Does the prohibition of third-party ownership for medical and dental practices derive from European law?

Unexpected decision by the ECJ

On 19 December 2024, the European Court of Justice (ECJ) delivered a landmark judgment in a case concerning the prohibition of third-party ownership of law firms in Germany, which was unexpected following the Advocate General's previous vote (case C-295/23). The ban on third-party ownership is valid under European law.

Following a similar ruling by the ECJ in 2009 on the prohibition of third-party ownership in the German Pharmacy Act, the question arose as to whether these standards could also be applied to other liberal professions in the healthcare sector, in particular investor-managed medical care centres (IMVZ), and what consequences could be drawn from the latest ECJ ruling.

The case

The ECJ heard a case concerning the withdrawal of the licence to practise law from a law firm's limited liability company (LLC) after the original sole lawyer-shareholder sold 51 per cent of his shares to an LLC under Austrian law, which is not licensed to provide legal advice in either Germany or Austria but focuses only on business consulting and investment. At the same time, the LLC's articles of association were amended to ensure the independence of the company's management, which was to be reserved for lawyers. The relevant bar association withdrew the LLC's licence. The case was referred to the ECJ by the Anwaltsgerichtshof München (Munich Bar Court).

The ECJ judgment

The ECJ considers that the core of the legal dispute is the question of compatibility with EU law of a regulation aimed at preventing purely financial investors who have no intention of practising law professionally, from influencing the operational activities of a law firm. It interprets the questions of the Munich Bar Court as seeking clarification as to whether European law precludes a national rule "according to which, if the law firm concerned is not to have its registration with the bar association revoked, prohibits shares in that company being transferred to a purely financial investor which does not intend to exercise, in that company, a professional activity covered by that legislation."

Investor-owned MCCs face the same issue

The ECJ considers that both the freedom of establishment and the free movement of capital are affected under European law, but that these restrictions are justified under EU law. The protection of recipients of services—in this case legal services—and, in this context, also the sound administration of justice and the proper exercise of the profession of lawyer all constitute overriding reasons relating to the public interest.

According to the court, a lawyer's duty of representation consists above all in "protecting and defending the principal's interests to the greatest possible extent, acting in full independence and in line with the law and professional rules and codes of conduct". The German rules on the prohibition of third-party ownership are appropriate to ensure the objective of safeguarding the proper administration of justice and ensuring the integrity of the legal profession, as the law expressly excludes the possibility for purely financial investors to influence the decisions and activities of a law firm. The desire of purely financial investors in a law firm to obtain a return on their investment, the ECJ fears, poses a clear risk that this desire may have a direct impact on the organisation and activity of a law firm, since if such investors consider that the return on their investment is insufficient, they may be tempted to demand "that the firm reduce costs or seek a certain type of client".

On the one hand, the Court states that the absence of conflicts of interest is essential to the exercise of the profession of lawyer and requires, in particular, that lawyers should be in a situation of independence, including financial independence, vis-à-vis the public authorities and other operators. On the other hand, the Court emphasises that, in the absence of harmonisation of the rules governing the professions and ethics at EU level, each member state is, in principle, free to regulate the exercise of the profession or ethics in question.

With regard to the profession of lawyer, a member state would therefore be entitled to conclude "that a lawyer would not be able to exercise his or her profession independently and in compliance with his or her professional and ethical obligations if that lawyer were part of a firm whose members are persons who, first, are neither practising lawyers nor members of any other profession subject to the moderating effect of rules of professional conduct and, second, act exclusively as purely financial investors with no intention of exercising, within that company, an activity falling within the scope of such a profession."

Prohibition of third-party ownership in the medical sector

Now that the ECJ has made it clear that a prohibition of third-party ownership is not in principle contrary to EU law for the liberal profession of lawyer, the question arises as to what consequences can or must be drawn from this for other liberal professions—particularly in the medical sector.

1. Pharmacies

Pharmacies are responsible for ensuring the proper supply of medicines to the population in the public interest. In order to be able to fulfil this public interest in an independent manner, owners and operators of pharmacies must be pharmacists. More than one person may operate a pharmacy only if all partners can obtain a licence to operate a pharmacy.

The prohibition of third-party ownership of pharmacies laid down in federal law has already been examined by the ECJ, which upheld it (judgments of 19 May 2009, cases C-171/07 and C-172/07). In view of the very specific nature of medicinal products and the associated protection of public health as an overriding reason in the public interest, the ECJ considered the prohibition of third-party ownership to be compatible with EU law, as the member states, within their wide margin of discretion regarding the level of health protection, can "require that medicinal products be supplied by pharmacists enjoying genuine professional independence. They may also take 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."

Therefore, member states may consider that pharmacies run by non-pharmacists may pose a risk to public health, as the profit-oriented nature of these businesses would not be accompanied by the mitigating factors that characterise the pharmacist's activity. Similarly, a member state may take into account the risk that non-pharmacist operators may jeopardise the independence of employed pharmacists by encouraging them to discontinue the sale of medicinal products which it is no longer profitable to keep in stock or that those operators may reduce their operating costs, which may affect the manner in which medicinal products are supplied at retail level.

2. Medical groups/joint practices

The situation is less clear when it comes to medical groups/joint practices. Germany has no explicit legal provision prohibiting third-party ownership. A model regulation of the German Medical Association has been implemented in a legally binding or at least comparable way in some federal states. Although there are standards, e. g., in the model professional code of conduct for physicians, these are of a much lower legal level; it is at least doubtful whether they can be easily derived from the medical laws of the federal states. To date, there is no binding legal prohibition of third-party ownership for medical groups/partnership practices that

would support a general prohibition of non-professional ownership.

3. MCCs

The area of medical care centres (MCC) is even less clearly regulated. § 95 of the German Social Code, vol. V (SGB V) only provides for the establishment of these centres as "physician-led facilities in which physicians who are entered in the register of physicians in accordance with § 2 (3) SGB V work as employees or contract physicians" and permits the establishment of these centres by licensed physicians, licensed hospitals, providers of non-medical dialysis services in accordance with § 126 (3) SGB V, recognised practice networks pursuant to § 87b (2) (3) SGB V, non-profit organisations involved in medical care that are recognised by statutory health insurers on the basis of a licence or authorisation, or by local authorities. German MCC law does not yet recognise the principles of differentiating between "good" and "bad" third-party ownership.

Consequences of the ECJ ruling

First of all, it should be noted that the ECJ has found an existing explicit legal prohibition to be compatible with EU law. There are currently no such legal prohibitions affecting the medical profession. It makes a difference whether an existing prohibition of foreign ownership is compatible with European law or whether such a prohibition does not exist at all. It does not follow from the conformity of an existing legal prohibition of third-party ownership with European law that any such (currently non-existent) prohibitions of third-party ownership are required by European law. It only follows from this that the non-existence of prohibitions is not a problem under European law.

It will be interesting when national legislators decide whether and, if so, under what conditions they wish to enact prohibitions of third-party ownership in the healthcare sector. According to the ECJ ruling of 13 December 2024, they are generally allowed to do so without being in breach with European law. But the question of whether they do so is a matter for each EU member state to decide, at least until there is uniform European legislation on the issue.

This is the second time that the ECJ has declared the prohibition of third-party ownership in the liberal professions to be compatible with European law. The ECJ's decision was based in particular on the wide scope for assessment and decision-making granted to the member states. The court also concluded that member states have the power to decide on the risk prognosis and the classification of financial interests of companies and persons outside the profession as at least an abstract risk to the independence of the exercise of the liberal professions.

This makes it clear that possible regulatory efforts by the German legislator—as called for by the German Medical Association—to introduce a more specific ban on third-party ownership of medical corporations and medical practices have few limits from a European legal perspective. However, the legislator must take positive action if it wants to introduce the ban on third-party ownership of MCCs. The ECJ ruling of 19 December 2024 means that it can do so. Whether it does do so is not a legal decision, but a political one.

It is only necessary to protect public health and enable the independent and conflict-free exercise of the liberal professions—objectives explicitly recognised in European law—and to base these laws on a comprehensible risk assessment.

Obviously, however, this does not in itself imply a decision on the constitutionality of a regulation prohibiting third-party ownership in Germany—in particular with regard to Art. 3 (1) of the Basic Law. Here, too, the general interests recognised under European law also appear to be the starting point for a possible justification of an encroachment on fundamental rights.

Summary

In its judgment of 19 December 2024, the ECJ has once again clarified that—in line with its case law on the prohibition of third-party ownership of pharmacies—a regulation prohibiting third-party ownership of law firms does not conflict with EU law. Due to the similarity of interests with other liberal professions in the medical field, this decision—also in view of the efforts of the 125th Congress of the German Medical Association—will breathe new life into the debate on a ban on third-party ownership of medical practices and other medical professions, as well as medical care centres. In particular, the question of the compatibility of such regulations with the fundamental rights enshrined in the Basic Law will have to be clarified. The ECJ has already given a clear answer to the question of compatibility with European law. It is now up to national legislators to show their colours.

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