

Healthcare & Life Sciences - Poland

Court rules on pharmaceutical loyalty programmes

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Background Facts Decision

The Supreme Administrative Court recently ruled on the issue of whether customer loyalty programmes were permissible advertising under the Pharmaceutical Law 2001.⁽¹⁾ The court held that such programmes constituted advertising of pharmacies and as such were prohibited. The decision gives some guidance on interpretation of the scope of the ban, which entered into force on January 1 2012.

Background

The Pharmaceutical Law and the Healthcare Activity Law 2011 are the main legal acts which regulate issues related to the advertising of pharmacies and healthcare institutions in Poland. The Pharmaceutical Law was amended in 2012 and new Article 94a introduced a ban on the advertising of pharmacies and their business. However, according to Article 94a(1), informing customers of the pharmacy's location and/or opening hours will not be perceived as advertising:

"It is forbidden to advertise community pharmacies and pharmaceutical dispensaries and their activities. The information about the location and opening hours of the community pharmacy and pharmaceutical dispensary is not advertising."

The rationale behind the rule was to protect patients and public finances from the negative impact of competitive advertising between pharmacy chains. However, the rule provides no guidance on the scope of prohibited advertising – in particular, whether it encompasses all promotional activities conducted by pharmacies or only direct advertising.

Facts

A Polish pharmacy chain launched two loyalty programmes for its customers:

- a pharmaceutical care programme, under which a pharmacy customer was given a card on which the pharmacist recorded information on all purchased medicinal products and checked whether there were any restrictions on combining such products; and
- a 60-plus programme designed for elderly customers, which suggested cheaper medicines for customers to buy, rather than reimbursed medicines.

Leaflets informing customers of the programmes were displayed in the pharmacies belonging to the chain and on its website. The Voivodeship pharmaceutical inspector ordered the immediate cessation of such advertising and fined the owner of the pharmacies. The inspector claimed that:

- the loyalty programmes were aimed at the general public as they were accessible on the pharmacies' website; and
- the act of the pharmacies counting points and providing information and explanations regarding the programmes was not part of the pharmaceutical service.

The pharmacy chain unsuccessfully appealed the Voivodeship pharmaceutical inspector's decision to the main pharmaceutical inspector and then to the Voivodeship Administrative Court in Warsaw.⁽²⁾

Decision

The Supreme Administrative Court held that customer loyalty programmes at pharmacies constituted prohibited advertising. It stated that the programmes were addressed to the general public and their purpose was to encourage customers to use the services of the particular pharmacies, either to attract new customers or to retain the existing clientele. The court also confirmed that the injunction against advertising could be directed not only against the entity managing the pharmacy, but also against anyone who advertised a pharmacy and thus violated the prohibition.

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The decision stated that all customer loyalty programmes at pharmacies are prohibited under the Pharmaceutical Law. It supported the reasoning that the ban on pharmacy advertising encompasses a number of promotional activities that may be used by pharmacies, including customer cards, bonus systems, lotteries, loyalty coupons and gifts. However, it may be questioned whether the court has gone too far and incorrectly extended the scope of the ban on pharmacy advertising to include the advertising of medicines within a pharmacy. The court ruled that there was no difference between mere advertising and information addressed to customers on commercial offers and services within the pharmacy.

It has been argued that the statutory ban on advertising of pharmacies constrains the freedom of economic activity. For this reason, in October 2013 the Polish Confederation Lewiatan, representing the biggest pharmacy chains in Poland, lodged a complaint with the European Commission against Article 94a of the Pharmaceutical Law, which introduced the ban on advertising by pharmacies. The complaint has not been yet published, but it was based on three counts:

- Articles 3 and 4 of the Treaty on European Union;
- Articles 34, 49 and 101 of the Treaty on the Functioning of the European Union; and
- Title VIII of Directive 2001/83/EC.

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Endnotes

- (1) Judgment of the Supreme Administrative Court, August 27 2014 (II GSK 1000/13)
- (2) Judgment of the Voivodeship Administrative Court, Warsaw, January 25 2013 (VI SA/Wa 2463/12).

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