

Editorial

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Legal aspects of on-line pharmacy : *free movement of goods* is not tantamount to *free provision of services* !

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The matter discussed by Francis de Clippele in his paper published in this issue of the *Acta Chirurgica* concerns the legality of the Internet sale of pharmaceutical products to consumers.

To make a long story short, let's recall that since June 2000 a Dutch pharmaceutical company has been offering for sale at its Internet address prescription and non-prescription medicines for human use, in languages including German, for consumers in Germany. The medicinal products were all authorized, some in Germany and some in the Netherlands. Shortly thereafter, the Bavarian health insurance company – Bayerische Betriebskrankenkassen – announced that patients should buy their drugs over the Internet to cut costs. Furthermore the Bayerische Betriebskrankenkassen set up a contract with the Dutch internet pharmacy shop DocMorris and advised its 1.8 million members to order cheaper drugs via the Internet. This would enable them to fill prescriptions at lower cost than at a pharmacy and would also allow them to buy non-prescription drugs more cheaply. The Bavarian company's website tells members very clearly: "You can use DocMorris. Refundable drugs will be refunded by us, just like drugs from any other pharmacy." Gerhard Schulte, head of the Bayerische Betriebskrankenkassen, estimates that German health insurance companies could save about 409 million Euro by buying drugs over the Internet.

Of course, this was perceived as a move that threatens to undermine the monopoly of the German pharmaceutical industry. Needless to add that the insurance company faced immediately strong opposition from local pharmacies as well as state institutions. The Bavarian social ministry issued an order from the State Insurance Agency trying to stop the company accepting bills from DocMorris. However, the "round table" of the German Health Service, a body of health professionals and interest groups which advises the minister, came down in favour of Internet trade of pharmaceutical drugs – against strong protests of the pharmacists who fear they will go out of business. Health minister Ulla Schmidt said that the health insurance companies should refund the costs of prescribed drugs, which are also for sale in Germany, as long as there was information provided on the application and side effects of the drug.

Drug safety and the nationwide closed network of basic pharmaceutical care are at risk if local pharmacists have to compete with Internet shops, are objecting the opponents of DocMorris. However, the legal background is not yet clear. From 2001 through 2003 the German Pharmacists Association has tried to stop DocMorris, which is said to have at least 20 000 customers in Germany, mainly for over the counter drugs. In November 2000 a court in Frankfurt ordered DocMorris to stop its deals with German customers because trading drugs by post is not allowed in Germany. The Dutch Internet shop reacted by letting its customers pick up the drugs themselves or using special courier services. The matter went to the European Court¹ for a ruling ; the Dutch company contending that a prohibition on the sale of medicinal products by mail order or e-mail order was incompatible with EU laws, in general, and the principle of the *free movement of goods*, in particular.

While commenting the deliberation of the European Court, Mr. de Clippele wisely mentions that the need to provide individual advice to the patient and the protection of the supply with medicines by checking the prescriptions are however genuine. The guarantee to prevent medicines to be widely available and with no requirements also constitutes an adequate reason for the prohibition of the email-order trade in medicinal products. To substantiate this, one definitive argument can be found in a recent publication: consumers who self-select medicines from websites have insufficient access to information and advice at the point of ordering and on delivery to make informed decisions about their safe and appropriate use.² So much for the effect of encouraging the *autonomy* of the patient by allowing him or her to buy anything from anywhere for any disease – and maybe in the near future to buy any surgical techniques or equipment.

¹ Cours de Justice des Communautés Européennes (CJCE), 11 December 2003, aff. C-322/01.

² T. L. BESSELL, J. N. ANDERSON, C. A. SILAGY, L. N. SANSOM, J. E. HILLER. *Surfing, self-medicating and safety: buying non-prescription and complementary medicines via the internet*. *Qual Saf Health Care* 2003, **12**: 88-92.

The restrictions on publicity and sale of medicines are indeed challenging the principle of *free movement of goods* when those restrictions are considered necessary and proportionate to serve the general interest.³ In other words, public health and health protection should not give way to the principle of free movement of goods. Why ? Because a physician who prescribes a medication and a pharmacist who checks the correctness and the

appropriateness of the prescription are providing a service to a patient not just selling a good to a consumer. *Free movement of goods* is not tantamount to *free provision of services* !

³ S. BOILLAT, S. CALLENS. *DocMorris : une nouvelle porte vers la libre circulation des médicaments en Europe ?* T.Gez./Rev.Dr.Santé 2003-2004 : 340-342.