Restrictions on advertising relating to the provision of oral and dental care services and EU law

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Abstract: The recent Judgment of the Court (Third Chamber) of 4 May 2017 in Case C-339/15 is examined. ECLI: EU: C: 2017: 335

1. Preamble

The use of advertising by dentists is restricted by laws of nations for public interest reasons, such as the protection of public health. This is so to the extent that, in some countries, restrictions go as far as prohibiting any type of promotion of oral and dental care services. And this explains why the Court of Justice of the European Union ("**CJEU**") has recently been asked whether this type of prohibition is in conformity with EU law.

The CJEU has ruled on the matter in its judgment of 4 May 2017 in Case C-339/15 (*Openbaar Ministerie v Luc Vanderborght*) on the occasion of Belgian legislation, under which the use of advertising by dentists is restricted and the advertising of dental services is prohibited. Thus, the Belgian Royal Decree laying down rules for the practice of dentistry[1] of 1 June 1934 provides that '*[f]or the purpose of informing the public, it is permissible to affix only an inscription or a plaque of modest dimensions and appearance to the building in which a competent person practises dentistry, stating the name of the practitioner and possibly his legal designation, his sessions days and times, the name of the undertaking or health care organisation within which*

[1] *Koninklijk Besluit houdende reglement op de beoefening van de tandheelkunde.*

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the practitioner carries out his professional activity; it may also state the branch of dentistry in which the practitioner specialises, such as surgical dentistry, oral prosthesis, orthodontics, dental surgery. [...]'.

And, according to the Belgian Law on Advertising in Dental Care Matters[2] of 15 April 1958, '*[n] o 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, injuries 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, hand-outs and brochures, via the medium of the press, broadcasting or cinema ...*'.

2. Restrictions on advertising and the Unfair Commercial Practices Directive

The first question facing the CJEU concerns the compatibility of advertising restrictions with the Unfair Commercial Practices Directive[3] ("**Directive 2005/29**"). In this regard, it is necessary first of all to determine whether the advertising constitutes a commercial practice within the meaning of Directive 2005/29 and is therefore subject to the rules laid down by the same. The CJEU concludes that the advertising of oral and dental care services such as that at issue, whether through publications in advertising periodicals or on the internet, or through the use of signs, constitutes a 'commercial practice', for the purposes of Directive 2005/29. It is thus concluded because art. 2(d) of Directive 2005/29 gives a particularly wide definition to the concept of '*commercial practice*' as '*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*', whilst under art. 2(c) of the same, the concept of a '*product*' covers any goods or service.

However, notwithstanding the application of Directive 2005/29, the same permits the existence of restrictive national rules, since art. 3 thereof provides that the same is without prejudice not only to Community or national rules relating to the health and safety aspects of products, but also to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with EU law, impose on professionals.

In conclusion, therefore, Member States are free to adopt stricter rules than those laid down in Directive 2005/29 in relation to the practices of members of a regulated profession such as that of dentist.

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[2] *Wet betreffende de publiciteit inzake tandverzorging.*

[3] Directive 2005/29/EC 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.

3. Restrictions on advertising by electronic means and the Directive on electronic commerce

Where the prohibition of advertising also extends to promotion on the Internet, it is open to question whether such a prohibition is contrary to the Directive on electronic commerce[4] ("**Directive 2000/31**"). Here, once again, it is necessary first of all to determine whether the online advertising falls within the scope of Directive 2000/31 and, if so, whether Directive 2000/31 allows for restrictions on the same.

3.1. As regards the scope of Directive 2000/31, it applies to '*information society services*'. And according to art. 2(a) of the same (by reference to art. 1(2) of Directive 98/34[5]), the concept of '*information society services*' covers '*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*'.

The above, however, does not mean that information society services are solely restricted to services giving rise to online contracting; in so far as they represent an economic activity, information society services also extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications. To that effect, recital 18 of Directive 2000/31 and the judgment of 15 September 2016 in Case C-484/14 (*Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*), where the performance of a service free of charge is provided by a service provider for the purposes of advertising the goods sold and services provided by that service provider, since the cost of that activity is incorporated into the price of those goods or services.

Furthermore, advertising relating to the provision of oral and dental care services by means of a website is commercial communication within the meaning of art. 2(f) of Directive 2000/31, inasmuch as a form of communication designed to promote, directly or indirectly, the services of a person practising a regulated profession.

Thus, the CJEU concludes that this type of advertising falls within the scope of Directive 2000/31.

3.2. Moving forward, art. 8(1) of Directive 2000/31 lays down the principle that Member States are to ensure that the use of commercial communications which are part of an information society service provided by a member of a regulated profession, or which constitutes such a service, is authorised [as is the case of dentists, since according to art. 2(g) of

[4] 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.

[5] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.

Directive 2000/31, read in conjunction with art. 1(f) of Directive 92/51 to which art. 2(g) refers, t a professional activity the taking up or pursuit of which is subject, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence must, inter alia, be regarded as a '*regulated profession*'].

Interpreting this provision, the CJEU believes that Directive 2000/31 requires Member States to ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted. Indeed, as provided by art. 8(1) of Directive 2000/31, said advertising may be subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession. But such rules cannot include a general and absolute prohibition of that type of communication.

Thus, the CJEU departs from the Opinion of the Advocate General, delivered on 8 September 2016, which argued that Directive 2001/31/EC does not preclude a national rule which prohibits providers of dental care, in the context of a profession or a dental practice, from advertising via the internet any advertising whatsoever for their services, where that rule aims to ensure compliance with the rules of the profession and applies to a service provider established on the national territory.

4. Advertising restrictions in light of the freedom to provide services in the European Union

As is well known, the Treaty on the Functioning of the European Union (TFEU) sets out the freedom of establishment (art. 49) and the freedom to provide services (art. 56). Consequently, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and restrictions on the freedom to provide services within the Union for nationals of Member States established in a Member State other than that of the recipient of the service are forbidden.

On this basis, the CJEU has also analysed whether the prohibition of advertising can affect these two fundamental freedoms of the Union.

The CJEU begins by recalling that, to the extent that the prohibition of advertising may affect a number of EU citizens coming from other Member States, there is a cross-border element involving the application of the Treaty provisions guaranteeing the freedoms of movement. In addition, the CJEU believes that the question must be analysed only in the light of the freedom to provide services, since according to its own case law when a national measure concerns both the freedom of establishment and the freedom to provide services, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and

may be considered together with it. And in the present case, '*the cross-border element which makes the Treaty provisions guaranteeing the freedoms of movement applicable is constituted by the movement of recipients of services established in another Member State*'.

The CJEU thus acknowledges that there is a restriction on the freedom of establishment because '*[n]ational legislation which imposes a general and absolute prohibition of any advertising for a certain activity is liable to restrict the possibility, for the persons carrying on that activity, of making themselves known to their potential clientele and of promoting the services which they offer to their clientele*'.

However, not all restrictions are contrary to the TFEU. In fact, it is settled case law of the CJEU that national measures which are liable to prohibit, impede or render less attractive the exercise of fundamental freedoms guaranteed by the Treaty may be allowed if they pursue an objective in the public interest, are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain the objective pursued. For instance, the judgment of 16 April 2013 in Case C-202/11 (*Anton Las v PSA Antwerp NV*) or the judgment of 12 September 2013 in Case C-475/11 (*Kostas Konstantinides*).

Although the CJEU understands that, in this case, the prohibition of advertising responds to a public interest objective (in so far as it seeks the protection of public health and the dignity of the profession of dentist), it is of the belief that the general and absolute prohibition of any advertising relating to the provision of oral and dental care services exceeds what is necessary to attain the objectives pursued by that legislation. This is because a radical prohibition also affects advertising messages that do not harm public health or the dignity of dentists. It is therefore a different case to that analysed by the CJEU in its judgment of 12 September 2013 in Case C-475/11 (*Kostas Konstantinides*), concerning the prohibition of advertising of medical services with content contrary to ethics professional.

On this point, therefore, the CJEU has also taken a narrower view than the Advocate General, who considered that the protection of public health may justify the prohibition of any form of communication designed to attract or provide an incentive to the general public. In the latter's opinion, not espoused by the Court, the relationship of trust between the patient and the dentist '*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*'.