One more judgement against therapeutic equivalent alternatives (ATEs), this time in Andalusia

The High Court of Justice of Andalusia, in a Judgement dated 18 May 2018, embraces the doctrine of the Supreme Court that upheld an appeal prepared by Faus & Moliner

Background

In 2014, Farmaindustria filed an appeal against the Framework Agreement called by the Andalusian Health Service (SAS) for the selection of active ingredients for certain indications. Farmaindustria based among other reasons, on the idea that grouping active ingredients in the same lot, defined by therapeutic indications, violates public procurement rules.

The Court of First Instance rejected the appeal arguing that the Framework Agreement only "disciplined" the general conditions of supply of active ingredients but without affecting particular medical acts, and that therefore, the freedom of prescription was safeguarded.

Farmaindustria filed an appeal against the judgement before the High Court of Justice, which was accepted embracing the reasoning of the Supreme Court in its Judgement dated 29 January 2018, which upheld an appeal prepared by our law firm against such Framework Agreement.

No distinctions with regard to the new Public Sector of Procurement Law

This Judgment is important for several reasons.

First, because the High Court of Justice decides in favour of correcting its previous doctrine based on the aforementioned judgement of the Supreme Court. Thus, the High Court of Justice understands that the configuration of the Framework Agreement did not attempt against neither the freedom of prescription nor the right of the patients to receive the most appropriate treatment, but it upholds the appeal because it understands that grouping different medicinal products in the same lot in a public tender is not possible.

Secondly, it is important to highlight that the decision of the High Court of Justice is based on the rules that are specifically applicable to medicinal products where the only groupings allowed are those which include medicinal products having the same active ingredient and identical administration route.

Finally, it is significantly important that the High Court does not consider in its judgement the new Law on Public Sector Contracts nor makes any comment in this regard. The fact that the new Law does not consider the requirement of "functional unit" for making the lots has not even been commented in this Judgement, which, once again, takes a position against the ATEs.

Our position is that in accordance with the new Law, in order to determine whether the division in lots has been properly carried out, it will be necessary to verify whether such division, in particular, is adequate for satisfying the needs that the public health system wishes to cover with the tender. We must not forget that in accordance with the new Law, public sector entities will only be able to celebrate agreements which are necessary and adequate for the fulfillment and performance of their purposes.