European Court of Justice, 13 March 2008, Doulamis

ADVERTISING

National legislation prohibiting advertising of dental care services

- **Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.**

The Court has held that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (Cipolla and Others, paragraph 47). It must be noted that a law such as the Law of 15 April 1958, in so far as it prohibits dental care providers from advertising, does not fall within any of the situations for the combined application of Articles 10 EC and 81 EC. As the Advocate General stated at point 71 of his Opinion, there is no evidence in the case in the main proceedings to show that the Law of 15 April 1958 encourages, reinforces or codifies concerted practices or decisions by undertakings. Nor is there anything in the order for reference to suggest that the law at issue has been divested of the character of legislation in that the Member State in question has delegated to private economic operators responsibility for taking decisions affecting the economic sphere. Lastly, even if it were possible to classify Mr Doulamis, in his capacity as proprietor of a dental clinic, as an 'undertaking' for the purpose of Article 81 EC, as interpreted by the Court (see, to that effect, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21), it does not follow from the order for reference that what is at issue here is any kind of agreement between undertakings, decision by associations of undertakings or concerted practice which may affect trade between the Member States, the object or effect of which is to prevent, restrict or distort competition within the common market. The answer to the question referred must therefore be that Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

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European Court of Justice, 13 March 2008
(C.W.A. Timmermans, K. Schiemann, J. Makarczyk, J.-C. Bonichot and C. Toader)
JUDGMENT OF THE COURT (Second Chamber)
13 March 2008 (*)
(Article 81 EC, read in conjunction with Article 10 EC – National legislation prohibiting advertising of dental care services)
In Case C-446/05,
REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de Première Instance de Bruxelles (Belgium), adjudicating on a criminal matter, made by decision of 7 December 2005, received at the Court on 14 December 2005, in the criminal proceedings against
Ioannis Doulamis,
intervening parties:
Union des Dentistes et Stomatologistes de Belgique (UPR),
Jean Totolidis,
THE COURT (Second Chamber),
composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,
Advocate General: Y. Bot,
Registrar: R. Grass,
having regard to the written procedure,
after considering the observations submitted on behalf of:
– Mr. Doulamis, by E. Koeune, avocat,
– the Belgian Government, by A. Hubert, acting as Agent,
– the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,
– the Commission of the European Communities, by F. Arbault, O. Beynet and K. Mojzesowicz, acting as Agents,
after hearing the **Opinion of the Advocate General at the sitting on 22 November 2007**,
gives the following
Judgment
1 The reference for a preliminary ruling concerns the interpretation of Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC.
2 This reference was made in criminal proceedings brought against Mr Doulamis, a dental technician, for infringement of, first, legislation governing the exercise of the dental profession and the medical profession and, secondly, legislation governing advertising in dental care matters.
Legal context

3 Article 3 of the Law of 15 April 1958 on advertising in dental care matters (Moniteur belge of 5 May 1958, p. 3542) ('the Law of 15 April 1958') imposes penalties on those who infringe Article 1 of that law, which is worded as follows:

'No person may, whether directly or indirectly, engage in advertising of any kind with a view to treating or providing treatment, whether or not by a qualified person, in Belgium or abroad, for dental or oral ailments, lesions or abnormalities, by means, inter alia, of displays or signs, inscriptions or plaques liable to be misleading as to the lawful nature of the activity advertised, leaflets, circulars, handouts and brochures, via the media of the press, radio or the cinema, by conferring or promising to confer benefits of any kind such as discounts or the provision of free transport for patients, or through the intermediary of canvassers or other such intermediaries.

The act on the part of mutual clinics and hospitals of informing their members of the dates and times of consultations, the names of those holding consultations and any changes to these shall not constitute advertising for the purposes of this article.'

The dispute in the main proceedings and the question referred for a preliminary ruling

4 It is apparent from the order for reference that Mr Doulamis is charged, inter alia, with having placed advertisements in a telephone directory for the 'John Doulamis Dental Laboratory' and the 'John Doulamis Dental Clinic', which is prohibited under the Law of 15 April 1958. The first advertising insert was published in the dental laboratories section and the second in the dental clinics section. Those inserts contained factual information, such as the services provided, the address, telephone number and opening hours of the two establishments.

5 Before the national court, Mr Doulamis submitted that advertising is an indispensable instrument for free economic competition. Thus, having invoked the combined provisions of Articles 10 EC and 81 EC, he relied on the judgment in Case 267/86 Van Eycke [1988] ECR 4769 to assert that, in view of the obligation upon the Member States not to introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings, that part of the criminal proceedings brought against him which relate to advertising in health care matters are unfounded.

6 Mr Doulamis maintained that, in view of the activities in which he is engaged, the dental clinic of which he is the proprietor meets the criteria for constituting an 'undertaking' for the purpose of Article 81 EC, which applies to members of the liberal professions. The national court is inclined to the view that the defendant was engaged in the supply of professional services and in the capacity of operator and proprietor of a dental clinic.

7 The Tribunal de Première Instance de Bruxelles states that Article 3(1)(g), the second paragraph of Article 10 EC and Article 81 EC, read in conjunction, would appear to suggest that a Member State cannot introduce or maintain in force measures likely to undermine the effectiveness of competition rules applicable to undertakings.

8 In that connection, it states that the possibility that the provisions in the Law of 15 April 1958 are liable to undermine free trade between the Member States, in so far as they may jeopardise the attainment of the objectives of a single market between those States, cannot be excluded.

9 According to the national court, which refers in that regard to point 89 of the Opinion of Advocate General Jacobs in the case which gave rise to the judgment in Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, owing to the heterogeneity of the professions and the specificities of the market in which they operate, it is necessary to assess, on a case by case basis, whether a restriction of conduct leads in fact on the market in issue to a restriction on competition within the meaning of Article 81 EC, when considered in the light of other Treaty provisions, such as Article 152 EC and Article 153 EC on the protection of public health and consumer protection, respectively.

10 Lastly, the national court observes that it is apparent from the Report of the Commission of the European Communities of 9 February 2004 on Competition in Professional Services [COM(2004) 83 final] that restrictions on advertising in that sector constitute interference with free competition.

11 In those circumstances, the Tribunal de Première Instance de Bruxelles decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, be interpreted as precluding a national law – in the present case the Law of 15 April 1958 – which prohibits (any person or) dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind, whether directly or indirectly, in the dental care sector?'

The question referred for a preliminary ruling

Admissibility

12 The Belgian and Italian Governments express doubts as to the admissibility of the present request for a preliminary ruling.

13 In that regard, it must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and

Case C-35/99 Arduino [2002] ECR I-1529, paragraph 24).

14 Nevertheless, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Arduino, paragraph 25, and Case C-425/06 Part Service [2008] ECR I-0000, paragraph 34).

15 However, none of those conditions is satisfied in this case.

16 It must be noted that the order for reference defines the national factual and legislative context in which the question referred arises. Moreover, the referring court has set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling.

17 The reference for a preliminary ruling from the Tribunal de Première Instance de Bruxelles is therefore admissible.

Substance

18 By its question, the national court asks, in essence, whether Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector, in so far as such a prohibition is liable to constitute interference with free competition.

19 According to settled case-law, although it is true that Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC, which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see **Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-11421**, paragraph 46).

20 The Court has held that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (Cipolla and Others, paragraph 47).

21 It must be noted that a law such as the Law of 15 April 1958, in so far as it prohibits dental care providers from advertising, does not fall within any of the situations for the combined application of Articles 10 EC and 81 EC.

22 As the Advocate General stated at point 71 of his Opinion, there is no evidence in the case in the main proceedings to show that the Law of 15 April 1958 encourages, reinforces or codifies concerted practices or decisions by undertakings. Nor is there anything in the order for reference to suggest that the law at issue has been divested of the character of legislation in that the Member State in question has delegated to private economic operators responsibility for taking decisions affecting the economic sphere.

23 Lastly, even if it were possible to classify Mr Doulamis, in his capacity as proprietor of a dental clinic, as an 'undertaking' for the purpose of Article 81 EC, as interpreted by the Court (see, to that effect, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21), it does not follow from the order for reference that what is at issue here is any kind of agreement between undertakings, decision by associations of undertakings or concerted practice which may affect trade between the Member States, the object or effect of which is to prevent, restrict or distort competition within the common market.

24 The answer to the question referred must therefore be that Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

Costs

25 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

OPINION OF ADVOCATE GENERAL BOT

delivered on 22 November 2007 1(1)

Case C-446/05

Procureur du Roi

v

Ioannis Doulamis

(Reference for a preliminary ruling from the Tribunal de première instance de Bruxelles (Belgium))
(National legislation prohibiting dental care providers from advertising their services to the general public – Articles 81 EC and 10 EC – Articles 43 EC and 49 EC – Restriction – Protection of public health – Proportionality)

1. The purpose of these preliminary ruling proceedings is to enable the referring court to assess the compatibility with Community law of its national legislation prohibiting dental care providers from advertising their services to the general public.

2. They originate in a criminal prosecution brought in Belgium against Mr Doulamis, who operates a dental laboratory and dental clinic in that Member State and who is accused of having placed advertisements for that laboratory and that clinic in the Belgacom telephone directory.

3. The Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), adjudicating on a criminal matter, questions whether the legislation on which that prosecution is based is compatible with Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, and has referred a question to the Court for a preliminary ruling on the interpretation of those provisions.

4. In this Opinion, I shall state that, in my view, the legislation at issue does not fall within the scope of those provisions, so that they must be interpreted as meaning that they do not preclude it.

5. I shall also say that the compatibility of that legislation with Community law must be examined in the light of Articles 43 EC and 49 EC on the freedom of establishment and the freedom to provide services.

6. I shall state that a ban on all advertising of dental care services to the general public constitutes a restriction on the exercise of those freedoms. I shall explain why that restriction is, in my view, justified on the ground of the protection of public health where the national legislation in question does not have the effect of prohibiting a dental care provider from giving basic details, free from enticement or incentive, making known his existence as a professional in a telephone directory or other source of information accessible by the public.

I – The legal framework

A – National law

7. Article 3 of the Loi du 15 avril 1958 relative à la publicité en matière de soins dentaires (Law of 15 April 1958 on advertising in dental care matters) (2) imposes penalties on those who infringe Article 1 of that law, which is worded as follows:

‘No person may, whether directly or indirectly, engage in advertising of any kind with a view to treating or providing treatment, whether or not by a qualified person, in Belgium or abroad, for dental or oral ailments, lesions or abnormalities, by means, inter alia, of displays or signs, inscriptions or plaques liable to be misleading as to the lawful nature of the activity advertised, leaflets, circulars, handouts and brochures, via the media of the press, radio or cinema, by conferring or promising to confer benefits of any kind such as discounts or the provision of free transport for patients, or through the intermediary of canvassers or other such intermediaries.

The act on the part of mutual clinics and hospitals of informing their members of the dates and times of consultations, the names of those holding the consultations and any changes to these shall not constitute advertising for the purposes of this article.’

B – Community law

1. The EC Treaty

8. Article 81(1) EC provides that the following are to be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

9. The second paragraph of Article 10 EC imposes an obligation on Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

10. Article 3(1)(g) EC provides that the activities of the European Community are to include, as provided for in the Treaty and in accordance with the timetable set out therein, a system ensuring that competition in the internal market is not distorted.

11. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. In accordance with the second paragraph of Article 43 EC, freedom of establishment is to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings.

12. Article 47(3) EC provides that, in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions on the freedom of establishment is to be dependent upon coordination of the conditions for their exercise in the various Member States. Dental care was the subject of Directives 78/686/EEC (3) and 78/687/EEC. (4)

13. Article 49 EC prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

14. Under Articles 46 EC and 55 EC, Articles 43 EC and 49 EC are not to constitute an obstacle to restrictions laid down on grounds of public health.

2. Secondary legislation on advertising

15. Secondary legislation on advertising comprises a general set of rules and special rules applicable, on the one hand, to specific products and, on the other, to specific information channels.

16. At the time of the facts in the main proceedings, the general set of rules was contained in Directive 84/450/EEC, (5) the purpose of which was to harmonise national laws concerning protection against misleading advertising. That measure was amended by Directive 97/55/EC, (6) which extended its scope to

comparative advertising, and by Directive 2005/29/EC. (7) Directive 84/450 was repealed and replaced by Directive 2006/114/EC. (8)

17. Directive 84/450 defines advertising as the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations. (9)

18. According to the same directive, misleading advertising means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor. (10)

19. Comparative advertising is any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. (11) It is permitted only if it meets a number of conditions. (12)

20. Member States must take appropriate measures to combat misleading advertising and to ensure compliance with the conditions of permitted comparative advertising. Moreover, they may adopt more extensive protection measures for combating misleading advertising than those provided for in Directive 84/450.

21. The above definitions and provisions are repeated in Directive 2006/114.

22. In tandem with the general scheme of rules, the Community legislature has adopted provisions which regulate advertising applicable to specific products, such as tobacco and medicinal products. (13) The measures adopted with respect to medicinal products are based on the protection of public health. They lay down an outright ban on the advertising to the general public of certain categories of medicinal products, such as those sold only on medical prescription, and the conditions which must be fulfilled by advertisements for other categories of medicinal products and advertisements directed at healthcare professionals.

23. The Community legislature has also coordinated the national rules and regulations governing television advertising (14) and electronic advertising. (15) Directive 89/552 provides, in particular, that television advertising and teleshopping must not encourage behaviour prejudicial to health or to safety. (16) Article 14(1) of that directive provides that television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls is to be prohibited. According to Article 14(2) of that directive, teleshopping for medicinal products which are subject to a marketing authorisation and teleshopping for medical treatment are prohibited. Under Article 3(1) of Directive 89/552, Member States are to remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by the directive.

II – The facts in the main proceedings

24. Mr Doulamis operates a dental laboratory and dental clinic in the commune of Saint-Gilles, in the Brussels Capital Region of Belgium.

25. In November 1996, the Union des dentistes et stomatologistes de Belgique (Belgian Association of Dentists and Stomatologists) brought a civil action against Mr Doulamis, alleging that he had engaged unlawfully in dental practice and had placed advertisements in the Belgacom telephone directory.

26. In the course of the police investigation carried out after that application to join the criminal proceedings as a party claiming damages, Mr Doulamis stated that he was a dental technician, that he had passed the examination for dental prosthetics technicians in 1981, that in 1985 he had obtained a diploma in business administration and that he held a certificate issued by the Chambre des métiers et négoces de la province du Brabant (Chamber of Trade and Commerce for the Province of Brabant) confirming that he fulfilled all the requirements necessary to practise as a dental prosthetics technician.

27. The investigation established that Mr Doulamis had placed three advertisements in the Belgacom telephone directory, one for the dental laboratory and the other two for the clinic. Those advertisements, as reproduced in the order for reference, were as follows.

28. The advertisement for the dental laboratory comprises, within a box measuring approximately 10 cm by 7 cm, under the headings ‘Jean Doulamis’ and ‘Dental laboratory’ written in large letters beside a sign, the words ‘Immediate one-hour repairs’, printed within a coloured band, followed by the following text: ‘Full range of removable and fixed prosthetics – Ceramics – Metal frame dentures – Descaling – Prosthetic renewals – Free check-ups and consultations – Personal service – Home visits’, followed by the address of the laboratory, telephone number and hours of opening.

29. The first advertisement for the dental clinic comprises, within a box measuring approximately 4 cm by 8 cm, from top to bottom, the headings ‘Jean Doulamis’, ‘Dental clinic’ and ‘Porte de Hal’ in large letters, followed by the same sign as above, followed by the words ‘Adult and child treatment – Fixed and removable prosthetics – Cosmetic orthodontics – Parodontology’, under which appear the clinic’s address, two telephone numbers, the words ‘On-site laboratory’ and the hours of opening.

30. The second advertisement for the clinic comprises, in a box measuring approximately 4 cm by 2 cm, the headings ‘Doulamis Jean’ and ‘Dental clinic’ in large letters, followed by the words ‘Treatment: Adults and children – Prosthetics – Orthodontics’, followed by the hours of opening, an address and a telephone number.

31. Mr Doulamis submitted in his defence that the Law of 1958 was contrary to free competition, both at national and international level. He referred to Article 81 EC and the judgment in Van Eycke, (17) in which the Court held that Article 81 EC, read in conjunction with Article 10 EC, requires the Member States not to introduce or maintain in force measures, even of a leg-

islative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. (18) He also made reference to the Report of the Commission of the European Communities on Competition in Professional Services. (19)

III – The question referred

32. The referring court states that it is faced with the following questions.

33. It follows from Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, that Member States may not introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings.

34. Mr Doulamis, who is a self-employed professional and operates a dental clinic, may be deemed to be an undertaking.

35. It cannot be ruled out that a law such as the Law of 1958 may affect freedom of trade between Member States in such a way as to impede completion of the single market. In this connection, it follows from the Opinion of Advocate General Jacobs in the case which gave rise to the judgment in Pavlov and Others (20) that, owing to the heterogeneity of the professions and the specificities of the markets on which they operate, no general formula can be applied. (21) It is therefore necessary to assess carefully in each case whether a restriction of conduct leads on the market in issue to a restriction of competition within the meaning of Article 81 EC, taking into account, where appropriate, the requirements of the protection of health and consumer protection.

36. It was in the light of those considerations that the Tribunal de première instance de Bruxelles decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, be interpreted as precluding a national law – in the present case the Law of 15 April 1958 – which prohibits (any person or) dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind, whether directly or indirectly, in the dental care sector?'

IV – Analysis

A – Admissibility of the question referred

37. The Belgian and Italian Governments submit that the question referred for a preliminary ruling is inadmissible.

38. The Belgian Government bases its contention of inadmissibility on the argument that Article 81 EC does not apply to the Law of 1958 because the ban on advertising in the dental care sector is social in nature and is intended to protect public welfare.

39. The Belgian Government deduces from this that the question referred by the national court is not relevant to the resolution of the dispute in the main proceedings and is of a purely hypothetical nature.

40. The Italian Government submits that the question referred is hypothetical because it seeks to clarify whether a general ban on all advertising in the dental care sector is compatible with Article 81 EC, whereas the Law of 1958 does not prohibit all forms of advertising but only those forms referred to in Article 1 of that law.

41. In my view, the arguments put forward by those governments are not capable of demonstrating that the question referred for a preliminary ruling is inadmissible.

42. It should be noted that, according to settled case-law, it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (22)

43. It is true that the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court. As is regularly stated in judgments on references for a preliminary ruling, the spirit of cooperation which must prevail in such proceedings requires the national court for its part to have regard to the function entrusted to the Court, which is to assist in the administration of justice in the Member States and not to give opinions on general or hypothetical questions. (23)

44. Thus, the Court has refused to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

45. The same is true where the problem raised by the referring court is hypothetical. (24) That may be the case, for example, where the question referred for a preliminary ruling by such a court relates to a legal or factual situation which does not correspond to the facts of the main proceedings. (25)

46. That may also be the case where the national court refers a question to the Court for a preliminary ruling with a view to enabling it to decide whether the legislation of another Member State is in accordance with Community law, where that court bases its question on an interpretation of that legislation which is founded on mere suppositions. (26)

47. I do not believe that the question referred by the Tribunal de première instance de Bruxelles for a preliminary ruling falls within any of those categories of inadmissibility.

48. Thus, contrary to the submissions of the Belgian Government, the question is not obviously without relevance to the resolution of the dispute in the main proceedings and is not hypothetical. If Article 3(1)(g) EC and the second paragraph of Article 10 EC, read in conjunction with Article 81 EC, were interpreted as meaning that they preclude a national law such as the

Law of 1958, the referring court would be obliged to disapply that law and acquit Mr Doulamis. The question referred is therefore entirely relevant to the resolution of the dispute in the main proceedings.

49. Next, were it the case that Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, did not apply to such a law, that would not make the question under consideration hypothetical. The referring court has set out the reasons for its uncertainty as to the application of that article in the present case, and those reasons are based on points of fact and law which are consistent with the legal and factual context described by that court.

50. Whether Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10, does or does not apply to national legislation such as the Law of 1958 is a question of interpretation of those provisions and that fact cannot call into question the admissibility of the question referred.

51. As regards, next, the Italian Government's argument that the question referred for a preliminary ruling is hypothetical because it does not relate to the substance of the Law of 1958, it should be noted that, in the context of the procedure established by Article 234 EC providing for cooperation between courts, the functions of the Court and those of the referring court are clearly separate, and it falls exclusively to the latter to interpret its national legislation. (27)

52. The Court of Justice must therefore take account of the legislative context in which the question referred to it arises, as described by the national court, even if that regulatory context is contested by the very State in which that court is located in the observations which it submits to the Court. (28)

53. Since the Tribunal de première instance de Bruxelles stated, in its order for reference, that the Law of 1958 was to be understood as prohibiting advertising of any kind in the dental care sector, it is not for the Court or the Italian Government to call that interpretation into question.

54. That is why I take the view that the question under consideration is admissible and that it is necessary to reply to it.

B – The question referred for a preliminary ruling

55. By its question, the referring court asks whether Article 81 EC, Article (3)(1)(g) EC and the second paragraph of Article 10 EC, read in conjunction, must be interpreted as precluding a national law which prohibits dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind of their services , whether directly or indirectly, to the general public.

56. To date, the Community legislature has not adopted any measure regulating or harmonising the possibility of advertising for the healthcare professions, in particular as regards dental care. Directive 78/686, the purpose of which is to facilitate the effective exercise of the right of establishment and the freedom to provide services in respect of the activities of dental practitioners, (29) contains no provision on that point. (30) It is therefore indeed the case that the question whether a national law such as the Law of 1958 is compatible with Community law must be examined in the light of the provisions of the Treaty.

57. It should be stated at this point, in response to the position adopted by the Belgian Government, that the fact that the Law of 1958, in prohibiting dental care providers from advertising their services, seeks to protect public health is no justification for the fact that that law may undermine the attainment of the objectives of the Treaty. Although, pursuant to Article 152 EC, measures in the health sector fall principally within the competence of the Member States, the Community's power in that sector being confined to supplementing such measures, the Member States must none the less, when exercising their powers, comply with Community law. (31)

58. Medical or paramedical work such as the provision of dental care is an economic activity subject to the rules of the internal market. The measures adopted in a Member State to regulate the advertising in which dental care providers may engage must not therefore infringe the Treaty rules on competition. Nor must they be contrary to the freedoms of movement. (32)

59. The objective pursued by the Law of 1958 cannot therefore, as such, exclude it from the scope of Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC. Whether or not that law falls within the scope of those provisions must therefore be assessed in the light of the characteristic features of that law and the facts in the main proceedings.

60. I share the Commission's view that the provisions of Article 81 EC, read in conjunction with those of Article 3(1)(g) EC and the second paragraph of Article 10 EC, do not apply to national legislation such as the Law of 1958.

61. On the other hand, the ban prohibiting dental care providers from advertising their services to the general public is, in my opinion, a restriction on the freedom of establishment and the freedom to provide services. I shall, however, say that such a ban may be justified on the ground of the protection of public health and indicate the extent to which it is, in my view, proportionate to that objective.

62. I shall examine each of those points in turn.

1. Whether the Law of 1958 is compatible with Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC

63. The purpose of Article 81 EC is to regulate the conduct of undertakings and not that of the Member States. It prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices by economic operators which may affect trade between Member States and which are incompatible with competition.

64. The Court has acknowledged that that article, read in conjunction with Article 10 EC, may be relied on against a legislative measure adopted by a Member State. Thus, according to settled case-law, while Article 81 EC is, in itself, concerned solely with the conduct of

undertakings and not with laws or regulations emanating from the Member States, that article, read in conjunction with Article 10 EC, none the less requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. (33)

65. However, by extending the scope of Article 81 EC to measures emanating from a Member State, it was not intended to extend it to any State measure which may have adverse effects on competition.

66. The Court has held that Articles 10 EC and 81 EC are infringed in two situations: first, where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, and, second, where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. (34)

67. In those two situations, a State measure is considered to be contrary to the provisions of Article 81 EC, by application of Article 10 EC, because it provides for or validates in law a concerted practice or a decision by undertakings which is contrary to the provisions of Article 81 EC. The combined application of Articles 81 EC and 10 EC to State measures which fall into either of those situations thus serves to ensure that a State measure does not undermine the prohibitions laid down in Article 81 EC with regard to undertakings. It also has the effect of preventing a concerted practice or decision by undertakings which have anti-competitive effects from escaping the penalties under that article solely because of their legal form. (35)

68. It none the less remains the case that Article 81 EC, in conjunction with Article 10 EC, applies to a legislative or regulatory measure adopted by a Member State only if that measure encourages, reinforces or codifies a measure attributable to undertakings.

69. The fact that the two situations referred to above are not exhaustive, because they are preceded by the adverbial phase ‘in particular’ in a number of the Court’s decisions, (36) does not in my view call that analysis into question. For confirmation that this is the case, it is sufficient to examine the Court’s interpretation of those two situations, which shows that, on the contrary, it sought to contain the scope of the combined application of Articles 81 EC and 10 EC within the narrow limits I have just set out.

70. Thus, in Arduino, (37) the Court was faced with a measure adopted by a Member State which, on the basis of a draft produced by a professional body of members of the Bar, approved a tariff fixing minimum and maximum fees for members of the profession. After establishing that that national measure may affect trade between Member States within the meaning of Article 81 EC, (38) it held that the measure in question did not fall within the scope of that provision in conjunction with Article 10 EC. The Court held that the Member State concerned , on the one hand, could not be said to have delegated to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the national measure at issue of the character of legislation, or, on the other hand, to have required or encouraged the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or to have reinforced their effects. (39)

71. Clearly, there is no evidence in this case to show that the Law of 1958 encourages, reinforces or codifies concerted practices or decisions by undertakings.

72. Thus, as the Commission observes, that law, in prohibiting advertising of any kind in the dental care sector, neither requires nor encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC.

73. Nor is there any evidence in the documents before the Court to suggest that the law in question reinforces a pre-existing agreement. Finally, the referring court provides no indication as to the circumstances in which the Law of 1958 was adopted, which would support the assumption that the Kingdom of Belgium had delegated to economic operators responsibility for taking a decision on advertising in the dental care sector and that the Law of 1958 simply codified that decision.

74. It should be noted, in this regard, that the grounds on which the national court referred the question for a preliminary ruling under consideration to the Court are unrelated to either of the situations for the combined application of Articles 10 EC and 81 EC which have been established by case-law. It should be recalled that the referring court has questioned whether those articles are applicable in the main proceedings because of the possible effects of the Law of 1958 on competition between the Member States and the fact that Mr Doulamis may be deemed to be an undertaking according to the definition of the term ‘undertaking’ given in case-law.

75. That is why I am of the opinion that the Law of 1958 does not fall within the scope of Article 81 EC, read in conjunction with Article 10 EC. I therefore propose that the Court’s answer to the referring court should be that Article 81 EC, Article 3(1)(g) EC and the second paragraph of Article 10 EC, read in conjunction, must be interpreted as meaning that they do not preclude a national law which prohibits dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind of their services, whether directly or indirectly, to the general public.

2. Whether the Law of 1958 is compatible with the freedom of establishment and the freedom to provide services

76. Medical and paramedical activities, in particular those which relate to dental care, therefore fall within the scope of the Treaty provisions guaranteeing the freedoms of movement. That analysis is borne out by the wording of Article 47(3) EC with respect to the freedom of establishment. It is also consistent with settled case-law as regards both that fundamental freedom (40) and the freedom to provide services. (41)

77. It is true that whether the Treaty provisions on those freedoms of movement are applicable depends on whether there is a cross-border element. It is settled case-law that those provisions cannot be applied to situations which are confined in all respects within a single Member State. (42) Thus, a national of a Member State cannot rely on Community law if he has not exercised his profession or acquired his training in another State of the European Union. (43)

78. In the light of the information provided by the referring court, there does not appear to be anything to link the dispute in the main proceedings to Community law. According to that information, Mr Doulamis pursues his activities in Belgium, where he is established, and has been prosecuted in that Member State for having placed advertisements in a national telephone directory. Moreover, it is clear from the documents before the Court that he obtained his qualifications as a dental prosthetics technician and in business management in Belgium. Finally, the referring court does not indicate that Mr Doulamis has moved within the Community in order to exercise his profession.

79. The only factor which is external to Belgium, on the basis of the information provided to the Court, is Mr Doulamis's place of birth, in Greece. However, in the absence of information on Mr Doulamis's nationality, his place of birth alone is not sufficient to establish that he is in the position of a Community national wishing to pursue an activity as a self-employed person in a Member State other than his State of origin. It will be for the referring court to verify that point and to examine whether Mr Doulamis is a national of a Member State other than the Kingdom of Belgium.

80. If that is not so, the fact that the dispute in the main proceedings may be devoid of any cross-border element should not, however, discharge the Court from its obligation to provide the referring court with the information needed in order to assess the compatibility of the Law of 1958 with Articles 43 EC and 49 EC.

81. It is clear from the case-law of the Court that it will interpret the scope of the freedoms of movement guaranteed by the Treaty where the dispute in the main proceedings does not contain any cross-border element, on the ground that that interpretation may be useful to the national court in resolving the dispute which has been brought before it in the main proceedings, in circumstances where the national court is bound by its domestic law to allow a national to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation. That case-law, which was established in the context of the free movement of goods in Guimont, (44) has been applied in the context of the other freedoms of movement. (45)

82. Moreover, it may be inferred from the grounds of the order for reference that the Tribunal de première instance de Bruxelles is seeking to assess the compatibility of its national legislation not only with Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, but also with the rules of the common market aimed at establishing a single market, which necessarily includes those relating to the freedoms of movement.

83. Finally, it should be recalled that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it, (46) and that, in accordance with settled case-law, the Court has a duty to provide interpretations of all the provisions of Community law which the national court needs for that purpose, even if those provisions are not expressly indicated in the questions referred to it by that court, provided that the latter has furnished the Court with the factual and legal material necessary to enable such an interpretation to be given. (47)

84. I am therefore of the opinion that the referring court should be given guidance as to the scope of Articles 43 EC and 49 EC which will be of use to it in resolving the dispute in the main proceedings. Accordingly, I shall set out in turn the reasons why a law of a Member State such as the Law of 1958, in prohibiting dental care providers from engaging in advertising of any kind of their services to the general public, constitutes a restriction within the meaning of those articles. I shall then indicate the extent to which such a restriction may be justified.

a) Whether there is a restriction within the meaning of Articles 43 EC and 49 EC

85. The freedom of establishment provided for in Article 43 EC includes the right to take up an occupation as a self-employed person in another Member State and to pursue that occupation there on a permanent basis. In accordance with the case-law of the Court, that article not only requires the abolition of discriminatory measures but is also applicable, according to the very broad expression often used by the Court, to 'all measures which prohibit, impede or render less attractive the exercise of that freedom'. (48)

86. The restrictions covered in this way by Article 43 EC include measures which, even though they apply without distinction, affect the conditions for pursuing the activity concerned and have the effect of depriving an economic operator of an effective means of competing with a view to penetrating a market. (49)

87. That appears to me to be true of the legislation of a Member State which prohibits advertising of any kind in the dental care sector.

88. The importance of advertising in gaining access to a market has already been highlighted by the Court on a number of occasions in the area of the free movement of goods.

89. Thus, in De Agostini and TV-Shop, (50) the Court held that it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

90. In Gourmet International Products, (51) the Court gave a ruling on legislation prohibiting, with a few insignificant exceptions, the directing of any adver-

tising messages for alcoholic beverages at consumers. It held that such a prohibition on advertising must be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 28 EC. (52)

91. The Court based that analysis on the fact that, in the case of products such as alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar. (53)

92. In Douwe Egberts, (54) the Court reached the same conclusion as in Gourmet International Products in relation to national legislation prohibiting references in the advertising of foodstuffs to slimming and to medical recommendations, attestations, declarations or statements of approval.

93. It appears to me that the grounds on which the Court reached such a conclusion when interpreting Article 28 EC with respect to a ban on the advertising of goods can be applied to the interpretation of Article 43 EC in connection with the legislation of a Member State which prohibits dental care providers from engaging in advertising of any kind of their services.

94. In my opinion, the relationship between a patient and a treatment provider is stronger than the relationship with a product, which results merely from consumer habits. In the healthcare sector, that relationship is based on the patient's trust in the service provider as an individual or in a healthcare establishment and the need for quality in respect of such services is clearly of the highest. That trust is based initially on the reputation of the professional or the healthcare establishment and, in general, the more treatment the patient receives, the more that trust is strengthened.

95. The need for such a high level of quality in the healthcare sector is reflected, in particular, in the fact that the healthcare professions have traditionally been highly regulated in the various Member States. Moreover, it was that extensive regulation which prompted the Community legislature to adopt in that field the first sectoral directives on recognition of the qualifications needed to exercise those professions and on harmonisation of the training required in order to obtain those qualifications. (55)

96. Healthcare is therefore a sector in which the free movement of professionals has met with significant obstacles and in which the need for mutual recognition has led to extremely wide-ranging harmonisation by the Community legislature.

97. That is why I take the view that access to the healthcare market in a Member State by a professional, whether a natural or a legal person, from another Member State is without doubt even more difficult than access to other activities such as banking or insurance, in which the risks are not as high and the relationship of trust between the service provider and the recipient does not have the same importance.

98. Consequently, I consider that a ban on all advertising to promote the provision of healthcare services is indeed liable to create a greater obstacle for professionals from other Member States than for those from the host Member State. A law of a Member State such as the Law of 1958 therefore constitutes, in my opinion, a restriction within the meaning of Article 43 EC.

99. Such a measure may also be regarded as a restriction on the freedom to provide cross-border services.

100. Article 49 EC, like Article 43 EC, requires the abolition of any restriction on the freedom to provide services, even if that restriction applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or otherwise impede the activities of providers of services established in another Member State where they lawfully provide similar services. Moreover, the freedom to provide services is enjoyed by both providers and recipients of services. (56)

101. The ban on advertising of any kind in the dental care sector, as provided for by the Law of 1958, deprives providers of advertising services established in Member States other than Belgium of the possibility of offering their services to professionals established in that Member State. It also prevents professionals such as Mr Doulamis from using the services of such providers.

102. It is now appropriate to examine whether that restriction may be justified.

b) Whether the restriction may be justified

103. The Belgian Government has set out the reasons for which the ban on advertising of any kind by service providers in the dental care sector was adopted. According to the Belgian Government, advertising practices aimed at attracting patients by means of advertisements or promotions are irreconcilable with the requirements of the protection of public health and the dignity of the profession. Such practices would be liable to undermine the trust which must exist between dental care providers and their patients, as well as the status and integrity of practitioners.

104. Similarly, the Italian Government has made reference to the provisions of Directive 2001/83 which prohibit the advertising to the general public of medicinal products which are available on medical prescription only and which authorise the Member States to ban advertising of medicinal products the cost of which may be reimbursed. It inferred from those provisions that the Member States were entitled to prohibit all advertising in those healthcare sectors in which that question had not been the subject of harmonisation measures.

105. According to the Italian Government, information provided to the public in the healthcare sector must

come from objective sources and advertising carried out by the service providers themselves would not fulfil that requirement of objectivity.

106. In the same way as the Belgian and Italian Governments, I am of the opinion that Member States are entitled to prohibit dental care providers from advertising their services to the general public where that prohibition is limited to the promotion of those services. I base that analysis on the following considerations.

107. In accordance with settled case-law, a restriction on the exercise of the freedoms of movement resulting from a national measure which is applicable without distinction may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective it pursues and does not go beyond what is necessary in order to attain it. (57)

108. The first of those conditions is clearly fulfilled. The protection of public health is cited as one of the grounds capable of justifying a measure which discriminates against nationals of other Member States. The Court has held, in this regard, that the health and life of humans rank foremost among the property or interests protected by the Treaty provisions providing for possible derogations from the prohibition of restrictions on the freedoms of movement. (58) The protection of public health is also one of the overriding reasons relating to the general interest which are capable of justifying restrictions on the freedoms of movement guaranteed by the Treaty. (59)

109. It is also indisputable that the second condition required by case-law is also fulfilled. The ban prohibiting service providers from engaging in advertising of any kind of their services to the general public is indeed intended to prevent them from engaging in advertising activities which might undermine the trust which their patients place in them, by detracting from the dignity of their profession and thus compromising the quality of care.

110. The question at the centre of the present case is therefore, in actual fact, whether such a prohibition is disproportionate in relation to such objectives or, in other words, whether those objectives may be achieved just as effectively by measures which are less restrictive.

111. That question is particularly apposite given that, at the time of the conduct complained of in the main proceedings, there were already Community measures in place which sought to protect consumers against excessive advertising, in particular against misleading advertising and television advertising which might encourage behaviour prejudicial to health.

112. The existence of that legislation therefore prompts me to examine whether the protection of public health and the protection of the dignity of the profession are capable of justifying a ban prohibiting dental care providers from engaging in advertising in the same way as for any other service provider, that is to say by promoting their services through any form of communication in order to encourage the consumer to purchase them. It must also be ascertained whether those grounds are capable of justifying a ban on any form of advertising to the general public.

113. I take the view that the protection of public health is capable of justifying a ban on any form of communication which offers enticements or incentives to the general public for the following reasons.

114. In the first place, healthcare services differ from other services. They affect the physical integrity and psychological balance of the recipient. Moreover, a patient who avails himself of those services is responding to a genuine need related to the restoration of his health and, in some cases, the protection of his life. Bearing in mind the importance of what is thus at stake, when having to decide whether or not to avail himself of treatment, the patient does not have the same freedom of choice as he does with other services. When he avails himself of treatment, the patient is not satisfying a desire but responding to a need.

115. In the second place, the dental care sector, as with all activities in the healthcare sector, is one in which, in my opinion, the degree of 'asymmetry of information' between the provider and the recipient of the service, to adopt the expression used by the Commission in its abovementioned Report on Competition in Professional Services, (60) is at its highest. This means that, in his area of activity, the service provider has a level of competence which is very much higher than that of the recipient, so that the latter is not in a position to make a genuine assessment of the quality of the service he is purchasing.

116. Consequently, taking into account that asymmetry in the level of competence and the significance to the patient of the decision whether or not to avail himself of healthcare services, I consider that the relationship of trust between the patient and the healthcare professional is a vital one. In other words, it must be possible for the patient to be convinced that, when that practitioner advises or recommends that he follow a course of treatment, the reasons for that advice or recommendation relate solely to the protection of his health.

117. That is why I share the opinion of the Belgian and Italian Governments when they state that that relationship of trust would necessarily be undermined if dental care providers were permitted to advertise to the general public in order to promote their services. In such circumstances, the patient might legitimately fear that, when the practitioner advises or recommends that he follow a course of treatment, that advice or recommendation is motivated, at least in part, by the economic interests of the practitioner. The patient might then reassess the value of that advice or recommendation and thus compromise his state of health by refusing or deferring the treatment proposed.

118. Consequently, I am of the opinion that the protection of public health may properly justify a ban prohibiting dental care providers from engaging in any form of advertising to the general public to promote their services. In so far as, in the absence of common or harmonised rules on advertising in the dental care sector, it is for each Member State to decide on the degree

of protection which it wishes to afford to public health and on the way in which that level of protection is to be achieved, having due regard, of course, to the principle of proportionality, (61) I am of the opinion that such a prohibition is not contrary to Articles 43 EC and 49 EC.

119. That prohibition cannot, however, be unlimited. In order for dental care providers, as well as other healthcare professionals, to be able to pursue their activities, the public must be aware of their existence. This means that the public must have some way of knowing the identity of the service provider, be that a natural or a legal person, the services which he is permitted to provide, the place where he provides them, his hours of business and contact details, such as telephone and fax numbers or an internet address.

120. Public access to such factual information is therefore necessary in order to put into effect the free movement of healthcare professionals. It also helps to improve the protection of public health by facilitating patient mobility within the Union. Developments in the Court's case-law since the judgments in Decker (62) and Kohll demonstrate that patients are increasingly seeking healthcare in other Member States. There are several reasons for that trend. They may, for example, wish to benefit from less expensive healthcare or treatments which do not exist in their State of residence, or they may wish to be treated more quickly than in the State of residence. This mobility, in giving patients access to a wider range of healthcare than is available in their Member State, also contributes to the protection of public health.

121. A national law prohibiting dental care providers from advertising their services, whether directly or indirectly, to the general public should not go so far as to prohibit such service providers from giving, in a telephone directory or other source of information accessible by the public, basic details, free from enticements or incentives, making known their existence as professionals, such as their name, the activities they are permitted to pursue, the place where they pursue them, their hours of business and their contact details.

122. It is for the national court to assess whether, in the case at issue, the advertisements which Mr Doulamis placed in the Belgacom telephone directory fall outside that limitation, in the light, in particular, of the manner in which those advertisements were presented and details such as 'Immediate one-hour repairs', 'Free check-ups and consultations', 'Personal service' and 'Home visits'.

123. In the light of the foregoing considerations, I shall propose that the Court's answer to the referring court should be that a national law which prohibits dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind of their services, whether directly or indirectly, to the general public constitutes a restriction on the freedom of establishment and the freedom to provide services within the meaning of Articles 43 EC and 49 EC. However, that restriction is justified on the ground of the protection of public health where the national legislation in question does not have the effect of prohibiting such service providers from giving, in a telephone directory or other source of information accessible by the public, basic details, free from enticements or incentives, making known their existence as professionals, such as their name, the activities they are permitted to pursue, the place where they pursue them, their hours of business and their contact details.

V – Conclusion

124. In the light of the foregoing, I propose that the Court should reply to the question referred for a preliminary ruling by the Tribunal de première instance de Bruxelles as follows:

Article 81 EC, Article 3(1)(g) EC, and the second paragraph of Article 10 EC, read in conjunction, must be interpreted as meaning that it does not preclude a national law which prohibits dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind of their services, whether directly or indirectly, to the general public.

However, such legislation constitutes a restriction on the freedom of establishment and the freedom to provide services within the meaning of Articles 43 EC and 49 EC.

That restriction is justified on the ground of the protection of public health where the national legislation in question does not have the effect of prohibiting dental care providers from giving, in a telephone directory or other source of information accessible by the public, basic details, free from enticements or incentives, making known their existence as professionals, such as their name, the activities they are permitted to pursue, the place where they pursue them, their hours of business and their contact details.

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1 – Original language: French.

2 – 'The Law of 1958'.

3 – Council Directive of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1978 L 233, p. 1).

4 – Council Directive of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ 1978 L 233, p. 10). That directive and Directive 78/686 were repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

5 – Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

6 – Directive of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC (OJ 1997 L 290, p. 18).
7 – Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22) ('Directive 84/450').
8 – Directive of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).
9 – Article 2(1).
10 – Article 2(2).
11 – Article 2(2a) of Directive 84/450.
12 – Comparative advertising is permitted, in essence, inter alia, if it is not misleading, if it compares goods or services meeting the same needs or intended for the same purpose, if it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price, if it does not discredit or denigrate a competitor and does not create confusion with a competitor and if it does not take unfair advantage of the reputation of the trade mark or trade name of that competitor.
13 – See Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ 1992 L 113, p. 13), repealed and replaced by Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).
14 – Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552').
15 – Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ 2000 L 178, p. 1).
16 – Article 12(d).
17 – Case 267/86 [1988] ECR 4769.
18 – Paragraph 16.
19 – COM(2004) 83 final/2.
20 – Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.
21 – Point 89.
22 – See, in particular, Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I-905, paragraph 41 and the case-law cited.
23 – Ibid., paragraph 42 and the case-law cited.
24 – Ibid., paragraph 43 and the case-law cited.
25 – See, in particular, Case C-13/01 Safalero [2003] ECR I-8679, paragraphs 38 to 40, and Case C-165/03 Längst [2005] ECR I-5637, paragraph 34.
26 – Case C-153/00 der Weduwe [2002] ECR I-11319, paragraphs 33 to 39.
27 – See, in particular, Case C-295/97 Piaggio [1999] ECR I-3735, paragraph 29 and the case-law cited.
28 – Case C-153/02 Neri [2003] ECR I-13555, paragraph 35.
29 – Second recital in the preamble.
30 – The sixth recital in the preamble to Directive 2005/36, which repealed and replaced Directive 78/686, states that '[t]he facilitation of service provision has to be ensured in the context of strict respect for public health and safety and consumer protection. Therefore, specific provisions should be envisaged for regulated professions having public health or safety implications, which provide cross-frontier services on a temporary or occasional basis'.
31 – See, to that effect, Case C-56/01 Inizan [2003] ECR I-12403, paragraphs 16 and 17.
32 – See, to that effect, Case C-260/89 ERT [1991] ECR I-2925, paragraph 12.
33 – Case C-198/01 CIF [2003] ECR I-8055, paragraph 45 and the case-law cited.
34 – Ibid., paragraph 46.
35 – See the Opinion of Advocate General Poiares Maduro in Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-11421, point 32.
36 – See, in particular, the order in Case C-250/03 Mauri [2005] ECR I-1267, paragraph 30, and Cipolla and Others, paragraph 47.
37 – Case C-35/99 [2002] ECR I-1529.
38 – Paragraph 33.
39 – Paragraph 43.
40 – See, in particular, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraph 24.
41 – See, with regard to medical activities, Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, as well as, with regard to dental care and, specifically, orthodontic treatment, Case C-158/96 Kohll [1998] ECR I-1931.
42 – See, in particular, Joined Cases C-29/94 to C-35/94 Aubertin and Others [1995] ECR I-301, paragraph 9; Case C-97/98 Jägerskiöld [1999] ECR I-7319, paragraph 42 and the case-law cited; and Case C-60/00 Carpenter [2002] ECR I-6279, paragraph 28.
43 – See, with regard to a therapist, Joined Cases C-54/88, C-91/88 and C-14/89 Nino and Others [1990] ECR I-3537, paragraph 11.
44 – Case C-448/98 [2000] ECR I-10663, paragraph 23.
45 – See, with regard to the free movement of capital, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR I-2157, paragraph 26, and Case C-300/01 Salzmann [2003] ECR I-4899, paragraph 33. See, with regard to the freedom of establishment and the freedom to provide services, Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941, paragraph 29, and Cipolla and Others, paragraph 30.

46 – See, in particular, Case C-45/06 Campina [2007] ECR I-2089, paragraph 30 and the case-law cited.
47 – See, in particular, Case C-152/03 Ritter-Coulais [2006] ECR I-1711, paragraph 29 and the case-law cited.
48 – See, in particular, Case C-442/02 CaixaBank France [2004] ECR I-8961, paragraph 11 and the case-law cited.
49 – See, as regards the French rules prohibiting the remuneration of sight accounts, CaixaBank France, paragraph 12.
50 – Joined Cases C-34/95 to C-36/95 [1997] ECR I-3843, paragraph 42.
51 – Case C-405/98 [2001] ECR I-1795.
52 – Paragraph 25.
53 – Paragraph 21.
54 – Case C-239/02 [2004] ECR I-7007, paragraph 53.
55 – The first sectoral scheme on the mutual recognition of qualifications was adopted in respect of doctors in 1975. It was followed by five other sectoral schemes, adopted between 1977 and 1985, concerning nurses responsible for general care and dental practitioners, in the form of Directives 78/686 and 78/687, and veterinary surgeons, midwives and pharmacists. Those directives were repealed and replaced by Directive 2005/36.
56 – Case C-262/02 Commission v France [2004] ECR I-6569, paragraph 22 and the case-law cited.
57 – CaixaBank France, paragraph 17 and the case-law cited.
58 – Case C-320/93 Ortscheit [1994] ECR I-5243, paragraph 16.
59 – Idem.
60 – Point 25.
61 – See, to that effect, Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivía [1991] ECR I-4151, paragraph 16.
62– Case C-120/95 [1998] ECR I-1831. It should be noted that the facts in Kohll related to the rejection of a request by a Luxembourg national for authorisation for his daughter, who was a minor, to receive treatment provided by an orthodontist established in Trier (Germany).