



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 July 2023¹

Case C-606/21

Doctipharma SAS

v

**Union des Groupements de pharmaciens d'officine (UDGPO),
Pictime Coreyre**

(Request for a preliminary ruling
from the cour d'appel de Paris (Court of Appeal, Paris, France))

(Reference for a preliminary ruling – Medicinal products for human use – Directive 2001/83/EC – Sale of medicinal products at a distance to the public – Medicinal products not subject to medical prescription – Directive 2000/31/EC – Activity of a company on a website regarding those non-prescription medicinal products – Activity consisting in an intermediation service between dispensing pharmacies and the public – Limitation of that type of sales by national law – Protection of public health)

I. Introduction

1. The marketing of medicinal products online falls within the scope of several acts of EU law and has been the subject of a number of requests for a preliminary ruling. By the present reference for a preliminary ruling, the national court asks the Court to examine an information society service which, like those used in other sectors of the economy, enables or at least facilitates the bringing together of professionals and their customers. More specifically, the questions referred by the national court concern the prohibition of certain activities imposed on the provider of such a service, which follows from the interpretation of the applicable national provisions, and the compatibility of that prohibition with Directive 2001/83/EC.²

¹ Original language: French.

² Directive 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').

II. Legal framework

A. *European Union law*

1. *Directives on information society services*

2. Article 1(2) of Directive 98/34/EC provides:³

‘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.

For the purposes of this definition:

- “at a distance” means that the service is provided without the parties being simultaneously present,
- “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

...’

3. Several EU legal instruments refer to that definition. In particular, Directive 2000/31/EC⁴ defines, in Article 2(a), the concept of ‘information society services’ by reference to Article 1(2) of Directive 98/34.

³ Directive 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 (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’).

⁴ Directive 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. Directive 2001/83

4. Article 1(20) of Directive 2011/62 inserted into Directive 2001/83 Title VIIA, entitled ‘Sale at a distance to the public’, which includes, inter alia, Article 85c, which is worded 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:
 - (i) name or corporate name and permanent address of the place of activity from where those medicinal products are supplied;
 - (ii) the starting date of the activity of offering medicinal products for sale at a distance to the public by means of information society services;
 - (iii) the address of the website used for that purpose and all relevant information necessary to identify that website;
 - (iv) if applicable, the classification in accordance with Title VI of the medicinal products offered for sale at a distance to the public by means of information society services.

Where appropriate, that information shall be updated;

- (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:
 - (i) the contact details of the competent authority or the authority notified pursuant to point (b);
 - (ii) a hyperlink to the website referred to in paragraph 4 of the Member State of establishment;
 - (iii) the common logo referred to in paragraph 3 clearly displayed on every page of the website that relates to the offer for sale at a distance to the public of medicinal products. The common logo shall contain a hyperlink to the entry of the person in the list referred to in point (c) of paragraph 4.

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.'

B. French law

5. Under Article L. 5125-25 of the code de la santé publique (Public Health Code):

'Pharmacists or their support staff are prohibited from soliciting orders from the public.

Pharmacists are prohibited from receiving orders for medicinal products and other products or items referred to in Article L. 4211-1 through the usual intermediary of brokers and from engaging in the delivery and home distribution of the aforementioned medicinal products, products or items ordered from them in that way.

Any order delivered outside the dispensing pharmacy by any other person may be distributed only in a sealed packet bearing the customer's name and address.

However, subject to compliance with the first paragraph of Article L. 5125-21, dispensing pharmacists, as well as other persons legally authorised to replace, assist or support them, may personally dispense an order at the home of patients whose situation so requires.'

6. Article L. 5125-26 of that code provides:

'The sale to the public of any medicinal products, products and items referred to in Article L. 4211-1 through brokerage firms, joint buying organisations or establishments owned or managed by persons who do not hold one of the degrees, certificates or other qualifications referred to in Article L. 4221-1 shall be prohibited.'

III. Facts in the main proceedings

7. The website www.doctipharma.fr, operated by Doctipharma SAS, allows internet users to purchase, 'from pharmacies' websites' (or, in other words, as the referring court states, 'from a pharmacist operating its e-commerce website from Doctipharma's technical solution'), pharmaceutical products and non-prescription medicinal products.

8. The referring court describes the operation of that website as follows. Internet users must create a customer account and complete a form to that end by providing personal information which will enable them to be identified and facilitate access to the pharmacists' websites of their choice. In order to create an account, internet users must nominate the pharmacist from whom they will make their purchases and to whom they will link their account. The Doctipharma

website offers non-prescription medicinal products in the form of a pre-loaded catalogue which internet users can ‘consult’ with a view to placing an order. The website presents the medicinal products offered by the pharmacies in the form of product ranges by indicating their prices and sends the order to the pharmacist whose website is hosted on the Doctipharma website. Payment is made by means of a single payment system common to all the associated pharmacies. A message sent to the customer account and the email address of the internet user who placed the order confirms that the order has been finalised.

9. The Union des Groupements de pharmaciens d’officine (UDGPO) (Union of Pharmacy Groups (UDGPO)) is an association of groups of pharmacies. It considers that the online sales process offered by Doctipharma to pharmacies means that that company is participating in the e-commerce of medicinal products and that, since Doctipharma is not a pharmacist, that activity is unlawful.

10. By judgment of 31 May 2016, the tribunal de commerce de Nanterre (Commercial Court, Nanterre, France) held that Doctipharma’s website was unlawful as far as the sale of medicinal products was concerned and essentially ordered Doctipharma to stop engaging in e-commerce in medicinal products on that website.

11. Doctipharma brought an appeal before the cour d’appel de Versailles (Court of Appeal, Versailles, France) which set aside that judgment by its judgment of 12 December 2017. That court took the view that the Doctipharma website was lawful since the internet users’ orders, which only pass through the platform created by Doctipharma as technical support for the dispensing pharmacists’ websites, are received by the pharmacists themselves without Doctipharma intervening in their processing in any other way. According to that court, that website enables customers to be put in direct contact with dispensing pharmacies.

12. By judgment of 19 June 2019, the Cour de cassation (Court of Cassation, France) set aside that judgment for infringement of Articles L. 5125-25 and L. 5125-26 of the Public Health Code and referred the case back to the cour d’appel de Paris (Court of Appeal, Paris, France), the referring court in the present case. According to the Cour de cassation (Court of Cassation), it is evident from Doctipharma’s activity, which consists in particular of connecting dispensing pharmacists with potential patients for the sale of medicinal products, that the company acts as an intermediary and thus participates in the e-commerce of medicinal products without being a pharmacist, in breach of those provisions of the Public Health Code.

13. By a statement dated 19 August 2019, Doctipharma brought an action before the cour d’appel de Paris (Court of Appeal, Paris), asking it subsequently to refer a number of questions to the Court of Justice for a preliminary ruling concerning, essentially, the interpretation of Article 85c of Directive 2001/83 and the principle of the free movement of services.

14. Doctipharma considers that its activity consists in the technical design and maintenance of a shared solution intended for dispensing pharmacists, with a view to enabling them to publish and operate their e-commerce websites for non-prescription medicinal products in accordance with the provisions governing the online sale of medicinal products. According to Doctipharma, the French courts must interpret Article L. 5125-25, paragraph 2, and Article L. 5125-26 of the Public Health Code in the light of Article 85c of Directive 2001/83 in order to determine whether the prohibition on intermediation in the sale of medicinal products resulting from those national provisions must apply to its activity.

15. In addition, Doctipharma submits that the solution adopted in the judgment in *Asociación Profesional Elite Taxi*⁵ is based on facts specific to that case relating, in particular, to the decisive influence exercised by Uber over the conditions under which drivers provide that service and it therefore cannot be transposed to the dispute in the main proceedings. The same applies, in its view, to the judgment in *A (Advertising and sale of medicinal products online)*,⁶ since the case which gave rise to that judgment concerned the enforceability of French restrictions on advertising for the sale of medicinal products against a company whose registered office is in a Member State other than France and which markets those products via its website to French consumers and therefore concerned a different issue from that at issue in the dispute in the main proceedings. It notes, however, that that judgment is relevant in the present case in so far as the online platform for the sale of medicinal products at issue in that case was an information society service within the meaning of Article 2(a) of Directive 2000/31.

16. In the same vein, referring to the judgment in *Asociación Profesional Elite Taxi*,⁷ the referring court considers, first, that the service provided by Doctipharma has different characteristics from that referred to in that judgment since, unlike Uber’s non-professional drivers, dispensing pharmacists are professionals in the sale of medicinal products and, second, Doctipharma does not appear to be involved in setting the price of the medicinal products. As to the judgment in *A (Advertising and sale of medicinal products online)*,⁸ the referring court states that that judgment does not concern the same questions as those raised in the dispute in the main proceedings, since that judgment concerns the compatibility of French restrictions on the advertising of medicinal products with Article 85c of Directive 2001/83.

IV. The questions referred for a preliminary ruling and the procedure before the Court

17. In those circumstances, the cour d’appel de Paris (Court of Appeal, Paris), by judgment of 17 September 2021, received at the Court of Justice on 30 September 2021, decided to stay the proceedings and to refer the following questions to the Court:

- ‘(1) Is Doctipharma’s activity, which is conducted on and from its website www.doctipharma.fr, to be regarded as an “information society service” within the meaning of Directive [98/34]?
- (2) If so, does Doctipharma’s activity, which is conducted on and from its website www.doctipharma.fr, fall within the scope of Article 85c of ... Directive [2001/83]?
- (3) Is Article 85c of ... Directive [2001/83] to be interpreted as meaning that the prohibition, based on an interpretation of Articles L. 5125-25 and L. 5125-26 of the Public Health Code, of Doctipharma’s activity, which is conducted on and from its website www.doctipharma.fr, constitutes a restriction justified by public health protection?
- (4) If not, is Article 85c of ... Directive [2001/83], to be interpreted as meaning that it allows Doctipharma’s activity, which is conducted on and from its website www.doctipharma.fr?

⁵ Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

⁶ Judgment of 1 October 2020 (C-649/18, EU:C:2020:764).

⁷ Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

⁸ Judgment of 1 October 2020 (C-649/18, EU:C:2020:764).

- (5) In that situation, is the prohibition of Doctipharma’s activity, based on the interpretation by the Cour de cassation (Court of Cassation) of Articles L. 5125-25 and L. 5125-26 of the Public Health Code, justified by public health protection within the meaning of Article 85c of ... Directive [2001/83]?
- (6) If not, is Article 85c of ... Directive [2001/83] to be interpreted as allowing the activity of an “information society service” offered by Doctipharma?

18. Written observations were submitted by the parties to the main proceedings, the Czech, French, and Italian Governments and the European Commission. The parties to the main proceedings, the French Government and the Commission were represented at the hearing held on 19 April 2023.

V. Analysis

A. *The first question referred for a preliminary ruling*

19. By its first question for a preliminary ruling, the referring court is seeking to ascertain whether the activity carried out by Doctipharma on its website constitutes an ‘information society service’ within the meaning of Directive 98/34.⁹

20. As a preliminary point, I should point out that the present reference for a preliminary ruling does not give a full picture of the service provided by Doctipharma and the information provided by the parties in that regard is not always consistent. Nevertheless, in the light of the information provided by the national court, the first question referred for a preliminary ruling must be understood as relating, in essence, to whether Article 1(2) of Directive 98/34 must be interpreted as meaning that a service provided on a website consisting in connecting pharmacists and customers for the sale of medicinal products not subject to medical prescription from dispensing pharmacies which subscribed to that website constitutes an ‘information society service’ within the meaning of that provision.

21. Directive 98/34 defines an ‘information society service’ as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient’.

22. In that regard, in the first place, the present reference for a preliminary ruling contains no specific evidence to suggest that the service provided by Doctipharma is provided for remuneration. However, it is apparent from the order for reference that the pharmacists operated their websites using Doctipharma’s technical solution; I infer from this that they must therefore subscribe to that service in advance. In its written observations, Doctipharma states that pharmacists subscribe to its platform on the basis of a flat-rate fee. The French Government adds that the service provided by Doctipharma is also the subject of a payback of a percentage of the amount of sales collected by the platform. In any event, it is irrelevant, in that context, whether

⁹ In that regard, it cannot be ruled out that the answer to the first question requires an interpretation of not only the provisions of Directive 98/34, but also those of 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). Directive 98/34 was repealed on 7 October 2015 by Directive 2015/1535 and Doctipharma states in its written observations that the service at issue was provided until 2016. However, it should be noted that the second directive reproduced the definition of ‘information society service’ which appeared in the first directive, and therefore the application of that second directive to the facts of the dispute in the main proceedings would not, in any event, affect the answer to the first question referred for a preliminary ruling.

the remuneration results from a deduction by Doctipharma from the price paid by the customer or a payment made by the pharmacist. The remuneration of an information society service does not require the service to be paid for by all of those for whom it is performed.¹⁰

23. In the second place, the referring court states, as is apparent from points 7 and 8 of this Opinion, that internet users purchase pharmaceutical products and non-prescription medicinal products on Doctipharma's website from the dispensing pharmacies' websites. It adds that the Cour de cassation (Court of Cassation) set aside the judgment of the cour d'appel de Versailles (Court of Appeal, Versailles) on the ground that the latter did not draw the appropriate conclusions from its own findings that Doctipharma's activity on its website consists, in particular, in connecting dispensing pharmacists and customers for the sale of medicinal products. Thus, irrespective of the controversial question as to whether, from a legal point of view, according to the definitions and concepts used in French law, the service provided by Doctipharma constitutes a form of intermediation or brokerage, it must be held that, from a factual point of view, that service makes it possible or, at least, facilitates the bringing together of pharmacists and customers.

24. In those circumstances, it must be held that, in so far as the customer and pharmacy are connected by means of a website without being present at the same time, the service provided by Doctipharma constitutes a service which is provided electronically and at a distance.¹¹ In that regard, it is for the referring court to verify that, at no point during the process of concluding the contract do the pharmacist and customer come into contact with each other, or with Doctipharma, other than by means of electronic equipment.

25. In the third place, it is apparent from the considerations set out in point 22 of this Opinion that the service provided by Doctipharma is provided at the individual request of both pharmacists, who must subscribe to Doctipharma's website in order to benefit from the service provided by that company, and customers, who wish to purchase medicinal products from pharmacists who have subscribed to that website.

26. Therefore, it must be found that a service provided by a provider on a website consisting in connecting pharmacists and customers for the sale, from the websites of the dispensing pharmacies which have subscribed to that site on the basis of a flat-rate fee, of medicinal products not subject to medical prescription, without the service provider, the pharmacist and the customer coming into contact with each other when concluding a contract of sale other than by means of electronic equipment, constitutes in principle an 'information society service' within the meaning of Directive 98/34.

27. That said, in accordance with the judgments in *Asociación Profesional Elite Taxi*,¹² *Airbnb Ireland*¹³ and *Star Taxi App*,¹⁴ to which reference is made by the national court and by the parties in their observations, a service which consists of connecting customers and service providers who satisfy all of the conditions laid down in Article 1(2) of Directive 98/34 constitutes, in principle, a service distinct from the subsequent service supplied by those providers to which it relates and must therefore be classified as an 'information society service'. However, that position is different if it appears that the service which connects the parties forms

¹⁰ See, to that effect, judgment of 3 December 2020, *Star Taxi App* (C-62/19, EU:C:2020:980, paragraph 45).

¹¹ See, by analogy, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 47).

¹² Judgment of 20 December 2017 (C-434/15, EU:C:2017:981, paragraphs 37 and 40).

¹³ Judgment of 19 December 2019 (C-390/18, EU:C:2019:1112, paragraph 50).

¹⁴ Judgment of 3 December 2020 (C-62/19, EU:C:2020:980, paragraph 49).

an integral part of an overall service whose main component is a service coming under another legal classification. It follows from that case-law that that is the case where that service which connects the parties is functionally and economically inseparable from the other service. Moreover, the provider of that first service would also have to organise and monitor the general operation of the second service.¹⁵

28. In that regard, in the first place and above all, as the Court observed in its judgment in *Ker-Optika*,¹⁶ referring to recital 18 of Directive 2000/31 and the explanatory memorandum accompanying the proposal for that directive, information society services cover, inter alia, the selling of goods online and services allowing online electronic transactions to purchase goods such as interactive teleshopping and online shopping malls.

29. In those circumstances, I have doubts as to whether the case-law referred to in point 27 of this Opinion is perfectly transposable to situations in which an activity consisting of the sale of goods online is facilitated or even carried out by means of an information society service, provided by another provider which connects sellers with customers. In such situations, a connecting service is not capable of forming an integral part of an overall service the principal element of which does not qualify as an ‘information society service’. As is clear from point 28 of this Opinion, an online sales service is, in itself, an information society service.

30. Accordingly, to consider that a service which connects sellers with customers forms an integral part of an overall sales service would not necessarily change the legal classification of that service as an ‘information society service’. However, the consideration that the criteria identified by the case-law referred to in point 27 of this Opinion are met should lead to the conclusion that the provider providing a service which, a priori, consists simply of connecting sellers and customers is, itself, the provider of the sales service.

31. In any event, and in the second place, as the referring court observes, the service in question in the present case does not satisfy the criteria identified in the case-law referred to in point 27 of this Opinion.

32. First, dispensing pharmacists are professionals in the sale of medicinal products who may engage in distance selling independently of the service provided by Doctipharma, with the result that that service can be separated from the actual sales transaction. Second, it does not appear that Doctipharma organises the general operation of sales transactions since the choice of a dispensing pharmacist is made by the customer and Doctipharma does not intervene in the pricing of medicinal products sold by professionals and does not exercise control over those sales transactions. Moreover, the fact that the medicinal products are presented on the Doctipharma website in the form of a pre-registered catalogue does not necessarily mean that that company determines the supply of medicinal products. It would appear from the oral argument at the hearing that that catalogue was first compiled on the basis of a list containing all the medicinal products authorised in the Member State in which Doctipharma and pharmacists subscribing to the company’s service are established, a list which was then supplemented with data on the availability of medicinal products provided by the subscribing pharmacists.

¹⁵ See, to that effect, judgments of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraphs 38 and 39); of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraphs 53 to 56); and of 3 December 2020, *Star Taxi App* (C-62/19, EU:C:2020:980, paragraphs 50 to 53).

¹⁶ Judgment of 2 December 2010 (C-108/09, EU:C:2010:725).

33. In the light of the foregoing, I maintain the position set out in point 26 of this Opinion. The answer to the first question referred for a preliminary ruling should therefore be that a service provided by a provider on a website consisting in connecting pharmacists and customers for the sale, from the websites of the dispensing pharmacies which have subscribed to that site on the basis of a flat-rate fee, of medicinal products not subject to medical prescription, without the service provider, the pharmacist and the customer coming into contact with each other when concluding a contract of sale other than by means of electronic equipment, constitutes an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34. In the present case, it is for the national court to ascertain whether, from a factual point of view, all of those elements were present as regards the service at issue in the dispute in the main proceedings.

B. The second question referred for a preliminary ruling

1. Definition of the question

34. By its second question, the referring court seeks to ascertain, in essence, whether Article 85c(1)(a) and Article 85c(2) of Directive 2001/83 must be interpreted as meaning that a prohibition imposed on the provider of a service such as that described in the first question referred for a preliminary ruling, which follows from the interpretation of national provisions prohibiting the use of that service by persons authorised or entitled to supply medicinal products not subject to medical prescription to the public at a distance, falls within the scope of one of those provisions.

35. Admittedly, that second question, as formulated by the referring court, relates simply to the question whether Doctipharma’s activity falls within the scope of Article 85c of Directive 2001/83.

36. However, that question is, in reality, a preliminary question to the third, fourth, fifth and sixth questions referred for a preliminary ruling by which the national court seeks to ascertain, in essence, whether Article 85c of Directive 2001/83 precludes the prohibition imposed on Doctipharma. In order to be able to answer that question, it is necessary not only to determine whether Doctipharma’s activity falls within the scope of that provision, but also to identify the more specific points of that article which prohibit that activity and which result from the interpretation of the national provisions at issue in the main proceedings.

37. In that regard, first, Article 85c(1) of Directive 2001/83 lists the conditions to which the offering for sale of medicinal products at a distance to the public by means of information society services are subject (‘[conditions under which] medicinal products are offered for sale’). In particular, Article 85c(1)(a) of that directive provides that ‘the natural or legal person offering the medicinal products [must be] 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’. That provision is supplemented by Article 85c(6) of that directive, in accordance with which ‘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’.

38. Second, Article 85c(2) of Directive 2001/83 provides that ‘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’.

39. In those circumstances, the reference to justification on grounds of public health protection, contained in the third and fifth questions referred for a preliminary ruling, leads me to believe that the referring court considers that the national provisions at issue fall within the scope of Article 85c(2) of Directive 2001/83. However, as the oral arguments presented at the hearing illustrate, such a consideration is far from obvious. Consequently, I propose that the second question be reworded so that the Court may assess whether the finding that the national provisions at issue fall within the scope of Article 85c(2) of Directive 2001/83 is a correct interpretation of that directive.¹⁷

40. To that end and in order to be able to give a useful response to the questions referred for a preliminary ruling, it is necessary to consider the delimitation of the respective scopes of Article 85c(1)(a) and Article 85c(2) of Directive 2001/83.

2. Delimitation of the respective scopes of the provisions concerned

41. It follows from Article 85c(1)(a) and (6) of Directive 2001/83 that one of the conditions for offering medicinal products for sale at a distance to the public by means of information society services concerns the persons who may carry on such an activity. As is clear from that first provision, those persons must be persons who are authorised or entitled to supply medicinal products to the public, also at a distance, in accordance with the national legislation of the Member State in which those persons are established. In other words, that provision can be understood as answering the question of ‘who’ may offer medicinal products for sale online. Moreover, while the condition laid down in Article 85c(1)(a) of that directive derives from EU law, it is for the Member State on whose territory the person is established (the Member State of origin) to provide an answer to that question.

42. By contrast, Article 85c(2) of Directive 2001/83 concerns the power of a Member State on whose territory medicinal products offered for sale at a distance are supplied to lay down ‘conditions ... for the retail supply on [the territory of that Member State] of medicinal products’. These are therefore conditions which may have been introduced at national level by the Member State of destination.

43. Consequently, it is necessary to distinguish, particularly where a person who offers medicinal products for sale online is established in the Member State on whose territory those medicinal products are supplied, as in the present case, between the condition laid down in Article 85c(1)(a) of Directive 2001/83 and those relating to the retail supply of medicinal products offered for sale online, imposed under Article 85c(2) of that directive.

44. In view of the general nature of the terms used in those two provisions, and in particular the wording used in Article 85c(2) of Directive 2001/83 ([‘conditions] for the retail supply ... of medicinal products for sale at a distance to the public by means of information society services’), I do not think that it is possible to solve that conundrum by interpreting their wording. However, useful elements to distinguish the conditions falling within the scope of each of those two

¹⁷ See point 34 of this Opinion.

provisions are to be found, in the first place, in recitals 21 to 24 of Directive 2011/62 and the case-law to which they refer and, in the second place, in Directive 2000/31, which also relates to the marketing of products online.

(a) *Directive 2011/62*

45. Recital 21 of Directive 2011/62, which inserted Article 85c in Directive 2001/83, states that ‘specific conditions for retail supply of medicinal products to the public have not been harmonised at Union level and, therefore, Member States may impose conditions for supplying medicinal products to the public within the limits of the [FEU] Treaty’. Recitals 22 to 24 of that directive provide clarification in that regard.

46. First of all, recital 22 of Directive 2011/62 states that, ‘when examining the compatibility with Union law of the conditions for the retail supply of medicinal products, the [Court] has recognised the very particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods. The Court has also held ... that it is for Member States to determine the level of protection which they wish to afford to public health and the way in which that level has to be achieved. Since that level may vary from one Member State to another, Member States must be allowed discretion as regards the conditions for the supply on their territory of medicinal products to the public’. Next, recital 23 of that directive states that, ‘in particular, in the light of the risks to public health and given the power accorded to Member States to determine the level of protection of public health, the case-law of the [Court] has recognised that Member States may, in principle, restrict the retail sale of medicinal products to pharmacists alone’. Lastly, recital 24 of that directive states that, ‘therefore, and in the light of the case-law of the [Court], Member States should be able to impose conditions justified by the protection of public health upon the retail supply of medicinal products offered for sale at a distance by means of information society services. Such conditions should not unduly restrict the functioning of the internal market’.

47. Moreover, as is clear from the judgment in *Apothekerkammer des Saarlandes and Others*,¹⁸ to which recitals 22 and 23 of Directive 2011/62 refer, the conditions for supplying medicinal products to the public concern, inter alia, the way in which medicinal products are marketed at retail level and, in particular, the possibility of restricting the retail sale of medicinal products solely to pharmacists enjoying genuine professional independence and of taking measures which are capable of eliminating or reducing a risk that that independence will be prejudiced because such prejudice would be liable to affect the degree to which the provision of medicinal products to the public is reliable and of good quality.

48. However, it must be observed that the judgment in *Apothekerkammer des Saarlandes and Others*¹⁹ does not concern online sales and, in any event, it was delivered before the adoption of Directive 2011/62. In accordance with the amendments introduced by that directive, the question of ‘who’ may offer medicinal products for sale online is referred to in Article 85c(1)(a) of Directive 2001/83.²⁰ Consequently, since that question is now covered by the latter provision, it cannot fall within the scope of the conditions relating to the retail supply of medicinal products offered for sale online, imposed by the Member State of destination under Article 85c(2) of that directive. However, that provision concerns the conditions relating to the other aspects

¹⁸ Judgment of 19 May 2009 (C-171/07 and C-172/07, EU:C:2009:316, paragraphs 34 and 35).

¹⁹ Judgment of 19 May 2009 (C-171/07 and C-172/07, EU:C:2009:316, paragraphs 19, 31, 34 and 35).

²⁰ See point 41 of this Opinion.

mentioned in the judgment in *Apothekerkammer des Saarlandes and Others*,²¹ namely the way in which medicinal products are marketed at retail level and, in particular, measures which are capable of eliminating or reducing a risk of undermining the independence of persons authorised or entitled to supply medicinal products to the public.

49. In the light of the foregoing, if it is to be held that, by the information society service which it provides, Doctipharma offers a service for the sale of medicinal products at a distance to the public, the prohibition imposed on that company should be examined in the light of Article 85c(1)(a) of Directive 2001/83 and, possibly, paragraph 6 of that article. By contrast, if Doctipharma is not to be regarded as offering medicinal products for sale at a distance to the public, the prohibition imposed on it should be regarded as a method of marketing medicinal products falling within the scope of Article 85c(2) of that directive. Without wishing to prejudge the assessment which the national court will be called upon to make in the present case, I am leaning towards that second classification.

50. First, I take the view that the result of the analysis based on the criteria identified in the case-law referred to in point 27 of this Opinion is also relevant in the context of the distinction between a situation falling within the scope of Article 85c(1)(a) of Directive 2001/83 and one falling within the scope of Article 85c(2) of that directive. The use of the same criteria would make it possible to ensure consistency in the solutions adopted in those two provisions and, as I shall demonstrate below,²² there is a certain parallelism between them as regards their perception of information society services in the context of the marketing of medicinal products online.

51. In any event, and subject to the checks to be carried out by the referring court, it follows from my analysis that, as I observed in point 32 of this Opinion, Doctipharma provides a specific service, which is not an integral part of an overall service the main element of which consists of the sale of medicinal products, and therefore that company cannot be regarded as offering medicinal products for sale at a distance to the public by means of information society services.

52. Second, the prohibition of a service such as that provided by Doctipharma results, according to the wording of the third and fifth questions referred for a preliminary ruling, from an interpretation of the national provisions at issue in the dispute in the main proceedings. Those provisions appear to prohibit persons authorised or entitled to supply medicinal products to the public, even at a distance, from engaging in certain conduct when offering those products for sale. Thus, the prohibition on the service provided by Doctipharma appears itself to result from a prohibition on such persons from using services such as that provided by Doctipharma. From that point of view, the prohibition referred to in those questions results from the interpretation of the national provisions which define the manner in which medicinal products are marketed online.

53. For the sake of completeness, having regard to its objective, the prohibition at issue in the dispute in the main proceedings may be regarded as a measure by which the national legislature sought to eliminate or reduce a risk of undermining the independence of persons authorised or entitled to supply medicinal products to the public. In the light of my interpretation of the judgment in *Apothekerkammer des Saarlandes and Others*,²³ in the context of Directive 2001/83,²⁴ such a measure would fall within the scope of Article 85c(2) of that directive.

²¹ Judgment of 19 May 2009 (C-171/07 and C-172/07, EU:C:2009:316).

²² See points 56 to 64 of this Opinion.

²³ Judgment of 19 May 2009 (C-171/07 and C-172/07, EU:C:2009:316).

²⁴ See point 48 of this Opinion.

54. In the light of the foregoing, subject to the checks to be carried out by the referring court regarding, first, the characteristics of the service at issue in the dispute in the main proceedings and, secondly, the normative content of the national provisions at issue in the dispute in the main proceedings, I consider that the prohibition resulting from those national provisions falls within the scope of Article 85c(2) of Directive 2001/83.

55. Moreover, the considerations set out in points 49 to 54 of this Opinion are corroborated by the cross-border dimension of the online sale of medicinal products.

(b) Directive 2000/31

56. Although the dispute in the main proceedings does not have a cross-border dimension, that dimension is a significant aspect of the e-commerce of medicinal products. Given the disparities between the laws of the Member States as regards the persons entitled to sell non-prescription medicinal products, distance selling could, even more than selling in a traditional sales outlet (a pharmacy), allow simplified access to certain medicinal products. In addition, the need to interpret the provisions referred to in the questions referred for a preliminary ruling by taking into account the cross-border dimension of online sales of medicinal products was also highlighted at the hearing. It cannot be ruled out that Member States other than the one on whose territory a provider of an information society service is established may attempt to restrict access to that provider's service.

57. In that regard, the cross-border dimension of the marketing of goods online by means of information society services is partially regulated by Directive 2000/31. The sale of medicinal products not subject to medical prescription is not entirely excluded from the application of that directive, as is illustrated by the references to that directive in Article 85c(1)(d) and (6) of Directive 2001/83, according to which those provisions apply without prejudice to the former directive.²⁵

58. According to the logic underlying Directive 2000/31 and, more specifically, Article 3(1) and (2) thereof, as regards requirements falling within the 'coordinated field', as defined in Article 2(h) of that directive, a provider of an information society service is, as a general rule, subject to the national legislation of the Member State of origin. A Member State other than the Member State of origin may, 'for reasons falling within the coordinated field', restrict the freedom to provide information society services only by adopting measures which fulfil the conditions set out in Article 3(4)(a) and (b) of that directive. The requirements which fall within the coordinated field may therefore be imposed by the Member State of origin or – within the limits imposed by Article 3(4) of that directive – by other Member States.

59. In that regard, first, as is clear from Article 2(h)(i) of Directive 2000/31, the coordinated field covers the requirements which the service provider must fulfil and which relate to the taking up and pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider or its liability.²⁶

60. Second, in accordance with Article 2(h)(ii) of Directive 2000/31, the national rules relating to the requirements applicable to goods as such and those relating to the conditions under which goods sold via the internet may be supplied within the territory of a Member State are not

²⁵ See also, to that effect, judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764, paragraph 32).

²⁶ See Article 2(h)(i) of Directive 2000/31.

covered by the coordinated field. Recital 21 of that directive states that the coordinated field ‘does not concern Member States’ legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States’ requirements relating to the delivery or the transport of goods, including the distribution of medicinal products’. Such requirements may therefore be imposed by a Member State of destination under Article 85c(2) of Directive 2001/83, without it being necessary to consider the question of the relationship between that directive and Article 3 of Directive 2000/31. The prohibition imposed on Doctipharma on the basis of the interpretation of the national provisions at issue in the dispute in the main proceedings does not appear to derive from such requirements.

61. However, in so far as the interpretation of those national provisions amounts, from Doctipharma’s point of view, to the prohibition on the pursuit of a specific activity by a provider of an information society service and, from the pharmacists’ point of view, to the prohibition on certain conduct as regards the sale of medicinal products online, those national provisions concern access to the activity of an information society service and the pursuit of such an activity. The national provisions at issue in the dispute in the main proceedings therefore lay down requirements falling within the coordinated field.

62. In that regard, the judgment in *A (Advertising and sale of medicinal products online)*²⁷ appears to confirm that certain requirements falling within the coordinated field of Directive 2000/31 may also constitute conditions, within the meaning of Article 85c(2) of Directive 2001/83. According to paragraph 68 of that judgment, the prohibition at issue which precludes pharmacies from soliciting their clients through a wide-ranging and multifaceted advertising campaign for their online services had ‘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’.

63. For the sake of completeness, I am not fully convinced that the judgment in *A (Advertising and sale of medicinal products online)*²⁸ prejudges definitively that any condition falling within the coordinated field must comply with Article 3(4) of Directive 2000/31 and Article 85c(2) of Directive 2001/83. As I have already noted in different contexts, that first provision does not cover general and abstract measures, whereas I do not rule out the possibility that such measures may fall within the scope of the second provision.²⁹ It is for that reason in particular that it is not clear that that judgment lays down a universal principle, applicable in all cases, with regard to the relationship between those two provisions.³⁰

64. However, and in any event, a Member State of destination must comply with the legislation of the Member State of origin as regards persons authorised to offer medicinal products for sale online, without being able to rely on Article 85c(2) of Directive 2001/83. As is clear from point 48 of this Opinion, the conditions under the latter provision do not answer the question as to ‘who’ may offer medicinal products for sale online. Only Article 3(4) of Directive 2000/31 can apply in

²⁷ Judgment of 1 October 2020 (C-649/18, EU:C:2020:764).

²⁸ Judgment of 1 October 2020 (C-649/18, EU:C:2020:764).

²⁹ See my Opinions in *Airbnb Ireland* (C-390/18, EU:C:2019:336, points 123 to 125); *LEA* (C-10/22, EU:C:2023:437, point 51); and *Google Ireland and Others* (C-376/22, EU:C:2023:467, point 73).

³⁰ First, the operative part of that judgment refers, in general terms, to Directive 2000/31, without mentioning Directive 2001/83 and Article 85c(2) thereof. Secondly, it follows from paragraph 27 of its judgment of 17 September 2021, delivered following the judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764), that the cour d’appel de Paris (Court of Appeal, Paris) appears to have read that judgment as meaning that Article 85c(2) of Directive 2001/83 covers requirements relating to online advertising and takes precedence over Article 3(4) of Directive 2000/31 in so far as the latter lays down the conditions under which a Member State may derogate from the principle set out in Article 3(1) and (2) thereof.

such a situation. As I observed in point 50 of this Opinion, there is therefore a certain parallelism between those two directives as regards their perception of information society services and the conditions to which they are subject.

65. In the light of the foregoing, I maintain the position set out in point 54 of this Opinion. The answer to the second question referred for a preliminary ruling should therefore be that Article 85c(2) of Directive 2001/83 must be interpreted as meaning that a prohibition imposed on the provider of a service such as that described in the first question referred for a preliminary ruling, which follows from the interpretation of national provisions prohibiting the use of that service by persons authorised or entitled to supply medicinal products not subject to medical prescription to the public at a distance, falls within the scope of that provision. In the present case, it is for the national court to ascertain whether all of those elements were present as regards the national provisions at issue in the dispute in the main proceedings.

C. The third, fourth, fifth and sixth questions referred for a preliminary ruling

1. Preliminary observations

66. By its third, fourth, fifth and sixth questions, which should be analysed together, the referring court seeks to ascertain whether Article 85c(2) of Directive 2001/83 precludes the prohibition of a service, such as that described in the first question referred for a preliminary ruling, which results from the interpretation of national provisions such as those described in the second question referred for a preliminary ruling.

67. Those questions are raised in the event that the service provided by Doctipharma is regarded as an information society service within the meaning of Directive 2001/83 (first question referred for a preliminary ruling). In the light of my reading of the second question referred for a preliminary ruling, the national provisions from which the prohibition of that service arises should be regarded as national provisions imposing conditions for the retail supply of medicinal products offered for sale at a distance to the public by means of an information society service, in accordance with Article 85c(2) of Directive 2001/83.

68. It follows from Article 85c(1) of Directive 2001/83 that, unlike the online sale of medicinal products subject to medical prescription, a Member State is not authorised to prohibit completely the offer of non-prescription medicinal products by means of online sales services supplied by a service provider established in another Member State, provided that the conditions laid down in that provision are fulfilled.³¹ In that context, a Member State of destination is authorised, under Article 85c(2) of that directive, to impose '[conditions] for the retail supply [on the territory of that Member State] of medicinal products for sale at a distance to the public by means of information society services'. Such conditions must be justified on grounds of public health protection.

69. As the Commission observes, the referring court cites national provisions the interpretation of which leads to the prohibition of a certain activity without specifying the link between the prohibition resulting from that interpretation and the objective of public health protection, referred to in Article 85c(2) of Directive 2001/83. Although the request for a preliminary ruling

³¹ See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:134, point 25).

concerns the question whether that prohibition is justified by the objective of public health protection, this Opinion must therefore be confined to providing general indications enabling the referring court to give an answer to that question.

2. *Information regarding the objective of public health protection*

70. Article 85c(2) of Directive 2001/83 merely states that the conditions imposed under that provision must be justified on grounds of public health protection.

71. In that regard, recital 24 of Directive 2011/62 clarifies the normative content of that provision by stating that the conditions imposed under it ‘should not unduly restrict the functioning of the internal market’. In view of the traditional terminology of EU law used in that clarification, I consider that it reflects the intention of the EU legislature to make the exercise of the power of a Member State of destination subject to a traditional test designed to determine whether the conditions imposed by a Member State are appropriate for securing attainment of the objective of public health protection and whether those conditions do not go beyond what is necessary to attain that objective.

72. Moreover, as I have shown in points 62 to 64 of this Opinion, the conditions imposed under Article 85c(2) of Directive 2001/83 may also be applied in the context of a cross-border dimension, in respect of providers of information society services established in Member States other than the one from which a condition imposed under that provision originates. The exercise of the power of a Member State of destination should therefore be subject to conditions modelled on those to which any restriction of the fundamental freedoms guaranteed by the articles of the FEU Treaty is subject.

73. I therefore propose that the answer to the third, fourth, fifth and sixth questions referred for a preliminary ruling should be that Article 85c(2) of Directive 2001/83 must be interpreted as precluding the prohibition of a service, such as that described in the first question referred for a preliminary ruling, which results from the interpretation of provisions such as those described in the second question referred for a preliminary ruling, unless it is shown that that prohibition is both appropriate and necessary for the protection of public health, this being a matter which it is for the referring court to ascertain.

74. In order to provide further guidance to the referring court, I shall make a few additional remarks as to the examination which that court must undertake.

75. In the first place, above all, in view of the importance of the relationship of trust which must prevail between a health professional, such as a pharmacist, and his or her clients, the protection of the dignity of a regulated profession 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.³² The same applies with regard to the reliability and quality of the supply of medicinal products at retail level.³³ Moreover, in the light of the fact that Directive 2011/62 seeks essentially to prevent falsified medicinal products from entering the supply chain, I must note that the need to ensure that the supply of medicinal products to the public is reliable

³² See judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764, paragraph 66).

³³ 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, paragraph 39).

and of good quality constitutes an objective of protecting human health and human life.³⁴ Lastly, in my opinion, the objective of protecting public health also includes preventing the irrational and excessive use of medicinal products which are not subject to medical prescription which meets the essential aim of safeguarding public health.³⁵

76. In the second place, as regards the suitability of a national measure to achieve the stated objective, it must be borne in mind that, where there is uncertainty as to the existence or extent of risks to human health, a Member State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, a Member State may take the measures that reduce, as far as possible, a public health risk.³⁶

77. In the third place, when assessing whether the principle of proportionality has been observed in the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the FEU Treaty 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.³⁷

78. For the sake of completeness, it should be noted that the Commission states in its written observations that the prohibition resulting from the interpretation of the national provisions at issue in the dispute in the main proceedings should also be examined in the light of Article 15(1) to (3) of Directive 2006/123/EC.³⁸

79. In that regard, the Commission recalls that, under Article 3(1) of that directive, ‘if the provisions of [that directive] conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions’. In the present case, in so far as there appears to be no incompatibility between the relevant provisions of Directive 2006/123 and those of Directive 2001/83, there is no reason to apply only the latter provisions.

80. Article 15(1) of Directive 2006/123 provides that Member States are to ensure in particular that the requirements listed in paragraph 2(d) of that article, namely those relating to access to the service activity in question by particular providers by virtue of the specific nature of the activity, are compatible with the conditions of non-discrimination, necessity and proportionality referred to in paragraph 3 of that article.

81. In essence, those conditions correspond to those examined in the context of my analysis of the third, fourth, fifth and sixth questions referred for a preliminary ruling. Moreover, there is nothing to suggest that the prohibition resulting from the interpretation of the national provisions is in itself discriminatory. The fact that, if the judgment in *A (Advertising and sale of medicinal products online)*³⁹ is followed to the letter, that prohibition would, subject to the derogation

³⁴ See judgment of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 68).

³⁵ See, by analogy, judgment of 22 December 2022, *EUROAPTIEKA* (C-530/20, EU:C:2022:1014, paragraphs 39, 43 and 44). See also, to that effect, judgment of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraphs 58 and 59).

³⁶ See, to that effect, judgment of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 72).

³⁷ See judgment of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 59).

³⁸ Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

³⁹ Judgment of 1 October 2020 (C-649/18, EU:C:2020:764).

clause in Article 3(4) of Directive 2000/31, be unenforceable against service providers established in other Member States does not alter, from an EU law perspective, the non-discriminatory nature of that prohibition as established at national level.

82. That said, the referring court does not ask a question about Directive 2006/123 and only the Commission has given an opinion on the possible application of that directive in the dispute in the main proceedings. Moreover, as I have stated, the referring court does not provide detailed information as to the characteristics of the service provided by Doctipharma and the objectives pursued by the prohibition imposed on that service. In those circumstances, I propose that the Court draw the referring court's attention to that directive, without however interpreting it.

VI. Conclusion

83. In the light of all the foregoing considerations, I propose that the Court reply to the questions referred for a preliminary ruling by the cour d'appel de Paris (Court of Appeal, Paris, France) as follows:

- (1) Article 1(2) 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998,

must be interpreted as meaning that a service provided by a provider on a website consisting in connecting pharmacists and customers for the sale, from the websites of the dispensing pharmacies which have subscribed to that site on the basis of a flat-rate fee, of medicinal products not subject to medical prescription, without the service provider, the pharmacist and the customer coming into contact with each other when concluding a contract of sale other than by means of electronic equipment, constitutes an 'information society service'. In the present case, it is for the national court to ascertain whether, from a factual point of view, all of those elements were present as regards the service at issue in the dispute in the main proceedings.

- (2) Article 85c(2) 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, as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011,

must be interpreted as meaning that a prohibition imposed on the provider of a service such as that described in the first question referred for a preliminary ruling, which follows from the interpretation of national provisions prohibiting the use of that service by persons authorised or entitled to supply medicinal products not subject to medical prescription to the public at a distance, falls within the scope of that provision. In the present case, it is for the national court to ascertain whether all of those elements were present as regards the national provisions at issue in the dispute in the main proceedings.

- (3) Article 85c(2) of Directive 2001/83

must be interpreted as precluding the prohibition of a service, such as that described in the first question referred for a preliminary ruling, which results from the interpretation of provisions such as those described in the second question referred for a preliminary ruling, unless it is shown that that prohibition is both appropriate and necessary for the protection of public health, this being a matter which it is for the referring court to ascertain.