

93 In that regard, it should be noted that the Court has previously recognised that such an objective relating to the protection of public health is legitimate (see, to that effect, judgment of 11 December 2003, *Deutscher Apothekerverband*, C-322/01, EU:C:2003:664, paragraph 106).

94 It is true that the consumption of medicinal products not subject to medical prescription does not, in principle, pose similar risks to those connected with the consumption of medicinal products that are subject to medical prescription (see, to that effect, judgment of 11 June 2020, *ratiopharm*, C-786/18, EU:C:2020:459, paragraph 36). However, it cannot be excluded that certain risks may also arise from the use of medicinal products not subject to medical prescription.

95 The measure at issue in the main proceedings thus has the objective of protecting public health, referred to in Article 3(4)(a) of Directive 2000/31.

96 The French Government claims that a medical questionnaire, such as that at issue in the main proceedings, is necessary in so far as the pharmacist concerned does not see the patient in his or her pharmacy and cannot therefore speak directly to the patient. The pharmacist cannot, therefore, give the patient advice on his or her own initiative. In those circumstances, that questionnaire should be regarded as enabling the pharmacist to gain better knowledge of the patient concerned and, by detecting possible contra-indications, to ensure the most appropriate dispensing of medicinal products.

97 Such considerations make it possible to consider that the measure at issue in the main proceedings is appropriate for the purposes of protecting the patient's health.

98 Lastly, as regards whether that measure is necessary, A submits that the Decree on best practice in the dispensing of medicinal products already ensures that patients can receive personalised advice by requiring online pharmacies to provide them with the possibility of a remote interactive exchange with a pharmacist. A also notes that the amount of medicinal products ordered by an interested party via its website are checked on a case-by-case basis, with reference to various parameters, including the history of orders made by that party. A claims that those checks are sufficient to prevent the risk of misuse of medicinal products and, accordingly, the measure at issue in the main proceedings goes beyond what is necessary.

99 However, the Court has previously held that an increase in the number of online interactive features, which the customer must use before being able to proceed to a purchase of a medicinal product, is an acceptable measure which is less detrimental to the free movement of goods than a prohibition of the online sale of medicinal products and which, just as effectively, ensures the attainment of the objective of reducing the risk of misuse of medicinal products purchased online (see, to that effect, judgment of 11 December 2003, *Deutscher Apothekerverband*, C-322/01, EU:C:2003:664, paragraphs 112 to 114).

100 Having regard to that case-law and to the measure of discretion accorded to Member States, as recalled in paragraph 71 above, national legislation such as that at issue in the main proceedings does not appear to go beyond what is necessary to ensure that the objective pursued is achieved.

101 Furthermore, as the Advocate General noted in point 148 of his Opinion, the fact that the patient has the option to consult a pharmacist before placing an order, even when coupled with a check on the amounts purchased by the person concerned, is not as effective as verification carried out by means of the prior collection of information from the patient.

102 It follows that the answer to the third part of the question referred is that Directive 2000/31 must be interpreted as not precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which requires that pharmacies selling such medicinal products include a health questionnaire in the process of ordering medicinal products online.

The fourth part of the question referred

103 By the fourth part of its question, the referring court seeks to ascertain, in essence, whether Directive 2000/31 must be interpreted as precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies selling such medicinal products from using paid referencing on search engines and price comparison websites.

104 Such legislation is such as to restrict the possibility for a pharmacy to make itself known to potential customers residing in another Member State and to promote the online sales service that it offers those customers.

105 In those circumstances, such legislation must be regarded as a restriction on the freedom to provide information society services derogating from the general prohibition laid down in Article 3(2) of Directive 2000/31.

106 It is therefore necessary to examine, in accordance with Article 3(4)(a) of that directive, whether the prohibition at issue in the main proceedings pursues one of the objectives referred to in that provision and whether it is appropriate to ensure the attainment of that objective and does not go beyond what is necessary in order to attain that objective.

107 As it stated at the hearing before the Court, it is apparent that the French Government justifies the prohibition of paid referencing on search engines and price comparison websites on the basis that such listings may have an impact on the balanced distribution of pharmacies throughout national territory since such listings are likely to concentrate the marketing of medicinal products in the hands of large pharmacies.

108 In that regard, the Court has previously recognised that the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality throughout national territory is capable of justifying a restriction on trade between Member States in so far as it contributes to the protection of health and life of humans (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 68 and the case-law cited).

109 Since the prohibition at issue in the main proceedings thus has the objective of protecting public health, referred to in Article 3(4)(a) of Directive 2000/31, it is necessary to assess whether it is appropriate to ensure the attainment of that objective and does not go beyond what is necessary in order to do so.

110 The Court has previously held that, where there is uncertainty as to the existence or extent of risks to human health, it is important that the Member State concerned should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. In addition, the Member State may take the measures that reduce, as far as possible, a public-health risk, including a risk to the reliability and quality of the provision of medicinal products to the public (judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 72 and case-law cited).

111 That said, it is for the Member States, in each individual case, to, in particular, adduce evidence of the appropriateness and necessity of a measure they adopt in derogation of a fundamental freedom (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraphs 69 and 70 and the case-law cited).

112 However, it should be noted that the French Government has not supported its general assertion, referred to in paragraph 107 above, with any specific evidence. Such an assertion cannot, therefore, satisfy the requirement of proof specified in the previous paragraph.

113 Consequently, it will be for the referring court to objectively examine whether any evidence that may be adduced before it allows it to reasonably conclude that the means chosen are appropriate for the attainment of the objectives pursued and that those objectives cannot be attained by measures which are less restrictive (see, by analogy, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 70 and the case-law cited).

114 It follows that the answer to the fourth part of the question referred is that Directive 2000/31 must be interpreted as precluding the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies selling such medicinal products from using paid referencing on search engines and price comparison websites, unless it is duly established before the referring court that such legislation is appropriate to ensure the attainment of the objective of protecting public health and does not go beyond what is necessary in order to attain that objective.

115 In the light of all of the foregoing, the answer to the question referred is that Directive 2000/31 must be interpreted as meaning that:

- it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from soliciting their clients through certain procedures and methods, in particular through the extensive sending of post and leaflets for advertising purposes outside their pharmacy, provided that it does not result in the provider in question being prevented from carrying out any advertising outside his or her pharmacy, regardless of the medium used or the scale thereof, which it is for the referring court to ascertain;
- it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded, provided, however, that such a prohibition is sufficiently circumscribed and particularly targeted solely at medicinal products and not at mere para-pharmaceutical products, which it is for the national court to ascertain;

- it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which requires that pharmacies selling such medicinal products include a health questionnaire in the process of ordering medicinal products online;
- it precludes the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies selling such medicinal products from using paid referencing on search engines and price comparison websites, unless it is duly established before the referring court that such legislation is appropriate to ensure the attainment of the objective of protecting public health and does not go beyond what is necessary in order to attain that objective.

Costs

116 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 (Third Chamber) hereby rules:

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’) must be interpreted as meaning that:

- **it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from soliciting their clients through certain procedures and methods, in particular through the extensive sending of post and leaflets for advertising purposes outside their pharmacy, provided that it does not result in the provider in question being prevented from carrying out any advertising outside his or her pharmacy, regardless of the medium used or the scale thereof, which it is for the referring court to ascertain;**
- **it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies from making promotional offers consisting in a discount on the total price of an order of medicinal products once a certain amount is exceeded, provided, however, that such a prohibition is sufficiently circumscribed and particularly targeted solely at medicinal products and not at mere para-pharmaceutical products, which it is for the national court to ascertain;**
- **it does not preclude the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which requires that pharmacies selling such medicinal products include a health questionnaire in the process of ordering medicinal products online;**

– **it precludes the application, by the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription, to the provider of that service established in another Member State, of national legislation which prohibits pharmacies selling such medicinal products from using paid referencng on search engines and price comparison websites, unless it is duly established before the referring court that such legislation is appropriate to ensure the attainment of the objective of protecting public health and does not go beyond what is necessary in order to attain that objective.**

[Signatures]

* Language of the case: French.
