

The European Court of Justice on the liberalisation of community pharmacy services

Francesca Buttigieg BPharm(Hons), MSc(Sunderland)

Email: francescabuttigieg@gmail.com

Keywords: pharmacy, European Court of Justice, liberalisation, pharmacy legislation

Today EU citizens are becoming increasingly aware of infringement procedures initiated at the European Court of Justice regarding several and varied issues. Community pharmacies around the European Union are not an exception, and have also been the subject of certain infringement proceedings.

Since October 2008 a number of European countries have been requested to change their legislation in order to liberalize community pharmacy services. This was followed by an EU workshop on pharmacies held in Berlin; where "Director General Jorgen Homquist opened the workshop by explaining the commission's motivation.....: Due to complaints, the Commission is forced to open infringement proceedings, but hopes for a solution without a trial."¹ Present at the Summit were representatives from the Pharmaceutical Group of the European Union (PGEU) who argued that a financial crisis would follow market liberalization, on the

other hand the Health Consumer Powerhouse and the European Union of the Social Pharmacies – representing mostly chain pharmacies – were in favor of liberalization.

With respect to the issue "parliamentarians ...pointed to the pharmacists' value to public welfare and called on the European Commission to not only judge liberal professions exclusively by market-economical criteria".²

Notwithstanding this, formal infringement proceedings were filed. Proceedings were filed against Germany and Portugal (September 2008) and Italy (November 2008 – 2nd Warning) as follows:

"Germany- prohibition for non-pharmacists on owning pharmacies and prohibition on owning more than four pharmacies

Portugal – prohibition for medicines wholesaling companies on owning pharmacies and prohibition on owning more than four pharmacies"³

"The European Commission has decided to formally request Italy to amend its legislation banning pharmacists from having more than one pharmacy and restricting the maximum number of pharmacies that may be owned by groups of pharmacists to four. In addition the four pharmacies must be located in the same province."⁴ (N.B Italy has already been taken to the ECJ due to issues concerning "acquisition of holdings in and setting-up of retail pharmacies". More information is available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/858&format=HTML&aged=0&language=EN&guiLanguage=en>).

In December 2008 the Advocate General Yves Bot gave his opinion with regard to the case against Germany and Italy. The Advocate General stated that:

1. There has been no breach of Community law since even though liberalization has been restricted; it is being done with the purpose of protecting public health.
2. Each member state has its populations health in mind and it should attain this by whichever means possible.

The Advocate General continued by emphasizing that drug dispensing is "closely linked to the independence which a pharmacist is required to exhibit in carrying out his duties"⁵. Therefore having a pharmacist owned establishment decreases the probability of any 'external' influence in the pharmacist's decision-making.

In particular Bot argued that "The presence of a salaried pharmacist who takes on tasks involving relationships with third parties, cannot guarantee a proper medical supply of the public at the same degree in terms of quality and neutrality"⁶. Bot also added that "the practicing pharmacist would, in a case of professional negligence, be subject to the withdrawal not only of his practicing licence, but also of his authorization to run a pharmacy, with the onerous financial consequences which follow therefrom."⁷

It should be noted that it is the European Judges who will have the final decision, however, one should also keep in mind that more often than not the European

Judges take into consideration the Advocate General's opinion and respect it.

It was speculated that "According to information unconfirmed so far, the EU judges will decide on Tuesday, 19 May, if the ban on outside ownership is an unfair restriction to the basic freedoms of Common Law or not."⁸

This was indeed confirmed, when the European Court of Justice stated that pharmacists' "private interest connected with the making of a profit is tempered by their

training, their professional experience and by the responsibility they owe, given that any breach of the rules of law or professional conduct undermines not only the value of his investment but also his own professional existence."⁹

The Court also points out that the safety of the public can be jeopardized if a pharmacist is indeed employed. The Court also "draws attention to the very particular nature of medicinal products, whose therapeutic effects distinguish them

substantially from other goods."¹⁰

To conclude, one must remember that although the European Court of Justice is in agreement with the legislation of some European Member States this does not mean that it is imperative for all member states to follow suit, whether or not a pharmacy should be owned by a pharmacist or not and whether this imposes a risk to the country's public health is entirely up to the discretion of the Country's governing body.

References

1. Patrick Hollstein. EU Workshop on Pharmacies – Summit of liberalization. [Online]. 2008 Oct 22 [Cited 09 Jan 18]. Available from: URL <http://www.pharma-adhoc.com/index.php?m=1&s=5&showPage=1&id=123>
2. Alexander Müller. Only partial success for pharmacists. [Online]. 2008 Oct 30 [Cited 09 Jan 18]. Available from: URL <http://www.pharma-adhoc.com/index.php?m=1&s=5&showPage=1&id=132>
3. Anon. Freedom of establishment for pharmacies: infringement proceedings against Germany and Portugal. [Online] 2008 Sep 18 [Cited 09 Jan 18]. Available from: URL <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1352&format=HTML&aged=0&language=EN>
4. Anon. Pharmacies: infringement proceedings against Italy. [Online]. 2008 Nov 27 [Cited 09 Jan 18]. Available from: URL <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/785&format=HTML&aged=0&language=EN&guiLanguage=en>
5. Pharma Adhoc. Advocate General's Opinion: Bot confirms ban on outside ownership. [Online]. 2008 Dec 16 [Cited 09 Jan 28]. Available from: URL www.pharma-adhoc.com/index.php?m=1&s=5&showPage=1&id=169
6. Pharma Adhoc. Advocate General's Opinion: Bot confirms ban on outside ownership. [Online]. 2008 Dec 16 [Cited 09 Jan 28]. Available from: URL www.pharma-adhoc.com/index.php?m=1&s=5&showPage=1&id=169
7. Pharma Adhoc. Advocate General's Opinion: Bot confirms ban on outside ownership. [Online]. 2008 Dec 16 [Cited 09 Jan 28]. Available from: URL www.pharma-adhoc.com/index.php?m=1&s=5&showPage=1&id=169
8. Pharma Adhoc. ECJ Decides on Pharmacies. Pharma Adhoc. [Online]. 2009 Apr 08 [Cited 09 Apr 24]. Available from: URL <http://www.pharma-adhoc.com/index.php?m=1&id=267>
9. Pharma Adhoc. Confirmation all along the line. Pharma Adhoc. [Online]. 2009 May 19 [Cited 09 May 21]. Available from: URL <http://www.pharma-adhoc.com/index.php?m=1&id=285>
10. Pharma Adhoc. Confirmation all along the line. Pharma Adhoc. [Online]. 2009 May 19 [Cited 09 May 21]. Available from: URL <http://www.pharma-adhoc.com/index.php?m=1&id=285>