JUDGMENT OF THE COURT (Second Chamber)

13 March 2008 *

In Case C-446/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de Première Instance de Bruxelles (Belgium), adjudicating on a criminal matter, made by decision of 7 December 2005, received at the Court on 14 December 2005, in the criminal proceedings against

Ioannis Doulamis,

intervening parties:

Union des Dentistes et Stomatologistes de Belgique (UPR),

Jean Totolidis,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

* Language of the case: French.

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr. Doulamis, by E. Koeune, avocat,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by F. Arbault, O. Beynet and K. Mojzesowicz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC.

2 This reference was made in criminal proceedings brought against Mr Doulamis, a dental technician, for infringement of, first, legislation governing the exercise of the dental profession and the medical profession and, secondly, legislation governing advertising in dental care matters.

Legal context

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

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

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

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

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

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

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

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

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

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

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

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

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

The question referred for a preliminary ruling

Admissibility

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

13 In that regard, it must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 24).

14 Nevertheless, in exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Arduino*, paragraph 25, and Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 34).

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

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

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

Substance

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

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

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

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

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

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

24 The answer to the question referred must therefore be that Article 81 EC, read in conjunction with Article 3(1)(g) EC and the second paragraph of Article 10 EC, does

not preclude a national law, such as the Law of 15 April 1958, which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.

Costs

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

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

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

[Signatures]