

## Court of Justice of the European Union: Reimbursement of a medicinal product for off-label use is not contrary to EU law

*On 21 November 2018, the EU Court of Justice rendered an important judgment relating to the reimbursement of medicinal products for off-label use. It follows from the judgment that the Member States may allow the reimbursement of a medicinal product also for a condition which is not specified in the decision on marketing authorisation even if such a use is motivated by purely economic grounds.<sup>1</sup>*

### The case in an outline

The Court's judgment responds to a request for a preliminary ruling made by the Italian Council of State which decided a dispute between Novartis and the Italian authorities relating to the reimbursement of the medicinal product Avastin for its off-label use in connection with the treatment of age-related macular degeneration.

Avastin is a medicinal product manufactured by Roche. It is approved for oncological conditions. However, many physicians prescribe Avastin for the treatment of eye disease, although its marketing authorisation does not cover such condition. Avastin must be then repackaged from its original vial and divided into several 0.1 ml single-use syringes for intravitreal injection.

On the other hand, Lucentis, a product of Novartis, is registered for the treatment of age-related macular degeneration. Lucentis is packaged in a 0.23 ml vial containing a medicinal solution. Each vial can be used for one 0.05 ml intravitreal injection.

In 2014, the Italian drug agency AIFA included Avastin in the list of reimbursed pharmaceuticals for the eye condition in question. This decision was apparently economically motivated. While one Lucentis package costs EUR 902, a single Avastin dose necessary for one intravitreal injection is more than ten times cheaper, priced at only EUR 82.

Novartis challenged the decision of the AIFA in court, stating that it favours the rival Avastin to the detriment of Lucentis. After its action was dismissed, Novartis filed an appeal with the Council of State which subsequently approached the Court of Justice.

### CJEU judgment

The Court of Justice first mentioned that EU law leaves it up to the Members States' discretion to set up their health care system in compliance with their needs and to regulate, to this end, the use of pharmaceutical products in order to maintain financial equilibrium of their health care systems. In this connection, the Union law also grants the Member States the power to fix prices of medicinal products.

As the Court further noted, EU law does not prohibit in any manner the prescription of an off-label medicinal product. This observation is consistent with the previous case-law under which "*off-label prescribing is not prohibited, or even regulated, by EU law ... There is no provision which prevents doctors from prescribing a medicinal product for therapeutic indications other than those for which a marketing authorisation has been granted.*"<sup>2</sup>

At the same time, there is no doubt that the concept of off-label use of medicinal products is well recognized under EU law. In addition, just as EU law does not prohibit off-label prescribing of medicinal products, it does not ban their repackaging for such purposes either.

As the Court of Justice noted in this connection, repackaging Avastin for its off-label use for the (unapproved) treatment of ophthalmologic diseases did not substantially change its composition, form or any other basic components. In contrast, repackaging by pharmacies started to occur following the market launch of Avastin after a doctor had

<sup>1</sup> Under Czech law, off-label use of a medicinal product is regulated by Section 8(4) of Act No. 378/2007 Coll., on Pharmaceuticals, as amended: "If a medicinal product is not distributed or if a medicinal product of the required therapeutic properties is not marketed, the attending medical doctor may use an authorised medicinal product in a manner which is not consistent with the summary of the product characteristics, if sufficient scientific grounds exist for the application of such method."

<sup>2</sup> Judgment T-452/14 - Laboratoires CTRS v Commission of 11 June 2015, para 79.

# Pharma Flash

December 2018

prescribed it to a patient for use by means of an individual prescription. Thus, such repackaging did not qualify as preparation of a new medicinal product and did not require a new marketing authorisation.

The Court of Justice concluded that EU law does not preclude national regulations which lay down the conditions under which Avastin may be repackaged in order to be used for the treatment of indications not covered by its marketing authorisation. In light of this conclusion, the Italian authorities were also authorised to grant reimbursement for off-label indications despite the fact that more expensive treatment alternatives approved for the relevant indication were available on the domestic market.

## Conclusion

The conclusions reached by the Court of Justice have a substantial impact on the pharmaceuticals market, as they suggest that reimbursement for off-label use can also be granted for economic reasons irrespective of the potential existence of a medicinal product that is registered for a particular indication.<sup>3</sup>

It seems that, compared with Italy, the Czech Republic has a more restrictive regime for off-label use of medicinal products. Off-label use of a medicinal product is possible only if no other medicinal product with the requisite therapeutic properties is in circulation, the use of which would be compliant with its SPC. The State Institute for Drug Control relies on this regulation and refuses to

approve reimbursement for off-label medicinal products if an available medicinal product for on-label use with similar therapeutic properties is in circulation.<sup>4</sup>

In light of the judgment, the question remains whether this restrictive regime is indeed justified. Experience from other Member States shows that even legislation which allows off-label use of a medicinal product where another medicinal product with the requisite therapeutic properties is in circulation the use of which is compliant with its SPC could be implemented in practice. The condition is that such use is scientifically justified, and a pharmacovigilance system is in place to secure patient safety.

The reimbursement for off-label use in these cases is motivated by an interest in cost efficiency and the related savings for the health insurance systems. Unfortunately, the current regulation embodied in Section 8(4) of the Czech Pharmaceuticals Act actually precludes competition between reimbursed off-label and on-label use in these cases, which is detrimental to both patients and the health insurance system.

In our opinion, the judgment should stir a debate as to whether it would be suitable to introduce into the current legislation the possibility of parallel existence of reimbursed off-label and on-label indications and to expose the reimbursement system to the positive effects of competition.

<sup>3</sup> Interestingly, in this connection AG Saugmandsgaard Øe in his opinion of 25 July 2018 took the stance that if national legislation allows healthcare professionals (physicians) to prescribe off-label use of medicinal products purely for the sake of financial savings, such a practice contradicts EU law. However, the Court of Justice does not seem to endorse this opinion of the AG, and this conclusion does not follow from it in any way.

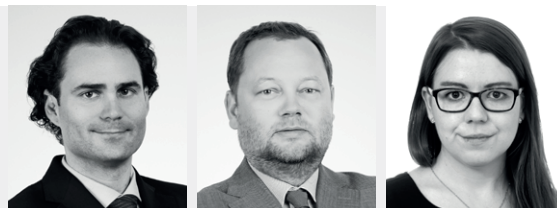
<sup>4</sup> See e.g. a letter from the State Institute for Drug Control to the Czech Oncological Society of 24 June 2017 published on the website here (only in Czech).

## Authors:

**Václav Audes** | Partner

**Roman Barinka** | Associate

**Vlad'ka Laštůvková** | Junior Associate



# HAVEL & PARTNERS

CONNECTED THROUGH SUCCESS

## Our team

200 lawyers | 400 employees

## Our clients

1,000 clients | 70 of the Fortune 500 global companies  
50 companies in the Czech Top 100 league | 7 companies in the Czech Top 10 league

## International approach

Legal advice  
in more than 80 countries of the world  
in 12 world languages  
up to 70% of cases involve an international element

[www.havelpartners.cz](http://www.havelpartners.cz)

### PRAGUE

Florentinum, Reception A  
Na Florenci 2116/15  
110 00 Prague 1  
Czech Republic  
Tel.: +420 255 000 111

### BRNO

Titanium Business Complex  
Nové sady 996/25  
602 00 Brno  
Czech Republic  
Tel.: +420 545 423 420

### OSTRAVA

Poděbradova 2738/16  
702 00 Ostrava  
Czech Republic  
Tel.: +420 596 110 300

### BRATISLAVA

Zuckerman del Centre  
Žižkova 7803/9  
811 02 Bratislava  
Slovak Republic  
Tel.: +421 232 113 900