

# Legal Alert

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## Law and the sale of medicinal products online - CJEU judgment

According to the EU Directive, Member States shall ensure that medicinal products which are Over-The-Counter Drug (OTC) are offered for sale at a distance, but under certain conditions. One of these is to limit the circle of entities that can offer medicinal products via distance selling<sup>1</sup>.

In Poland, distance selling of OTC medicinal products can only be conducted by pharmacies open to the public and pharmacy dispensary<sup>2</sup> - a consequence of the restriction mentioned above. Other Member States have adopted their own legislation, e.g. in France it is prohibited for pharmacists to cooperate with intermediaries who offer the sale and home delivery of medicinal products.

### Factual state

On 29 February 2024, the Court of Justice of the European Union (CJEU) issued a judgment in Case C-606/21, which may change the approach to the sale of OTC medicinal products via online platforms.

The judgment follows a dispute in France between *Doctipharma SAS* (the company) and *Union des Groupements de pharmaciens d'officine*. The company created and was responsible for managing a sales platform that enabled pharmacists to connect with pharmacy customers, including by editing and maintaining websites.

The action of the company, which is not a de facto pharmacist, was considered to involve participation in the trade of medicinal products and thus the company was engaged in illegal brokering of OTC medicinal products.

The case was considered by courts of all instances, even the French Cassation Court, which considered that a retrial was necessary.

During the retrial, the French Court of Appeal submitted a preliminary question to the CJEU on the interpretation of the Directive's provisions in relation to the distance selling of OTC medicinal products.

### CJEU decision

In its judgment, the CJEU emphasised that an unequivocal answer to the question of whether the activities of a company fall within the scope of Article 85c of the Directive and the correct interpretation of the provision in question depend on the correct assessment by the referring court of the characteristics of the service offered - **is the company merely assisting in making contact or is it nevertheless a sales entity?**

Depending on the answer to the above question:

- a) if the activity were considered to be the provision of distance selling of OTC medicinal products, then a Member State's prohibition on the provision of this service would be in compliance with the Directive;
- b) if the service offered by the company were to be regarded as merely enabling contact between the seller and the customer, with further activities being "left to" the seller (the company cannot therefore sell medicinal products itself) - then the prohibition of this service would be contrary to EU legislation.

## Summary

We would like to point out that the restriction in Polish pharmaceutical law is in line with the directive, which gave Member States the possibility to define the conditions for the **sale** of OTC medicinal products, including by means of subjective restrictions. However, the provisions of EU law and their correct interpretation should not lead to the restriction of other services, including those allowing contact between the pharmacy or the pharmacist and the customer.

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<sup>1</sup> 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.

<sup>2</sup> Article 68(3) of the Act of 6 September 2001 Pharmaceutical Law.