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## Viagra no longer stands up ... at least not for the moment

4 Mars 2005

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**Thème:** Protection du consommateur et pratiques du commerce

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Pfizer, the manufacturer and distributor of the well-known drug Viagra had to take down its publicity on the Dutch website [www.erectieplein.nl](http://www.erectieplein.nl). On this website, sponsored by Pfizer, visitors could anonymously find information on erection difficulties and the different remedies and products available on the market. Furthermore, it was possible to order and obtain Viagra via links to an online doctor and internet pharmacy. As in other Member States of the European Union, advertising for drugs, in particular when they are only available on prescription, is subject to a rigorous and restrictive regulatory regime. For this reason the key question the Dutch Commission for Pharmaceutical Advertising had to answer was whether the Viagra related messages were objective public information or publicity.

Since European law defines advertising in a very broad manner, the distinction between general information and commercials is sometimes very difficult to make. Article 1 of Directive 92/28/EC states that advertising of medicinal products shall include any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products. Furthermore and with some limited exceptions, e.g., corporate websites and press coverage, the Directive on electronic commerce also defines electronic commercial communications broadly. Article 2 of the latter Directive states that commercial communication means any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. For this reason, a website where a certain product, e.g., Viagra, or its image is promoted, can be considered a commercial communication.

The Commission for Pharmaceutical Advertising held that the website [www.erectieplein.nl](http://www.erectieplein.nl) had to be considered commercial information. In contrast to alternative products, the image of Viagra – and thus the product Viagra – was more than present. In addition, the statements made were not always neutral, nor merely informative. Furthermore, it was stressed that the links to the online e-doctor and internet pharmacy only referred to Pfizer's Viagra product. For these reasons and irrespective of the fact that the website was not operated by Pfizer, the Commission ruled that it was Pfizer who made sure that the prescription and sale of Viagra via this website was promoted.

In addition, this case underlines another interesting topic: the online or distance selling of medicinal products. Pfizer, in cooperation with an e-doctor and internet pharmacy, had set up a system to order Viagra online. From the [erectieplein.nl](http://erectieplein.nl) website, visitors could log on to the website [www.emaildokter.nl](http://www.emaildokter.nl) and file out an online request form for a Viagra prescription. Once the doctor delivered the required prescription, the visitor could purchase Pfizer's erection difficulty product in an online pharmacy.

According to the Dutch 1963 Act on the distribution of medicinal products, the online distribution of registered drugs by e-pharmacies is not strictly forbidden. For this reason, Dutch and European consumers can order drugs by telephone, fax or over internet. In the event a prescription is required, it is sufficient that this is sent to the e-pharmacy, delivering the drugs by post.

From a European perspective, the situation is more complex. Both the Directive on B2C distance contracts as the electronic commerce Directive, applicable to most online activities, grant Member States the right to impose restrictions to the online promotion and selling of medical products to safeguard the general interest or public health. Article 14 of Directive 97/7 on distance contracts states that Member States may introduce more stringent provisions to ensure a higher level of consumer protection, including a ban on the marketing of certain goods or services, particularly medicinal products. In addition, the electronic commerce Directive does not encompass Member States' legal requirements relating to the delivery or the transport of goods, including the distribution of medicinal products.

In one of the first cases concerning the distance selling of pharmaceutical products, the European Court of Justice confirmed this possibility and held that Member States could impose certain restrictions on the cross-border trade of medical products. In its judgement of 11 December 2003, the Court held that a national prohibition on the sale of medicinal products by mail order is a restriction on the free movement of goods. A distinction is, however, made between the sale of prescription and non-prescription medicines. In the event non-prescription medicines are sold at a distance, or over the internet, this prohibition is not justified. It is possible that adequate advice and information is provided. Furthermore, the European Court stressed that new technologies such as internet, even have certain advantages. In contrast, for medicines available on prescription, the Court held that the prohibition for e-pharmacies can be justified. The possibility to receive such medicines without any other control could increase the risk of prescriptions being abused or incorrectly used. Moreover, the fact that the labelling of a medicinal product may be in a different language can have more harmful consequences in the case of prescription medicines.