Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 8 May 2025 [1]

Case C-115/24

UJ
v
Österreichische Zahnärztekammer,
interveners:
Urban Technology GmbH,
DZK Deutsche Zahnklinik GmbH

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Public health – Concept of 'provision of healthcare' – Concept of 'provision of healthcare through telemedicine' – Concept of 'physical healthcare services' – Complex treatment involving the provision of healthcare through telemedicine and physical healthcare services – Whether that healthcare is cross-border healthcare – Concept of 'healthcare provider' – Applicable law – Directive 2011/24/EU – Member State of treatment – Directive 2000/31/EC – Information society service – Directive 2005/36/EC – Professional qualifications – Article 56 TFEU – Freedom to provide services – Article 49 TFEU – Freedom of establishment)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation, first, of Article 56 TFEU and, secondly, of Article 2(n), Article 3(d) and (e), Article 4(1)(a) and Article 7 of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, [2] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, [3] and Article 5(3) of Directive 2005/36/EC on the recognition of professional qualifications. [4]

2. The request was made in proceedings between the Österreichische Zahnärztekammer (Austrian Chamber of Dentists, Austria; 'the ÖZ') and UJ, a dentist established in Austria, supported by Urban Technology GmbH and DZK Deutsche Zahnklinik GmbH ('DZK'), two German companies, concerning an appeal brought by UJ against the order made on appeal by

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 9 March 2011 (OJ 2011 L 88, p. 45).

[3] Directive of the European Parliament and of the Council of 8 June 2000 (OJ 2000 L 178, p. 1).

[4] Directive of the European Parliament and of the Council of 7 September 2005 (OJ 2005 L 255, p. 22).

the Oberlandesgericht Graz (Higher Regional Court, Graz, Austria), which varied in part the order of the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria), which dismissed the ÖZ's application for interim measures seeking an interim order requiring UJ to cease participating directly or indirectly in activities in the field of dentistry carried out in Austria by foreign companies which do not hold the permits required under Austrian legislation.

3. In that context, the Court is called upon to rule on the interpretation of a number of acts of secondary EU law and of Article 56 TFEU on the freedom to provide services, in a particular field, which is barely dealt with in the case-law of the Court although it is rapidly developing, namely the field of telemedicine.

II. Legal framework

A. European Union law

1. Directive 2000/31

4. Recital 18 of Directive 2000/31 states:

'(18) Information society services span a wide range of economic activities which take place on-line. … activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.'

5. Article 1 of that directive, entitled 'Objective and scope', provides, in paragraph 4 thereof:

'4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.'

6. Article 2 of that directive, entitled 'Definitions', provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of 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 (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 (OJ 1998 L 217, p. 18)]; [5]

(b) "service provider": any natural or legal person providing an information society service;

[5] Article 1 of Directive 98/48 specifies that an 'Information Society Service' is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: – "at a distance" means that the service is provided without the parties being simultaneously present, – "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, – "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request. …' That definition was reproduced identically in Article 1 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), which repealed Directives 98/34 and 98/48.

…

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

…'

7. Article 3 of that directive, entitled 'Internal market', provides, in paragraphs 1 to 4 thereof:

'1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

…’

2. Directive 2005/36

8. Recitals 4, 6 and 8 of Directive 2005/36 state:

‘(4) In order to facilitate the free provision of services, there should be specific rules aimed at extending the possibility of pursuing professional activities under the original professional title. In the case of information society services provided at a distance, the provisions of Directive [2000/31] should also apply.

…

(6) The 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.

…

(8) The service provider should be subject to the application of disciplinary rules of the host Member State having a direct and specific link with the professional qualifications, such as the definition of the profession, the scope of activities covered by a profession or reserved to it, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety.’

9. Article 5 of that directive, entitled ‘Principle of the free provision of services’, provides:

‘1. Without prejudice to specific provisions of Community law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State:

(a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (hereinafter referred to as the Member State of establishment), and

(b) where the service provider moves, if he has pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when the profession is not regulated in that Member State. The condition requiring two years’ pursuit shall not apply when either the profession or the education and training leading to the profession is regulated.

2. The provisions of this title shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, the profession referred to in paragraph 1.

The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity.

3. Where a service provider moves, he shall be subject to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State.'

3. Directive 2011/24

10. Recitals 2, 4, 8, 10, 11, 19 and 26 of Directive 2011/24 state:

'(2) Article 114 TFEU is the appropriate legal basis since the majority of the provisions of this Directive aim to improve the functioning of the internal market and the free movement of goods, persons and services. Given that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, Union legislation has to rely on this legal basis even when public health protection is a decisive factor in the choices made. In this respect, Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health is to be guaranteed taking account in particular of any new development based on scientific facts.

…

(4) Notwithstanding the possibility for patients to receive cross-border healthcare under this Directive, Member States retain responsibility for providing safe, high quality, efficient and quantitatively adequate healthcare to citizens on their territory. Furthermore, the transposition of this Directive into national legislation and its application should not result in patients being encouraged to receive treatment outside their Member State of affiliation.

…

(8) Some issues relating to cross-border healthcare, in particular reimbursement of healthcare provided in a Member State other than that in which the recipient of the care is resident, have already been addressed by the Court of Justice. This Directive is intended to achieve a more general, and also effective, application of principles developed by the Court of Justice on a case-by-case basis.

…

(10) This Directive aims to establish rules for facilitating access to safe and high-quality cross-border healthcare in the Union and to ensure patient mobility in accordance with the principles established by the Court of Justice and to promote cooperation on healthcare between Member States, whilst fully respecting the responsibilities of the Member States for the definition of social security benefits relating to health and for the organisation and delivery of healthcare and medical care and social security benefits, in particular for sickness.

(11) This Directive should apply to individual patients who decide to seek healthcare in a Member State other than the Member State of affiliation. As confirmed by the Court of Justice, neither its special nature nor the way in which it is organised or financed removes healthcare from the ambit of the fundamental principle of the freedom to provide services. However, the Member State of affiliation may choose to limit the reimbursement of

cross-border healthcare for reasons relating to the quality and safety of the healthcare provided, where this can be justified by overriding reasons of general interest relating to public health. The Member State of affiliation may also take further measures on other grounds where this can be justified by such overriding reasons of general interest. Indeed, the Court of Justice has laid down that public health protection is among the overriding reasons of general interest that can justify restrictions to the freedom of movement envisaged in the Treaties.

…

(19) When a patient receives cross-border healthcare, it is essential for the patient to know in advance which rules will be applicable. The rules applicable to cross-border healthcare should be those set out in the legislation of the Member State of treatment, given that, in accordance with Article 168(7) TFEU, the organisation and delivery of health services and medical care is the responsibility of the Member States. This should help the patient in making an informed choice, and should avoid misapprehension and misunderstanding. It should also establish a high level of trust between the patient and the healthcare provider.

…

(26) The right to reimbursement of the costs of healthcare provided in another Member State by the statutory social security system of patients as insured persons has been recognised by the Court of Justice in several judgements. The Court of Justice has held that the Treaty provisions on the freedom to provide services include the freedom for the recipients of healthcare, including persons in need of medical treatment, to go to another Member State in order to receive it there. The same should apply to recipients of healthcare seeking to receive healthcare provided in another Member State through other means, for example through eHealth services.'

11. That directive comprises five chapters, namely Chapter I, entitled 'General provisions', containing Articles 1 to 3, Chapter II, entitled 'Responsibilities of Member States with regard to cross-border healthcare', containing Articles 4 to 6, Chapter III, entitled 'Reimbursement of costs of cross-border healthcare', containing Articles 7 to 9, Chapter IV, entitled 'Cooperation in healthcare', containing Articles 10 to 15, and, lastly, Chapter V, entitled 'Implementing and final provisions', containing Articles 16 to 23.

12. Article 1 of that that directive, entitled 'Subject matter and scope', provides in paragraphs 1 and 2 thereof:

'1. This Directive provides rules for facilitating the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. This Directive also aims at clarifying its relationship with the existing framework on the coordination of social security systems, Regulation (EC) No 883/2004 [of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1)], with a view to application of patients' rights.

2. This Directive shall apply to the provision of healthcare to patients, regardless of how it is organised, delivered and financed.'

13. Article 2 of that directive, entitled 'Relationship with other Union provisions', provides:

'This Directive shall apply without prejudice to:

…

(e) Directive [2000/31];

…

(n) Directive [2005/36];

…'

14. Article 3 of Directive 2011/24, entitled 'Definitions', is worded as follows:

'For the purpose of this Directive, the following definitions shall apply:

(a) "healthcare" means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;

…

(d) "Member State of treatment" means the Member State on whose territory healthcare is actually provided to the patient. In the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established;

(e) "cross-border healthcare" means healthcare provided or prescribed in a Member State other than the Member State of affiliation;

(f) "health professional" means a doctor of medicine, a nurse responsible for general care, a dental practitioner, a midwife or a pharmacist within the meaning of Directive [2005/36], or another professional exercising activities in the healthcare sector which are restricted to a regulated profession as defined in Article 3(1)(a) of Directive [2005/36], or a person considered to be a health professional according to the legislation of the Member State of treatment;

(g) "healthcare provider" means any natural or legal person or any other entity legally providing healthcare on the territory of a Member State;

…'

15. Article 4 of that directive, entitled 'Responsibilities of the Member State of treatment', provides, in paragraph 1 thereof:

'Taking into account the principles of universality, access to good quality care, equity and solidarity, cross-border healthcare shall be provided in accordance with:

(a) the legislation of the Member State of treatment;

(b) standards and guidelines on quality and safety laid down by the Member State of treatment; and

(c) Union legislation on safety standards.'

16. Article 7 of that directive, entitled 'General principles for reimbursement of costs', provides, in paragraph 7 thereof:

'The Member State of affiliation may impose on an insured person seeking reimbursement of the costs of cross-border healthcare, including healthcare received through means of telemedicine, the same conditions, criteria of eligibility and regulatory and administrative formalities, whether set at a local, regional or national level, as it would impose if this healthcare were provided in its territory. This may include an assessment by a health professional or healthcare administrator providing services for the statutory social security system or national health system of the Member State of affiliation, such as the general practitioner or primary care practitioner with whom the patient is registered, if this is necessary for determining the individual patient's entitlement to healthcare. However, no conditions, criteria of eligibility and regulatory and administrative formalities imposed according to this paragraph may be discriminatory or constitute an obstacle to the free movement of patients, services or goods, unless it is objectively justified by planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.'

B. Austrian law

17. Under Paragraph 3(1) of the Zahnärztegesetz (Austrian law on dentists; 'the ZÄG'),[6] the profession of dentist must be pursued in accordance with rules laid down by that law.

18. Under Paragraph 4(2) of the ZÄG, the profession of dentist encompasses any activity based on scientific expertise in dentistry, including complementary and alternative medical treatments, which is carried out directly on humans or indirectly for humans.

19. In accordance with Paragraph 4(3) of that same law, the scope of activities reserved to members of the dental profession includes, inter alia, examination for the presence or absence of diseases and anomalies of the teeth and the treatment thereof, including cosmetic and aesthetic dental procedures, in so far as that they require a dental examination and diagnosis, and the prescribing of medication, remedies and dental diagnostic aids.

20. Under Paragraphs 24, 25 and 26 of the ZÄG, members of the dental profession must practise their profession personally and directly, where appropriate in collaboration with other members of the dental profession or members of other healthcare professions, in particular in the form of practice- and equipment-sharing groups (Paragraph 25 of that law) or group practices (Paragraph 26 of that law). Furthermore, they may make use of assistants in practising their profession provided that those assistants act in accordance with their precise instructions and under their constant supervision (Paragraph 24(2) of that law). Under Paragraph 26(1)(2) of the

[6] BGBl I 126/2005, as amended in 2023 (BGBl I 191/2023).

ZÄG, a group practice may be operated in the legal form of a limited liability company. However, it is a requirement, inter alia, that all its members are dentists who are authorised to practise independently (Paragraph 26(3)(1) of that law).

21. Paragraph 31 of that law governs the 'freedom to provide services' and reads as follows:

'(1) Nationals of a State party to the Agreement on the European Economic Area (EEA) or of the Swiss Confederation who lawfully practise as dentists in one of the other States that are parties to the EEA Agreement, or in Switzerland, may, in the exercise of their freedom to provide services, temporarily practise as dentists in Austria, without being registered as a dentist there, from their place of business or place of employment in another country.

(2) Before providing for the first time, in Austria, a dental service which requires a temporary stay in federal territory, the service provider must notify the Austrian Chamber of Dentists in writing, via the Chamber of Dentists of the Land in which the service is to be provided, enclosing the following documents: …'

22. The Austrian courts already held, in the case-law concerning competition law, that that provision applies only to natural persons authorised to practise the profession, and not to limited liability companies, in particular if their shareholder structure does not comply with Paragraph 26 of the ZÄG.

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

23. The ÖZ is a body governed by public law established in Vienna (Austria), which is authorised by law to represent the interests of Austrian dentists and dental practitioners.

24. UJ is a dentist established in Austria who is authorised to examine and treat patients in the territory of that Member State under treatment contracts which she concludes with them.

25. Urban Technology and DZK are part of a dental undertaking that operates worldwide. Urban Technology is established in Germany and its purpose is to 'provide services in the field of lifestyle products for final customers'. It advertises a dental jaw alignment procedure, within dental medicine, using transparent dental splints, which is marketed under the brand name 'DrSmile'. Via its website, potential customers request an appointment with the relevant 'partner dentist', such as UJ, practising in the location they have selected, including in Austria. When such an appointment is made, that partner dentist, at his or her own practice, takes a medical history, carries out a consultation, takes a 3D scan of the jaw and carries out any pre-treatments required for the splint therapy. Next, that partner dentist sends the images and a recommendation regarding the dental alignment procedure to DZK. DZK is also established in Germany.[7] After examining the file, DZK sends the customer a treatment plan with full pricing information.

26. When that treatment plan has been approved, only DZK concludes a treatment contract with the patient, which covers all services in connection with a 'DrSmile' dental alignment. It obtains the dental splints from Urban Technology, which in turn orders them from third parties. The customer receives the splints by post. Further care is provided via an app belonging to DZK,

[7] The members of Urban Technology and of DZK are not dentists. However, DZK does have a licence and the other necessary permits under German law to operate a dental care centre ('dental clinic') in Germany.

through which patients regularly send images of their teeth to DZK. Furthermore, DZK has a contractual relationship with the partner dentist, in this case UJ, and remunerates that dentist for the services he or she has provided to the patients concerned as part of the 'DrSmile' treatment.

27. The ÖZ brought an action for an injunction, before the Landesgericht Klagenfurt (Regional Court, Klagenfurt), under the Bundesgesetz gegen den unlauteren Wettbewerb (Federal law against unfair competition),[8] together with an application for interim measures prohibiting UJ, by way of an interim injunction and until the judgment on the action for an injunction has acquired the force of *res judicata*, from participating directly or indirectly in activities in the field of dentistry carried out in Austria by foreign companies which are not authorised to practise the profession of dentist in Austria under the ZÄG, or to operate a medical establishment under Austrian law.

28. UJ claims that DZK, with which she collaborates, is a private healthcare establishment, authorised under German law, whose activities with regard to telemedicine are permitted in Austria, and that her collaboration with that undertaking consisting of performing certain tasks in connection with orthodontic treatment is also permitted. Furthermore, UJ claims that she carries out her activities directly, personally and independently.

29. The Landesgericht Klagenfurt (Regional Court, Klagenfurt) dismissed the application for interim measures brought by the ÖZ. It held that UJ did not participate in the activities in the field of dentistry pursued by Urban Technology and DZK, that there were two treatment contracts which had to be regarded as separate from one another and, therefore, that UJ was not to be classified as an 'agent' or considered to be participating, in Austrian territory, in foreign activities in the field of dentistry.

30. Hearing an appeal against the decision of that court, the Oberlandesgericht Graz (Higher Regional Court, Graz) essentially upheld the application for interim measures. It held, inter alia, that UJ acted as an 'agent' of DZK under the treatment contracts concluded between her and the patients; that DZK was not authorised to provide dental services in Austria; that DZK's treatment services in Austria, provided through UJ acting as an agent, were carried out directly and without the use of information and communication technology; that UJ therefore participated in activities in the field of dentistry which were provided by a foreign company in Austria without being authorised to practise as a dentist under the ZÄG and without holding an operating licence, in accordance with the Austrian legislation applicable to healthcare establishments; that UJ had therefore, first, infringed the rules on cooperation laid down in Paragraph 24 of the ZÄG and, secondly, participated as an agent in the interference, by a foreign company in a field which is reserved to members of the dental profession, under Paragraph 3 and Paragraph 4(3) of the ZÄG.

31. UJ brought an appeal before the Oberster Gerichtshof (Supreme Court, Austria), the referring court, seeking, in essence, that the application for interim measures brought by the ÖZ be dismissed.

32. In the first place, that court is uncertain whether UJ actually participates in activities in the field of dentistry carried out in Austria by foreign companies. It points out that there is a uniform treatment contract between the patient and DZK, which means that only DZK is, in the legal sense, providing services to the patient. For her part, UJ has contractual links only with DZK, in her capacity as its agent. This raises the question of determining the place where dental services

[8] BGBl. 448/1984.

are 'provided'. In particular, it is necessary to determine whether the country-of-origin principle applies in the present case, and whether the place where the services are provided is therefore Germany, where DZK lawfully operates a dental clinic. That court therefore seeks to establish whether Article 3(d) of Directive 2011/24, under which, in the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established, is intended to apply only for the purposes of reimbursement of costs within the meaning of Article 7 of that directive, or whether it lays down a general country-of-origin principle for telemedicine services, or whether that principle can be inferred from Directive 2000/31.

33. In the second place, in order to determine whether Directive 2011/24 applies in the present case, the referring court considers whether the terms 'healthcare', 'provided', 'in the case of telemedicine', within the meaning of Article 3(d) of that directive, relate exclusively to individual medical services which are provided (across borders) with the support of information and communication technologies (ICT) or to an entire treatment contract which can also include physical examinations in the patient's Member State of residence, and whether ICT-supported services must predominate for there to be 'healthcare in the case of telemedicine'. Furthermore, the referring court asks whether, in the case of a connection between those two types of services, as in the present case, they may be regarded, as a whole, as 'cross-border healthcare' within the meaning of Article 3(d) and (e) of Directive 2011/24.

34. In the third place, that court is uncertain as to the law applicable to 'telemedicine'. In that regard, the interaction between, on the one hand, Article 2(n), Article 3(d) and Article 4(a) of Directive 2011/24, and, on the other hand, Article 5(3) of Directive 2005/36, under which a service provider who 'moves' to another Member State is to be subject to rules of a professional, statutory or administrative nature in the host Member State, is relevant. The relationship between Directive 2000/31, in particular Article 2(h)(ii) and recital 18 thereof, Directive 2005/36, in particular Article 5 and recital 4 thereof, and Directive 2011/24, in particular Article 2(n), Article 3(d) and Article 4(a) thereof, is also relevant. In another context, the Court has already ruled that professional assistance in tax matters which is provided across borders without the persons active on behalf of the company concerned moving to the other Member State does not fall within Article 5 of Directive 2005/36, because it applies only where the service provider moves to the territory of the host Member State.[9] According to the referring court, as regards healthcare, and in order to protect patients, the professional rules of the patient's Member State of residence must be complied with even in the case of pure cross-border correspondence services and notwithstanding the country-of-origin principle.

35. In the fourth and last place, the referring court asks how Article 56 TFEU should be interpreted if it were to be considered that the dental services provided by UJ are legally 'provided' in Austria. More specifically, first, as regards UJ, the question arises as to whether, by not operating on the basis of her own treatment contract but only as an agent of DZK, UJ has infringed the ZÄG, which governs the dental profession, by interfering in the professional field reserved to members of that profession. The referring court notes that, even though DZK is operating in Germany as an authorised private clinic, in Austria, it does not have an operating licence under the law applicable to healthcare establishments and is not authorised under the ZÄG. Furthermore, its shareholder structure is contrary to the provisions of that law. The referring court therefore asks whether the provisions of the ZÄG, which primarily provide for the direct and personal exercise of the profession and the free movement of services only 'temporarily' for 'nationals of a State that is a party to the EEA Agreement', are compatible with

[9] See judgment of 17 December 2015, *X-Steuerberatungsgesellschaft* (C-342/14, 'the judgment in *X-Steuerberatungsgesellschaft*', EU:C:2015:827, paragraphs 34 and 35).

the freedom to provide services provided for in Article 56 et seq. TFEU, where, as in the present case, a foreign dentist provides, on a permanent basis and pursuant to a uniform treatment contract, services (supported by ICT) in part from abroad and in part in national territory by using, as an agent, a dentist authorised to practise the profession in that territory. Secondly, as regards DZK, that court asks whether an application (by analogy) of the provisions relating to group practices in Paragraph 26 of the ZÄG, according to which the members of such practices must all be dentists, is also contrary to the freedom to provide services, having regard, in particular, to the case-law according to which Member States are permitted to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for public health and the survival of the population, especially since it is not necessarily the case that natural persons can guarantee a higher level of care than legal persons. [10]

36. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1.1) Does the scope of Article 3(d) of Directive [2011/24], under which, in the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established, extend only to the reimbursement of costs within the meaning of Article 7 thereof?

(1.2) If the answer to Question 1.1. is in the negative, does Article 3(d) of the Patient Mobility Directive (Directive [2011/24]) lay down a general country-of-origin principle in respect of telemedicine services?

(1.3) Does Directive [2000/31] lay down a country-of-origin principle in respect of telemedicine services?

(2.1) Does "healthcare in the case of telemedicine" as provided for in Article 3(d) of the Patient Mobility Directive (Directive [2011/24]) relate exclusively to individual medical services which are provided (across borders) with the support of [ICT] or to an entire treatment contract which can also include physical examinations in the patient's country of residence?

(2.2) If physical examinations can be included, must ICT-supported services predominate for there to be "healthcare in the case of telemedicine" and, if so, in accordance with which criteria is the predominance to be assessed?

(2.3) Is medical treatment as a whole to be regarded as cross-border healthcare within the meaning of Article 3(d) and (e) of the Patient Mobility Directive (Directive [2011/24]) if, from the patient's perspective, the healthcare provider established in the other Member State, with whom the patient has concluded a treatment contract (in the present case: a dental clinic), provides part of the overall treatment with the support of ICT, whereas the other part of the overall service is provided by a healthcare provider (dentist) established in the same Member State as the patient?

[10] See judgments of 28 April 1998, *Kohll* (C-158/96, 'the judgment in *Kohll*', EU:C:1998:171, paragraph 51), and of 13 May 2003, *Müller-Fauré and van Riet* (C-385/99, EU:C:2003:270, paragraph 67).

(3.1) Must Article 2(n) of the Patient Mobility Directive (Directive [2011/24]), in conjunction with Articles 3(d) and 4(a) thereof and Article 5(3) of Directive [2005/36] be interpreted as meaning that a dental clinic established in Germany must, in cases of "healthcare by telemedicine" in Austria, comply with the national rules of a professional, statutory or administrative nature which are applicable there (in particular Paragraphs 24, 26 and 31 of the [ZÄG])?

(3.2) Must Article 5(3) of the Professional Qualifications Directive (Directive [2005/36]) be interpreted as meaning that a healthcare provider moves to another Member State where such provider provides solely ICT-supported medical services? If that question is answered in the negative, does it constitute moving to another Member State if such provider undertakes physical examinations or treatment carried out by agents in the patient's Member State of residence?

(4) Does the freedom to provide services pursuant to Article 56 et seq. TFEU preclude the requirements laid down [in] the [ZÄG], which in Paragraph 24 et seq. thereof primarily provides for the direct and personal exercise of the profession and the free movement of services only "temporarily" for "nationals of a State that is a party to the EEA Agreement" under Paragraph 31 thereof, namely for situations such as the present, where a foreign dentist provides – in principle on a permanent basis – services in part supported by ICT from abroad (in the sense of cross-border services by correspondence) and in part in Austria by using an Austrian dentist authorised to practise the profession as an agent pursuant to a uniform treatment contract?'

37. Written observations were lodged by UJ, the ÖZ, Urban Technology, DZK, the Austrian, Netherlands and Polish Governments and the European Commission. Those same parties, with the exception of the Austrian and Polish Governments, also presented oral argument at the hearing held on 13 February 2025.

IV. Analysis

A. Admissibility of some of the questions referred

38. In their written observations, the ÖZ and the Republic of Austria argue that some of the questions referred for a preliminary ruling by the national court are inadmissible. At issue are, in particular, first, questions 1.1 to 1.3, 2.1, 2.2, 3.1 and 3.2, which are said to be hypothetical [11] or to bear no relation to the actual facts of the main action or its purpose, [12] on the ground that they concern provisions of Directives 2011/24, 2000/31 and 2005/36 relating to 'telemedicine' services, whereas the dental treatment at issue in the main proceedings consists of 'physical acts'; secondly, questions 3.1 and 3.2, which, according to the Republic of Austria, are doubly hypothetical in so far as the scope *ratione personae* of Directive 2005/36 does not include legal persons such as Urban Technology and DZK; and, lastly, question 4, which, according to the ÖZ, does not satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court of Justice as to the content of the request for a preliminary ruling, in so far as it is not drafted in a 'clear and precise' manner.

[11] More specifically, the Republic of Austria refers to questions 1.1 to 1.3, 2.1, 2.2, 3.1 and 3.2.

[12] More specifically, the ÖZ refers to questions 1.2, 1.3, 3.1 and 3.2.

39. In that regard, I would point out that, according to the Court's settled case-law, a question referred for a preliminary ruling concerning EU law enjoys a presumption of relevance. The Court may refuse to rule on such a question only where it is quite obvious that the interpretation of EU 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. [13]

40. In the present case, I note that the order for reference describes in sufficient detail the legal and factual context of the case in the main proceedings. In addition, the information provided by the referring court makes it possible to determine the scope of the questions referred and to conclude that they are neither hypothetical nor unrelated to the subject matter of the dispute before it, nor drafted in an insufficiently 'clear and precise' manner. First, as regards questions 1.1 to 1.3, 2.1, 2.2, 3.1 and 3.2, and the alleged inapplicability of Directives 2011/24, 2000/31 and 2005/36 on the ground that DZK provides only physical healthcare services, which therefore do not fall within the concept of 'telemedicine services', I note that those questions relate specifically, in various respects, to the characterisation and legal treatment of that healthcare and cannot, therefore, be regarded as hypothetical or unrelated to the subject matter of the dispute. Secondly, as to the hypothetical nature of questions 3.1 and 3.2 which, according to the Republic of Austria, results from the fact that Directive 2005/36 is not applicable to legal persons such as DZK, I would point out, that although that directive guarantees the recognition of professional qualifications acquired by *nationals* of Member States in one or more Member States, that is to say, natural persons, for the purposes of access to the regulated professions which it covers and their pursuit in another Member State, those two questions are formulated in the context of the particular situation in which a natural person, in this case UJ, who practises the profession of dentist, acts as an 'agent' of a legal person, in this case DZK, so the question as to applicability of that directive has the characteristics of a question relating to the substance. [14] Thirdly, as regards question 4, I consider that that question meets the requirements laid down in Article 94 of the Rules of Procedure, so that the Court has before it the factual and legal material necessary to enable it to give a useful answer. [15]

41. In those circumstances, I consider all the questions submitted by the referring court to be admissible.

B. Substance

42. The referring court, considering that the factual context of the dispute in the main proceedings raises a number of questions relating to the interpretation and application of Directives 2011/24, 2000/31 and 2005/36 and of Article 56 TFEU, has decided to ask a number of questions which concern various aspects relating to the characterisation – and the consequences that that characterisation entails – of hybrid healthcare, namely healthcare involving both the provision of physical services by a dentist, and services provided at a distance via ICT.

[13] See, inter alia, judgment of 20 March 2025, *Arce* (C-365/23, EU:C:2025:192, paragraph 38 and the case-law cited).

[14] See Article 2(1) of Directive 2005/36. Furthermore, the Court has already, in the past, accepted substantially to analyse the applicability of Directive 2005/36 to legal persons (see, inter alia, the judgment in *X-Steuerberatungsgesellschaft* (paragraphs 34 and 35), and, as for admissibility, Opinion of Advocate General Cruz Villalón in the same case (C-342/14, EU:C:2015:646, points 42 to 46 and the case-law cited)).

[15] See, to that effect, judgment of 13 November 2018, *Levola Hengelo* (C-310/17, EU:C:2018:899, paragraph 30).

43. More specifically, the doubts expressed by the referring court concern a situation in which persons established in Austria have had recourse to examinations and treatments necessary for dental alignment therapy carried out by a dentist authorised to practise in Austria, and subsequently continued the treatment via a digital application on the basis of a dental alignment treatment contract concluded with a dental clinic governed by German law and not authorised to operate in Austria.

44. In that regard, I would point out first of all that, in the present case, despite the fact that the action for an injunction at issue in the main proceedings has been brought against the dentist, UJ, the reservations expressed by that court appear to relate principally to the legal position of DZK. It is not disputed that UJ satisfies all the conditions required by Austrian law in order to be able to practise as a dentist in Austria.

45. In reality, those reservations are more concerned with the characterisation of the facts in the main proceedings, which appears to constitute the premise of the referring court's legal reasoning, namely that UJ practises in Austria as an 'agent' of DZK, hence DZK is in the present case the only provider of dental treatment, and that treatment constitutes a single treatment, despite being composed of several services of a different nature. However, the parties to the main proceedings do not agree with that legal characterisation, which thus impacts their proposed interpretation of the provisions governing, inter alia, the scope of the directives referred to in point 42 of the present Opinion.

46. In that context, and subject to verification by the referring court of the merits of that premise, I propose to analyse those different aspects in the following order: first of all, it will be necessary to assess whether, and under what conditions, an activity such as that at issue in the main proceedings can be regarded as being part of a 'telemedicine' service, within the meaning of Directive 2011/24 (questions 2.1 to 2.3); next, it will be necessary to examine the legal consequences which such a characterisation entails both from the perspective of Directive 2011/24 (questions 1.1 and 1.2) and from that of Directive 2000/31 *(question 1.3)*; in addition, it will be important to analyse the relevance of Directive 2005/36 (questions 3.1 and 3.2) and, finally, the relevance of the freedom of movement and, in particular, the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU) (question 4).

1. The characterisation of a 'telemedicine' service within the meaning of Directive 2011/24 (questions 2.1 to 2.3)

47. By its questions 2.1 to 2.3, the referring court asks, in essence, first, whether the concept of 'healthcare' 'provided' 'in the case of telemedicine', referred to in Article 3(d) of Directive 2011/24, covers only medical services provided exclusively via ICT, or also covers an entire treatment contract, including physical examinations, and, in the latter case, whether physical services must predominate and, if so, how that predominance is to be assessed. Secondly, that court seeks to ascertain whether medical treatment as a whole is to be regarded as being covered by the concept of 'cross-border healthcare', within the meaning of Article 3(d) and (e) of Directive 2011/24, if the provider of part of the treatment is established in a Member State other than that of the patient, and part of that treatment is provided by another provider established in the same Member State as the patient.

48. Those questions, which have been asked in order to determine whether Directive 2011/24 applies in the present case,[16] seek to determine whether healthcare, such as that at issue in the main proceedings, may be regarded as 'telemedicine' if treatment includes both a physical examination carried out in the patient's Member State of residence and services provided via ICT.

49. In that regard, I would point out from the outset that Article 3(d) of Directive 2011/24 defines the 'Member State of treatment' as the Member State on whose territory healthcare is actually provided to the patient, and states, in its second sentence, that 'in the case of telemedicine, healthcare is considered to be *provided in the Member State where the healthcare provider is established*'.[17] It follows from that provision that the concept of 'telemedicine', which is a type of 'healthcare' covered by that directive, within the meaning of Article 3(a) thereof,[18] has clear legal consequences, namely the determination of the place of where the services are supplied and, therefore, of the law applicable to the supply of those services.[19]

50. However, that concept is not defined or clarified by that directive.

51. The Court has consistently held that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account not only its wording but also its context and the objective pursued by the rules of which it is part.[20] The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation.[21]

52. In the first place, *as regards the wording and legislative history*, according to the Court's settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined according to their usual meaning in everyday language.[22] As regards new and technical terms, such as 'telemedicine', it is in particular the broader regulatory context that is relevant.

53. In that regard, I believe it appropriate to take into account, first, the Commission communication of 4 November 2008 on telemedicine,[23] which, although not legally binding, is, since it was published before Directive 2011/24 was adopted, particularly relevant for the purpose of assessing the meaning of the term 'telemedicine', which the Commission used in particular in the proposal for the directive.[24] Thus, in the section 'Definitions and examples', 'telemedicine' is defined as the 'provision of healthcare services, *through use of ICT*, in situations where the health professional and the patient (or two health professionals) *are not in the same*

16 See point 33 of the present Opinion.

17 Emphasis added.

18 Since that concept must therefore be subject to the same professional, quality and safety requirements as any other healthcare (see, to that effect, Position (EU) No 14/2010 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare, adopted by the Council on 13 September 2010 (OJ 2010, C 275E, p. 1), p. 23).

19 Those consequences will be analysed in points 69 and 70 of the present Opinion.

20 See judgment of 29 July 2024, *LivaNova* (C-713/22, EU:C:2024:642, paragraph 61 and the case-law cited).

21 See judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47 and the case-law cited).

22 See, to that effect, judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 17 and the case-law cited).

23 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on telemedicine for the benefit of patients, healthcare systems and society (COM(2008) 689 final).

24 See recital 10 of the proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare of 2 July 2008 (COM(2008) 414 final) ('the proposal for a directive').

location. It involves secure transmission of medical data and information, through text, sound, images or other forms needed for the prevention, diagnosis, treatment and follow-up of patients'. [25]

54. Secondly, the proposal for a directive provided that one of the modes of supply of 'cross-border healthcare' was 'cross-border provision of healthcare *(i.e.: delivery of service from the territory of one Member State into the territory of another); such as telemedicine services*, remote diagnosis and prescription, laboratory services', and that that mode of supply was distinct from the other three modes of supply of cross-border healthcare. [26] That understanding of the concept of 'telemedicine' has not been challenged during the legislative process. [27]

55. It follows that the defining element of the concept of 'telemedicine', in the sense intended by the EU legislature, lies in the fact that the service is provided at a distance via ICT, without the simultaneous physical presence of the actors concerned, namely the patient and the healthcare provider. This is also confirmed by other subsequent sources of soft law, such as the Commission Staff Working Document on the applicability of the existing EU legal framework to telemedicine services of 6 December 2012 [28] and guidelines from relevant European and international organisations. [29]

56. In the second place, that interpretation is *supported by the context* of Directive 2011/24. It should be recalled that, in accordance with Article 7(1) of that directive, one of the general principles applicable to the reimbursement of costs of cross-border healthcare is that the costs incurred by an insured person who receives such healthcare must be reimbursed in the Member State of affiliation, if that healthcare is among the benefits to which the insured person is entitled in the Member State of affiliation. However, Article 7(7) of that directive allows the Member State of affiliation to 'impose on an insured person seeking reimbursement of the costs of cross-border healthcare, *including healthcare received through means of telemedicine*, the same conditions, criteria of eligibility and regulatory and administrative formalities … as it would impose if this healthcare were provided in its territory'. [30] The use of the word '*including*' implies that healthcare received through means of telemedicine falls within the scope of 'cross-border healthcare', defined in Article 3(e) of that directive as 'healthcare provided or prescribed in a Member State other than the Member State of affiliation'. Therefore, within the context of the

[25] Emphasis added. That communication explains that 'telemedicine encompasses a wide variety of services. Those most often mentioned in peer-reviews are teleradiology, telepathology, teledermatology, teleconsultation, telemonitoring, telesurgery and teleophthalmology. Other potential services include call centres/online information centres for patients, remote consultation/e-visits or videoconferences between health professionals'.

[26] See recital 10 of the Proposal for a Directive. The other three modes of supply are: (i) healthcare received abroad (patient moving to a healthcare provider in another Member State for treatment), (ii) permanent presence of a healthcare provider (establishment of a healthcare provider in another Member State), and (iii) temporary presence of persons (mobility of health professionals, for example moving temporarily to the Member State of the patient to provide services).

[27] See, inter alia, 2980th Council meeting Employment, Social Policy, Health and Consumer Affairs Brussels, 30 November and 1 December 2009 (16611/1/09 REV 1 (Presse 348)), which stated that 'eHealth includes different services: … telemedicine (*in situations where the health professional and the patient are not in the same location*; this includes for example teleradiology and telepathology)' (emphasis added).

[28] Commission Staff Working Document on the applicability of the existing EU legal framework to telemedicine services (SWD(2012) 414 final, p. 3), available only in English. In that document, it is clarified that e-referrals are explicitly excluded from the scope of telemedicine, as they are 'an ancillary and independent act, which can also be delivered *in a face-to-face meeting* with a doctor' (emphasis added).

[29] See CPME Policy on Telemedicine (CPME 2021/012 FINAL, p. 1), Standing Committee of European Doctors of 20 March 2021, available in particular in French: 'Telemedicine is the practice of medicine over a distance, in which interventions, diagnoses, therapeutic decisions, and subsequent treatment recommendations are based on patient data, documents and other information transmitted through telecommunication systems'. See, to that effect, in addition, OMS, Consolidated Telemedicine implementation guide, p. 2, of 9 November 2022, available only in English, which defines 'telemedicine' as 'the delivery of health-care services where distance is a critical factor, by all health-care professionals using [ICT] for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries all in the interests of advancing the health of individuals and their communities'.

[30] Emphasis added.

application of Directive 2011/24, 'telemedicine' involves providing healthcare in a Member State other than the Member State of affiliation, where the patient is physically present, without that patient needing to go physically to the country of treatment in order to receive that healthcare there, precisely through the use of ICT.

57. In the third place, that interpretation also appears to be consistent with the *objective pursued* by Directive 2011/24, which consists, inter alia, of facilitating access to safe and high-quality cross-border healthcare and promoting cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare.[31] That objective feeds into the more general objectives referred to in Article 168 TFEU, which serves, inter alia, as a legal basis for that directive and which, first, in paragraph 1 thereof, sets the more general objective of ensuring a 'high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities' and, second, in paragraph 7 thereof, states that 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care'.

58. In that regard, when a doctor carries out medical treatment in a Member State, the applicable law must ensure that health and safety requirements are met, that appropriate liability mechanisms are put in place and that the doctor also knows the legal framework in which he or she is practising. However, applying the health, safety and liability rules of another Member State to the professional activity of a doctor practising in his or her own Member State on the sole ground that treatment as a whole also includes telemedicine services provided by other healthcare providers in other Member States would undermine the competence of the Member State of treatment to organise its healthcare and would expose doctors and their patients to unjustified legal uncertainty. In such a situation, a Member State could no longer require its own doctors providing healthcare on its territory to meet the health and safety requirements in force in that Member State. Instead, the Member State of treatment would have to impose the health, safety and liability rules of another Member State on its own doctors.

59. Furthermore, in cases where only the telemedicine element is carried out in a cross-border context, an 'overall assessment' would lead to services provided purely within one Member State being falsely reclassified as cross-border services. If a physical examination or treatment were to be regarded as an integral part of a telemedicine service solely on the ground that it was carried out under a uniform treatment contract including services de facto provided through telemedicine, that would effectively lead to a circumvention of the rule laid down in the first sentence of Article 3(d) of Directive 2011/24, according to which 'Member State of treatment' means the Member State on whose territory healthcare is 'actually' provided to the patient.

60. Lastly, a different interpretation may encourage abuse in the application of the rules on the reimbursement of cross-border healthcare costs. In the case of complex healthcare services, that could lead to the conclusion of contracts with entities established in a Member State other than the patient's Member State of affiliation which carry out, for example, only preliminary examinations by telemedicine and, although a substantial part of the medical services covered by a contract is provided in the patient's Member State of affiliation, the services covered by the contract could all still be treated as a cross-border provision of healthcare services giving rise to the reimbursement of the costs provided for in Article 7(1) of Directive 2011/24.

[31] See first sentence of Article 1(1) of Directive 2011/24.

61. Therefore, in so far as 'telemedicine' concerns only services provided at a distance via ICT, without the simultaneous physical presence of those involved, services which are physically provided in the simultaneous presence of the doctor and the patient are not covered by the concept of 'telemedicine', even if they are provided in the context of a general treatment that includes both telemedicine and in-person services.

62. In the present case, it follows that the in-person services provided by UJ at her own practice, namely taking a medical history, carrying out a consultation, taking a 3D scan of the jaw and carrying out the pre-treatments required for splint therapy, cannot be regarded as falling within the category of 'telemedicine' services within the meaning of Article 3(d) of Directive 2011/24, regardless of, first, the relationship between the parties and, in particular, of the fact that patients have contractual links only with the telemedicine service provider or the fact that UJ acts as an 'agent' of DZK, or, second, the fact that they are provided under a 'uniform healthcare contract'. On the other hand, the services provided at a distance by DZK – that is to say, all the services provided by DZK after the treatment plan has been approved [32] – may be covered by the concept of 'telemedicine' within the meaning of Directive 2011/24, provided that they are, in practice, separate services and do not require the subsequent involvement of the dentist.

63. Although it is for the referring court alone to assess the 'separate' nature of the services provided by DZK, I consider that the following information might be useful to it in that regard.

64. First, I recall that Article 3(a) of Directive 2011/24 defines the concept of 'healthcare' as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including *the prescription, dispensation and provision of medicinal products and medical devices*'. [33] The mere supply of medical devices by digital means – as in the present case, providing dental splints – and the provision of follow-up treatment through an app could therefore constitute such 'healthcare'. In that regard, I observe that, in accordance with recital 26 of Directive 2011/24, the freedom to provide services includes the freedom for the recipients of healthcare, including persons in need of medical treatment, not only to go to another Member State in order to receive that care, but also 'to receive healthcare provided in another Member State through other means, for example through eHealth services'.

65. Secondly, where telemedicine services appear to be ancillary and inseparable from the physical service, [34] in so far as they may affect the quality of that service, or where telemedicine services also require the involvement of a doctor in the patient's Member State of affiliation, [35] I consider that those telemedicine services cannot be separated from the physical services. I note that, under Article 3(d) of Directive 2011/24, the Member State of treatment is the Member State on whose territory healthcare is '*actually* provided'. Thus, where certain healthcare services are provided using technologies which form an integral part of that healthcare, they are subject to the same legal treatment as other physical healthcare. In fact, such healthcare is not 'telemedicine' within the meaning of the second sentence of Article 3(d) of that directive; that healthcare is 'actually provided' in the patient's Member State of residence and, consequently, would not constitute 'cross-border healthcare' within the meaning of Article 3(e) of that directive.

[32] See point 26 of the present Opinion.

[33] Emphasis added.

[34] See, by analogy, judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764, paragraph 55).

[35] I would like to highlight that certain telemedicine applications could also require the intervention of a second doctor in the Member State where the treatment is actually provided to the patient, for example in teleradiology and telepathology.

66. In the light of the foregoing, I propose that the answer to questions 2.1 to 2.3 referred should be that the concept of 'healthcare … provided … in the case of telemedicine', referred to in Article 3(d) of Directive 2011/24, must be interpreted as meaning that it covers only medical services which are provided exclusively via ICT, and that services which are physically provided in the simultaneous presence of the doctor and the patient are not covered by the concept of 'telemedicine', within the meaning of that provision, even if they are provided in the context of a uniform treatment contract which includes both telemedicine and physical, in-person services, independently of the degree of preponderance of each of those services.

2. The legal rules applicable to 'telemedicine' services under Directive 2011/24 (questions 1.1 and 1.2)

67. By questions 1.1 and 1.2, the referring court asks, in essence, whether the scope of Article 3(d) of Directive 2011/24 is limited to the reimbursement of the costs of cross-border healthcare, within the meaning of Article 7 thereof, and, secondly, whether that directive lays down a general rule that telemedicine services must be provided in accordance with the legislation of the Member State in which the healthcare provider is established.

68. It should be recalled that those questions seek primarily to determine the place where telemedicine services are 'provided' and, in particular, whether Article 3(d) of Directive 2011/24, which provides that, in the case of telemedicine, healthcare is considered to be provided in the Member State where the healthcare provider is established, is intended to apply only for the purposes of reimbursement of the costs of cross-border healthcare or whether it lays down, on the contrary, a general country-of-origin principle in respect of telemedicine services. In view of my suggested answer to questions 2.1 to 2.3, I would point out that that question is, in fact, relevant only in so far as the referring court considers that the digital services provided by DZK can be separated from the physical services provided by UJ.

69. As regards the question of the scope of Directive 2011/24 and whether it is limited to the reimbursement of the costs of cross-border healthcare, I consider, for the reasons which I shall set out in the following points of the present Opinion, that it should be answered in the negative, both recitals 8 and 10 and the structure of that directive, as well as the content of the other chapters thereof – with the exception of Chapter III, the only chapter devoted to reimbursement of healthcare costs – militate in favour of recognising a broader scope.

70. In this respect, I would note that determining a 'Member State of treatment', within the meaning of Article 3(d) of Directive 2011/24, is important not only for the purposes of the provisions of Chapter III of Directive 2011/24, entitled 'Reimbursement of costs of cross-border healthcare'. Its importance goes beyond matters relating to reimbursement, in so far as determining the 'Member State of treatment' makes it possible for a patient receiving cross-border healthcare (or telemedicine) to know in advance the rules that will be applied to him or her. As is apparent, in particular, from recital 19 of Directive 2011/24, 'the rules applicable to cross-border healthcare should be those set out in the legislation of the Member State of treatment, given that, in accordance with Article 168(7) TFEU, the organisation and delivery of health services and medical care is the responsibility of the Member States'. In the context of Chapter II of that directive, entitled 'Responsibilities of Member States with regard to cross-border [healthcare]', Article 4, entitled 'Responsibilities of the Member State of treatment', states, in paragraph 1 thereof, first, that cross-border healthcare is to be provided in accordance, in particular, with the legislation of the Member State of treatment and with the standards and guidelines on quality and safety laid down by that Member State and imposes, secondly, a

number of obligations [36] and responsibilities. [37]

71. It follows that Article 4(1)(a) and (b) of Directive 2011/24, read in conjunction with Article 3(d) of that directive, establishes a general rule that telemedicine services must be provided in accordance with the legislation of the Member State in which the healthcare provider is established.

72. In that regard, I would recall that the first sentence of Article 1(1) of Directive 2011/24 states that the general aim of the directive is to provide rules for facilitating the access to safe and high-quality cross-border healthcare and promote cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. [38] Thus, that general aim, which is to facilitate access to cross-border healthcare, while preserving the competencies of Member States in the field of healthcare, is pursued not only by the rules on the reimbursement of costs laid down in Chapter III of that directive, but also by the rules on the respective responsibilities of the Member State of treatment and the Member State of affiliation, which are set out in Chapter II of that directive. Chapter II is not only important in that it provides doctors, patients and public bodies with legal certainty as to the applicable rules (and related reporting obligations), but above all fulfils a fundamental role in that directive from the point of view of patient mobility, by making it possible to determine clearly which Member State is competent to regulate a given situation. Articles 4 and 5 of Directive 2011/24 ensure that, as required by Article 168(7) TFEU, the competence of each Member State in matters of health policy is respected. [39]

73. That fundamental role in relation to patient mobility also applies in the case of telemedicine, in so far as, in accordance with a combined reading of Article 3(d) and Article 4(1) of that directive, telemedicine services are regulated by the Member State in which the healthcare provider is established in so far as concerns the actual supply of the services. In practical terms, this means that, like a doctor treating patients from another Member State at his or her practice, a doctor who advises patients from other Member States via video call must therefore obtain authorisation only in his or her own Member State and comply with the rules laid down in that Member State. National rules of the Member State of affiliation, where the patient resides, according to which the supply of telemedicine services by healthcare providers from other Member States is subject to its national legislation, are therefore all as incompatible with Article 4(1) of that directive as are national rules which do the same for patients who are physically in another Member State.

74. However, I would point out that Article 3(d) and Article 4 of Directive 2011/24, according to which telemedicine services are regulated by the Member State in which the healthcare provider is established, have no normative content outside the scope of that directive. In that regard, it is also necessary to apply the other relevant rules of EU law, including, in particular, Directive 2000/31.

75. In the light of the foregoing, I propose that the answer to questions 1.1 and 1.2 referred should be that the normative content of Directive 2011/24 is not limited to the provisions on the reimbursement of costs of cross-border healthcare, set out in Chapter III of that directive, but

[36] See Article 4(2) to (4) and Article 6 of Directive 2011/24.

[37] See Article 5 of Directive 2011/24.

[38] See, in that regard, also recitals 2, 4, 10 and 26 of Directive 2011/24.

[39] That is to say, that the Member State of treatment is competent as regards the rules on the provision of care in its territory and that the Member State of affiliation is competent as regards the rules on the reimbursement of costs of healthcare for persons covered by its healthcare system.

also includes the rules on the respective responsibilities of the Member State of treatment and of the Member State of affiliation with regard to cross-border healthcare, which are set out in Chapter II of that directive, so that, as regards 'healthcare' coming within 'telemedicine', within the meaning of Article 3(d) of that directive, determining the 'Member State of treatment' for that type of healthcare is important not only for the purpose of reimbursement of costs of cross-border healthcare under, inter alia, Article 7(7) of that same directive, but also for the legislation, standards and guidelines on quality and safety applicable to that type of healthcare, pursuant to Article 4(1) of Directive 2011/24.

3. The legal rules applicable to 'telemedicine' services under Directive 2000/31 (question 1.3)

76. By question 1.3, the referring court seeks, in essence, to ascertain whether Directive 2000/31, like Directive 2011/24, lays down a rule according to which telemedicine services must be provided in accordance with the legislation of the Member State in which the healthcare provider is established.

77. In the first place, I note that, although Directive 2000/31 predates Directive 2011/24, it may be applied cumulatively with that directive. Directive 2011/24 provides, in Article 2(e), that it is to apply without prejudice to the provisions of Directive 2000/31. [40]

78. In the second place, it is important to ascertain whether 'telemedicine' services can fall within the scope of Directive 2000/31. In my view, that does appear to be the case. Article 2(a) of that directive, referring to other legislative acts, [41] defines 'information society service' as 'any service normally provided for remuneration, *at a distance*, by electronic means and at the individual request of a recipient of services', that definition stating that 'for the purposes of this definition: "*at a distance" means that the service is provided without the parties being simultaneously present*'. [42] Furthermore, recital 18 of that directive states that 'activities which *by their very nature* cannot be carried out at a distance and by electronic means, such as … *medical advice requiring the physical examination of a patient* are not information society services'. [43] It follows that, as long as telemedicine services are provided for remuneration, *at a distance*, by electronic means and at the individual request of a patient, they may be regarded as 'information society services'. However, as stated in the definition of the concept of 'telemedicine' in Directive 2011/24, any service requiring the physical examination of a patient is not, by its very nature, an information society service. The Court, relying on recital 18 of the directive, has held that activities which, by their very nature, cannot be carried out at a distance or by electronic means, such as medical advice requiring the physical examination of a patient, are not information society services, and consequently, do not fall within the scope of that directive, and that if medical advice requiring a physical examination of a customer is inseparable from the selling of contact lenses, which falls, in principle, within the scope of Directive 2000/31, the fact that such advice is required means that such selling does not, ultimately, fall within the scope of that directive. [44] In addition, the fact that telemedicine is not one of the fields referred to in the annex to that

[40] See, also, Chapter 3(d) of the statement accompanying the proposal from which Directive 2011/24 is derived (COM(2008) 414 final, p. 6).

[41] See Article 1(2) of Directive 98/34, as amended by Directive 98/48.

[42] Emphasis added.

[43] Emphasis added.

[44] See judgment of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraphs 33 and 34).

directive to which, in accordance with Article 3(3) of that directive, the country-of-origin principle does not apply, further reinforces the finding that healthcare services provided at a distance by telemedicine constitute information society services. [45]

79. In the third place, the applicability of Directive 2000/31 to telemedicine services being confirmed, the question now arises whether that directive establishes a general rule that telemedicine services must be provided in accordance with the legislation of the Member State in which the healthcare provider is established, in this case Germany.

80. At the outset, I note that, in accordance with Article 1(1) of Directive 2000/31, it 'seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States'. To that end, according to Article 3(1) of that directive, each Member State is to ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the 'coordinated field'. Article 2(h) of that directive defines that field as covering the requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. [46] It follows that, in the present case, the digital services provided by DZK are therefore governed by German legislation, since Germany is the Member State within the 'coordinated field'. It is common ground that DZK has a licence and other authorisations necessary to operate a dental care centre in Germany.

81. In the fourth and last place, although not expressly referred to in question 1.3, I note that, in accordance with Article 3(2) of Directive 2000/31, 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State'. Directive 2000/31 is based on the application of the principles of control in the home Member State and mutual recognition, so that, within the coordinated field defined in Article 2(h) of that directive, information society services are regulated solely in the Member State on whose territory the providers of those services are established. [47] Consequently, first, it is the responsibility of each Member State as the Member State where information society services originate to regulate those services and, on that basis, to protect the general interest objectives referred to in Article 3(4)(a)(i) of that directive. Secondly, in accordance with the principle of mutual recognition, it is for each Member State, as the Member State of destination of information society services, not to restrict the free movement of those services by requiring compliance with additional obligations, falling within the coordinated field, which it has adopted.

82. Accordingly, Article 3 of Directive 2000/31 precludes, subject to the exemptions authorised under the conditions laid down in paragraph 4 of that article, a provider of an information society service wishing to provide that service in a Member State other than that in which he or she is established from being subject to requirements in the coordinated field imposed by that other Member State.

[45] That is confirmed by recital 57 of Directive 2011/24, according to which the interoperability of eHealth services must be carried out while respecting national legislation on the provision of healthcare services adopted in order to protect the patient, to the extent that they are compatible with Directive 2000/31.

[46] That field relates to requirements which the service provider must meet and which concern access to the activity of an information society service, such as qualification, authorisation or notification requirements, and the exercise of the activity of an information society service, such as requirements concerning the behaviour of the service provider, the quality or content of the service. See, to that effect, judgment of 30 May 2024, *Google Ireland and Eg Vacation Rentals Ireland* (C-664/22 and C-666/22, 'the judgment in *Google Ireland*', EU:C:2024:434, paragraph 57 and the case-law cited).

[47] See, to that effect, the judgment in *Google Ireland* (paragraph 58 and the case-law cited).

83. In the present case, it is common ground that the Austrian measures at issue in the main proceedings prohibit DZK from operating legally in Austria, in so far as they require, on pain of penalties, compliance with the obligations referred to in point 20 of the present Opinion.

84. It is therefore necessary to ascertain whether national measures such as those mentioned in point 20 of the present Opinion satisfy the conditions laid down in Article 3(4) of Directive 2000/31.

85. In that regard, first, under Article 3(4)(a) of that directive, the measure concerned must be necessary in the interests of public policy, the protection of public health, public security or the protection of consumers; it must be taken against an information society service which actually undermines those objectives or constitutes a serious and grave risk to those objectives; and, finally, it must be proportionate to those objectives. Accordingly, only measures 'taken against a given information society service' may fall within the scope of that provision. In that regard, the Court has ruled that that provision must be interpreted as meaning that *general and abstract measures* aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services do not fall within the concept of 'measures taken against a given information society service' within the meaning of that provision.[48] In addition, I note that Article 3(4)(a) of that directive, as an exception to the principle of control in the home Member State, must be interpreted strictly. Accordingly, that exception cannot be applied to measures which are likely, at most, to have only an indirect link with one of the objectives referred to in that provision.[49]

86. In the present case, it is for the referring court to assess whether the condition requiring a dental service provider to provide his or her services directly and personally affects the German provider DZK, and whether that condition must be justified. It seems to me, in the present case, that the Austrian measures at issue in the main proceedings are general and abstract, so that they cannot be classified as 'measures taken against a given information society service' within the meaning of Article 3(4)(a) of that directive.

87. Secondly, under the second indent of Article 3(4)(b) of Directive 2000/31, before taking restrictive measures, the Member State concerned must notify the Commission and the Member State on whose territory the service provider is established of its intention to take such measures. It is for the referring court to verify that such notification has in fact been provided.

88. In the light of the foregoing, I propose that answer to question 1.3 referred should be that telemedicine services may come within the concept of 'information society services' and therefore fall within the scope of Directive 2000/31, which implies, inter alia, in accordance with Article 3(1) and (2) of that directive, first, that it is the responsibility of each Member State as the Member State where information society services originate to regulate those services and, on that basis, to protect the general interest objectives referred to in Article 3(4)(a)(i) of that directive, and, second, in accordance with the principle of mutual recognition, it is for each Member State, as the Member State of destination of information society services, not to restrict the free movement of those services by requiring compliance with additional obligations, falling within the coordinated field, which it has adopted.

[48] See, to that effect, the judgment in *Google Ireland* (paragraph 73 and the case-law cited).

[49] See the judgment in *Google Ireland* (paragraph 86 and the case-law cited).

4. The applicability of Directive 2005/36 to 'telemedicine' services (questions 3.1 and 3.2)

89. By questions 3.1 and 3.2, the referring court asks, in essence, first, whether Article 2(n), Article 3(d) and Article 4(1)(a) of Directive 2011/24, read in conjunction with Article 5(3) of Directive 2005/36, require a healthcare provider established in one Member State which 'provides' 'healthcare' by 'telemedicine' in another Member State to comply with professional rules of a professional, statutory or administrative nature in force in that second Member State; and, secondly, whether a healthcare provider 'moves' to another Member State, within the meaning of Article 5(3) of Directive 2005/36, where it provides solely ICT-supported medical services or where that service provider arranges for physical examinations or treatments to be carried out by agents in the patient's Member State of residence.

90. By those two questions, which I propose to deal with together, that court seeks, in essence, to ascertain whether Article 5(3) of Directive 2005/36 applies to 'telemedicine' services provided by a healthcare provider established in another Member State, within the meaning of Directive 2011/24.

91. Although, pursuant to Article 2(n) of Directive 2011/24, that directive applies without prejudice to the provisions of Directive 2005/36, I consider that that question should be answered in the negative.

92. In the first place, it should be noted that, under Article 5(3) of Directive 2005/36, where a service provider moves from his or her Member State of establishment – namely, the Member State in which he or she is legally established for the purposes of pursuing a profession there – to another State – namely the host Member State [50] – he or she is subject, in the host Member State, to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, and to the disciplinary provisions applicable in the host Member State to professionals who pursue the same profession there. [51] As provided in Article 5(2) of that directive, the former provision applies only where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, his or her profession.

93. However, in the context of the cross-border provision of telemedicine services, as is apparent from the analysis in the preceding points of the present Opinion, the service provider does not move to another Member State, but provides the service from his or her own Member State. The Court has established that a 'move', within the meaning of those provisions, must involve the physical crossing of the border. [52] In the judgment in *X-Steuerberatungsgesellschaft*, the Court established that a service which is provided in the exercise of a profession regulated in the host Member State and which is performed without physical crossing of the border by the persons acting for the company concerned, does not fall under Article 5 of Directive 2005/36. In that case, the Court held that the services provided by X, a company which provided, from the Netherlands, professional assistance in tax matters to clients located in Germany, and without the persons acting on behalf of that company travelling to German territory did not satisfy the

[50] According to Article 1 of Directive 2005/36, the 'host Member State' is the Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications and in which a person having acquired their required professional qualifications in another Member State wish to practice a regulated profession.

[51] See judgment of 12 September 2013, *Konstantinides* (C-475/11, EU:C:2013:542, paragraphs 39 and 40). The Court held that 'professional rules are covered by Article 5(3) of the directive only if they are directly linked to the actual practice of medicine and failure to observe them harms the protection of patients. … nor the rule prohibiting unprofessional advertising by doctors … are professional rules which are directly and specifically linked to professional qualifications relating to access to the regulated profession concerned …'.

[52] See Opinion of Advocate General Szpunar in Airbnb Ireland (C-390/18, EU:C:2019:336, points 102 and 103 and the case-law cited).

condition, laid down in Article 5(2) of that directive, for the service provider to 'move', in so far as provision of the service did not involve 'physical crossing' of the border by the service provider or persons acting on its behalf to the territory of the host Member State, namely Germany. [53]

94. Accordingly, I consider that 'telemedicine' services cannot fall under Article 5 of Directive 2005/36. In the present case, that conclusion means, in practice, that the relevant provisions of the ZÄG [54] cannot therefore be relied on against a dental clinic established in Germany which provides cross-border healthcare in Austria by telemedicine. As is apparent from the analysis set out above, the law applicable to the provision of services is determined solely by Article 3(d) of Directive 2011/24, read in conjunction with Article 4(1) of that directive; this is therefore a question of the law of the Member State in which the service provider is established.

95. In the second place, I consider that that conclusion cannot be invalidated by the argument put forward by the ÖZ, the Republic of Austria and the Netherlands, according to which, in essence, it should be held that services provided by electronic means also meet the condition that the service provider must 'move', on the ground, inter alia, that in the interests of protecting patients, a more flexible approach would be preferable. First, I would point out that such a teleological interpretation would be contrary to the meaning of the term 'move', which involves a 'physical' (and not 'virtual') movement of the 'service provider' (and not the 'provision of services'). The same clear and unequivocal meaning is apparent from the various different language versions of Article 5(2) and (3) and from recital 5 of Directive 2005/36. [55] Secondly, general considerations regarding the protection of patients and consumers are not sufficient to justify, in my view, such a broad interpretation, which would almost be *contra legem*. It should be recalled that, in the judgment in *X-Steuerberatungsgesellschaft*, the referring court had set out the risks to which taxpayers would be exposed if they were given tax advice by persons not possessing the professional or personal qualifications necessary to do so. [56] That did not, however, prevent the Court from interpreting Article 5(3) of Directive 2005/36 in accordance with its wording and requiring a physical crossing of the border in order for that provision to be applicable. Thirdly, I would also note, in that regard, that medical standards and practices differ significantly less between the Member States than the rules of national tax law, which are often both complex and subject to constant amendments. Furthermore, it must be noted that the profession of dentist, unlike that of tax adviser, is largely harmonised, in that Article 34 et seq. of Directive 2005/36 lay down minimum requirements both for basic dental training and for specialist dental training. Those articles preclude a person who does not have evidence of basic dental training from practising that profession. [57] It follows that dentists established in other Member States must be afforded all guarantees equivalent to those accorded to dentists established on national territory, for the purposes of freedom to provide services. [58]

96. In the third and last place, the conclusion which I suggest in point 94 of the present Opinion cannot be called into question either if the referring court would find that DZK was also providing physical healthcare. However, it seems to me to be somewhat artificial to consider that healthcare which is physically provided by a first healthcare professional in the Member State in which he or she is established, in this case UJ, is in fact provided by a second professional established in

[53] See the judgment in *X-Steuerberatungsgesellschaft* (paragraphs 24, 34, 35 and 55).

[54] See Articles 24, 26 and 31 of the ZÄG.

[55] For example, for those two provisions, the German ('sich begeben'), Greek ('μετακίνηση'), Spanish ('desplazamiento'), Italian ('spostamento'), Dutch ('begeeft'), Portuguese ('deslocação'), Romanian ('deplasează') and English ('move') language versions.

[56] See the judgment in *X-Steuerberatungsgesellschaft* (paragraph 30).

[57] See judgment of 19 September 2013, *Conseil national de l'ordre des médecins* (C-492/12, EU:C:2013:576, paragraph 41).

[58] See the judgment in *Kohll* (paragraph 48).

another Member State, in this case DZK, solely by reason of the contractual relationships between those two healthcare professionals, and to conclude, therefore, that the second healthcare professional has moved in order physically to provide that healthcare. To make the applicability of the professional rules of the host Member State dependent on the person providing healthcare there being classified as an 'agent' would not, in my view, contribute to pursuing the objective referred to, inter alia, in recital 4 of Directive 2005/36, which is 'to facilitate the free provision of services'. In that regard, in the light of the judgment in *X-Steuerberatungsgesellschaft*, even if UJ acts on behalf of DZK, she cannot be considered to have moved for those purposes to a Member State other than that in which she is established. The situation may be different if DZK had sent a dentist from Germany to a medical consultation with its clients, *quod non*.

97. In the light of the foregoing, I propose that the answer to questions 3.1 and 3.2 referred should be that Article 2(n), Article 3(d), and Article 4(a) of Directive 2011/24, read in conjunction with Article 5(3) of Directive 2005/36, preclude the application of national professional rules to a telemedicine healthcare provider established in another Member State. Article 5(3) of that latter directive must be interpreted as meaning that a healthcare provider does not move to another Member State when it solely provides medical services with the support of ICT, irrespective of whether additional healthcare is provided directly by third parties in the Member State of affiliation.

5. The compatibility of the Austrian legislation with the freedoms of movement guaranteed by the FEU Treaty (question 4)

98. By question 4, the referring court seeks to ascertain, in essence, whether the freedoms of movement guaranteed by primary EU law preclude legislation of a Member State which primarily provides for the direct and personal exercise of the profession of dentist in that Member State only temporarily for EEA nationals.

99. As a preliminary point, I would observe that the question of the possible incompatibility of the provisions of the Austrian law on dentists with the freedom to provide services arises in the present case only if there is a cross-border element. In that regard, it is necessary to draw a distinction between two situations.

100. First, as regards the 'telemedicine' services that DZK [59] provides in Austria from Germany, it must be held that there is a cross-border element. However, the provisions of the ZÄG are not relevant since, as is apparent from my proposed answers to the preceding questions, only German law is applicable to those services, under both Directive 2011/24 and Directive 2000/31. Accordingly, Austrian law is not applicable and the question of its compatibility with Article 56 TFEU does not arise, since the requirements of the ZÄG are not enforceable against DZK.

101. Secondly, as regards the physical services provided by UJ, the existence of a cross-border element is more uncertain, in so far as an Austrian dentist examines, in Austria, a patient a priori Austrian. At first sight, that is a purely internal situation without a cross-border element, and the fundamental freedoms – in particular the freedom to provide services provided for in Article 56 TFEU – are therefore irrelevant. Nevertheless, the referring court appears to attribute the entire activity of the Austrian dentist to DZK, in so far as it assumes that UJ acts 'as an agent' on behalf of DZK, and the physical examination in Austria should therefore be regarded as having been carried out by DZK. The wording of the question referred by that court appears to treat a legal person,

[59] See point 26 of the present Opinion.

DZK, as a 'foreign dentist'; a legal fiction which raises a number of questions. The following analysis is based on the premise established by that court – which, I recall, has sole jurisdiction to assess the facts of the case [60] – according to which UJ acts merely as a *longa manus* of DZK and, in such a situation, the provisions of the ZÄG relating to dentists are applicable to DZK.

102. In that context, only the provisions of the ZÄG capable of affecting the physical services provided by DZK through UJ are logically at issue. However, it must be noted, first, that Paragraph 31 of the ZÄG, which governs the 'freedom to provide services' and which refers only to natural persons authorised to practise as dentists, [61] cannot apply to a legal person such as DZK, even indirectly, since the latter has not raised the possibility of using, for the purposes of providing physical services in Austria, collaborators lawfully practising as dentists in Member States other than the Republic of Austria. Secondly, the requirements laid down in Paragraph 24 of that law, according to which dentists must practise their profession personally and directly, also seem to me to concern only natural persons. Moreover, in reality, that condition is satisfied, in so far as it is common ground that UJ provides physical services 'personally and directly', albeit on behalf of DZK. Accordingly, it appears that the only provision of the ZÄG which is capable of affecting the physical services which UJ provides on behalf of DZK in Austria could be Paragraph 26(3)(1) of the ZÄG, which concerns the composition of 'group practices' and, in particular, the requirement that all members of such practices must be members of the dental profession who are authorised to practise independently. Although they are authorised to operate a dental clinic lawfully in Germany, DZK's members are not dentists. That rule must therefore be examined in the light of the provisions relating to freedom of movement. [62]

103. In that regard, in the first place, I consider that it will be for the referring court to ascertain whether DZK's activity, in the context of its collaboration with UJ, leads to DZK being regarded as 'established' in Austria, which entails an analysis in the light of Article 49 TFEU. [63] On the other hand, if DZK is not established in Austria, it would have to be regarded as a cross-border service provider covered by the principle of freedom to provide services and, in that case, for the reasons set out in point 100 of the present Opinion, the provisions of the ZÄG would not be enforceable against DZK.

104. In the second place, if, after examining all the relevant circumstances, the referring court were to find that DZK uses UJ to participate, on a stable and continuing basis, in Austrian economic life, and must therefore be deemed to be established in Austria, it will be necessary to examine whether the freedom of establishment enshrined in Article 49 TFEU precludes rules, such as those laid down in the ZÄG, requiring that members of 'group practices' must be members of the dental profession authorised to practise that profession independently.

[60] See, to that effect, judgment of 8 September 2010, *Stoß and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraphs 62 to 64 and the case-law cited).

[61] See points 21 and 22 of the present Opinion.

[62] See judgment of 21 September 2017, *Malta Dental Technologists Association and Reynaud* (C-125/16, 'the judgment in *Malta Dental*', EU:C:2017:707, paragraph 54 and the case-law cited).

[63] See, to that effect, judgment of 2 September 2021, *Institut des Experts en Automobiles* (C-502/20, EU:C:2021:678, paragraphs 32 to 34 and the case-law cited). Against it being regarded as an institution, for the purpose of the continuous and stable integration of DZK in economic life, in Austrian territory the following factors in this case apply: the fact that, both in law and fact, UJ remains largely independent in her relationships with her patients; the fact that UJ, as it has been confirmed at the hearing, only makes limited working hours available to DZK; and, finally, the fact that the service which she provides in collaboration with DZK is covered by separate remuneration. Similarly, it seems to me particularly important to point out the fact that UJ does not receive concrete instruction in connection with the business of dentistry and carries out the service on the basis of her own know-how. That applies equally to examinations and to the recommendation concerning an alignment procedure using dental splints. It must, in that regard, verify UJ's system of remuneration in case of a negative recommendation concerning such an alignment procedure.

105. In the light of the foregoing, I propose that the question referred for a preliminary ruling be reformulated as follows: 'where a dental clinic provides physical services on a permanent basis in a Member State other than that in which it is authorised to provide its services by using, as an agent, a dentist authorised to practise in that Member State, does the freedom of establishment provided for in Article 49 TFEU preclude the provisions of legislation of that Member State which require, inter alia, that "group practices", in which dentists may practise their profession, must operate in the form of a limited liability company, and that all its members are members of the dental profession authorised to practise independently?'

106. In that regard, it is apparent in particular from Paragraph 26(3)(1) of the ZÄG that DZK cannot operate in Austria, even using UJ as an 'agent', in so far as the ZÄG appears to prohibit the provision of dental services by an undertaking whose members are not all dentists, even if the in-person services are provided by a 'local' agent.

107. In that regard, I recall that Article 49 TFEU requires the elimination of restrictions on the freedom of establishment. According to their wording, the FEU Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State. Furthermore, according to the Court's settled case-law, Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty.[64] Such a restriction constitutes legislation which makes establishment in the host Member State of an economic operator from another Member State subject to prior authorisation, and reserves the pursuit of a self-employed activity to certain economic operators.[65] That appears to be the case of requirements relating to the composition of 'group practices' provided for in the ZÄG. Consequently, national legislation such as that at issue in the main proceedings is capable of constituting a restriction on freedom of establishment within the meaning of Article 49 TFEU.

108. Nevertheless, restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons of general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective.[66] As the order for reference does not contain sufficiently substantiated contentions, as regards that question, it will be for the referring court to carry out, where necessary, a detailed assessment in the light of the explanations provided by the Republic of Austria.

109. However, it is conceivable that the purpose of the condition imposed by the ZÄG is to ensure the safety of the recipients of medical care services. In that regard, I note that the Court has held that the compulsory involvement of a dental practitioner[67] in the treatment of a patient to whom a dental technologist dispenses his or her services is aimed at ensuring the protection of public health, which constitutes an overriding reason of general interest capable of justifying a

64 See judgment of 21 June 2012, *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraph 31 and the case-law cited).

65 See judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraphs 22 to 24 and the case-law cited). See also, from the perspective of the freedom to provide services, the judgment in *Kohll* (paragraph 35 and the case-law cited).

66 See the judgment in *Malta Dental* (paragraph 56 and the case-law cited) and judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 25 and the case-law cited). See, in that regard, judgment of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraph 86).

67 More specifically, a person who pursued the dental training referred to in Article 34 of Directive 2005/36 and who has evidence of basic dental training.

restriction of the freedom of establishment. [68] As regards the proportionality of such an obligation, the Court has held that the requirement for the compulsory intermediation of a dental practitioner is appropriate in order to attain the objective of protecting public health and does not go beyond what is necessary for that purpose. [69]

110. In the light of the foregoing, I propose that the answer to question 4 referred, as reformulated, should be that Article 49 TFEU precludes any national measure liable to hinder or render less attractive the exercise of the freedom of establishment guaranteed by the Treaty, and in particular legislation which makes establishment in the host Member State of an economic operator from another Member State subject to prior authorisation and which reserves the pursuit of a self-employed activity to certain economic operators, unless that legislation is justified by overriding reasons in the public interest.

V. Conclusion

111. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) Article 3(d) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare

must be interpreted as meaning that the concept of 'healthcare provided in the case of telemedicine' covers only medical services which are provided exclusively via information and communication technologies, and that services which are physically provided in the simultaneous presence of the doctor and the patient are not covered by the concept of 'telemedicine', within the meaning of that provision, even if they are provided in the context of a uniform treatment contract which includes both telemedicine and physical, in-person services, independently of the degree of preponderance of each of those services.

(2) Directive 2011/24

must be interpreted as meaning that its normative content is not limited to the provisions on the reimbursement of costs of cross-border healthcare, set out in Chapter III of that directive, but also includes the rules on the respective responsibilities of the Member State of treatment and of the Member State of affiliation with regard to cross-border healthcare, which are set out in Chapter II of that directive, so that, as regards 'healthcare' coming within 'telemedicine', within the meaning of Article 3(d) of that directive, determining the 'Member State of treatment' for that type of healthcare is important not only for the purpose of reimbursement of costs of cross-border healthcare under, inter alia, Article 7(7) of that same directive, but also for the legislation, standards and guidelines on quality and safety applicable to that type of healthcare, pursuant to Article 4(1) of Directive 2011/24.

[68] See the judgment in *Malta Dental* (paragraphs 57 and 58).

[69] See the judgment in *Malta Dental* (paragraphs 60 to 62 and the case-law cited). The Court recalled that, in order to assess whether a Member State has observed the principle of proportionality in the area of public health, it should be taken into account that the health and life of humans rank foremost among the assets and interests protected by the FEU Treaty and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since that level may vary from one Member State to another, Member States must be allowed a measure of discretion in that area.

(3) Article 3 of 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, read in conjunction with Article 2(a) and (h) of that directive,

must be interpreted as meaning that telemedicine services may come within the concept of 'information society services' and therefore fall within the scope of Directive 2000/31, which implies, inter alia, in accordance with Article 3(1) and (2) of that directive, first, that it is the responsibility of each Member State as the Member State where information society services originate to regulate those services and, on that basis, to protect the general interest objectives referred to in Article 3(4)(a)(i) of that directive, and, second, in accordance with the principle of mutual recognition, it is for each Member State, as the Member State of destination of information society services, not to restrict the free movement of those services by requiring compliance with additional obligations, falling within the coordinated field, which it has adopted.

(4) Article 5(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications

must be interpreted as meaning that a healthcare provider does not move to another Member State when it solely provides medical services with the support of information and communication technologies, irrespective of whether additional healthcare is provided directly by third parties in the Member State of affiliation.

(5) Article 49 TFEU

must be interpreted as meaning that it precludes any national measure liable to hinder or render less attractive the exercise of the freedom of establishment guaranteed by the Treaty, and in particular legislation which makes establishment in the host Member State of an economic operator from another Member State subject to prior authorisation and which reserves the pursuit of a self-employed activity to certain economic operators, unless that legislation is justified by overriding reasons in the public interest.