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Judgment of the Court in Case C-21/23 | Lindenapotheke

GDPR: Member States may make provision for competitors of the person allegedly responsible for an infringement of the laws protecting personal data to challenge that infringement in court as a prohibited unfair commercial practice

The online sale of pharmacy-only medicinal products requires the explicit consent of the customer to the processing of his or her data, even where those medicinal products do not require a prescription

The German Federal Court of Justice, which is required to resolve a dispute between two competing pharmacists, asks the Court of Justice to interpret the Regulation on the protection of personal data (GDPR). The Court finds that the GDPR does not preclude national legislation which makes it possible for competitors of the person allegedly responsible for an infringement of the laws protecting personal data to challenge that infringement in court as a prohibited unfair commercial practice. This remedy is available to competitors alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing the GDPR and the remedies available to data subjects provided for by that regulation.

In addition, the Court finds that information that is entered by customers when ordering pharmacy-only medicinal products online constitutes data concerning health within the meaning of the GDPR, even where the sale of those medicinal products does not require a prescription. Consequently, the seller must inform those customers, in a manner that is accurate, comprehensive and easily understandable, of the specific characteristics and purposes of the processing of those data, and request their explicit consent to such processing.

The German Federal Court of Justice is to resolve a dispute between two German pharmacists. The pharmacist who owns the 'Lindenapotheke' pharmacy has been marketing pharmacy-only medicinal products on Amazon since 2017. Customers must enter certain information when ordering these medicinal products online.

On the basis of the German legislation on unfair commercial practices, a competing pharmacist applied to the German courts for an order that the owner of Lindenapotheke cease that activity so long as there is no guarantee that customers will be able to give their prior consent to the processing of data concerning health. The courts at first and second instance held that that marketing activity amounted in fact to an unfair and unlawful practice, since it is contrary to the Regulation on the protection of personal data (GDPR).¹ In the absence of explicit consent from the customers purchasing those medicinal products, the sale entails processing of data concerning health that is prohibited under that regulation.

The German Federal Court of Justice wonders whether the national legislation, which allows a competitor to bring legal proceedings against the person allegedly responsible for infringements of the GDPR on the basis of the prohibition of unfair commercial practices, is consistent with that regulation. Indeed, according to the GDPR, it is in principle for the national supervisory authorities to monitor and enforce that regulation and for the data subjects (in this case, the customers) to defend their rights. The German court also wishes to know whether the information

entered when pharmacy-only medicinal products are purchased online constitutes data concerning health within the meaning of the GDPR, even where those medicinal products do not require a prescription. It therefore turned to the Court of Justice.

The Court replies, in the first place, that **the GDPR does not preclude national legislation which**, alongside the rights and powers conferred by the GDPR on the national supervisory authorities, on data subjects and on associations representing those persons, **allows competitors** of the person allegedly responsible for an infringement of the laws protecting personal data **to bring legal proceedings against that person, for infringements of that regulation, on the basis of the prohibition of unfair commercial practices**. On the contrary, **this undoubtedly contributes to strengthening the rights of data subjects** and ensuring that they enjoy a high level of protection. Moreover, this may be **particularly effective**, in so far as **a large number of GDPR infringements could thus be prevented**.

In the second place, the Court finds that **information entered by customers** (such as their name, the delivery address and the information required for individualising the medicinal products) **when ordering pharmacy-only medicinal products online constitutes data concerning health within the meaning of the GDPR, even where the sale** of those medicinal products **does not require a prescription**.

Those data are capable of **revealing information about the health status of an identified or identifiable data subject by means of an intellectual operation involving comparison or deduction** because a link is established between that person and a medicinal product, its therapeutic indications or its uses, irrespective of whether that information concerns the customer or any other person for whom the customer places the order. Accordingly, in the absence of a prescription, it is immaterial whether it is only with a certain degree of probability and not with absolute certainty that those medicinal products are intended for the customers who ordered them. **To make a distinction according to the type of medicinal product** and to whether or not the sale of those medicinal products requires a prescription would be **contrary to the GDPR's objective** of ensuring **a high level of protection**. Consequently, the seller must inform those customers in an accurate, comprehensive and easily understandable manner of the specific characteristics and purposes of the processing of those data and request **their explicit consent** to that processing.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.