OPINION OF ADVOCATE GENERAL

BOT

delivered on 31 January 2008 [1]

1. The present reference for a preliminary ruling concerns the provisions of Italian legislation on advertisements for the medical professions and private clinics. According to those provisions, the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments is prohibited on national television networks. However, such advertising is permitted on local television networks and through other media on condition, first, that authorisation is obtained from the competent local authority, the conditions to be fulfilled to obtain that authorisation not being specified, and, second, that the expenditure on such advertising does not exceed 5% of declared income for the previous year.

2. The national court wishes to know whether the prohibition on broadcasting advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks laid down in that legislation is compatible with Community law, notwithstanding the fact that such advertisements are permitted under certain conditions on local television networks.

3. In this Opinion, I shall state that that prohibition of such advertisements on national television networks constitutes a restriction on freedom of establishment and freedom to provide services.

4. I shall also state that, while a Member State may properly impose restrictions on the exercise of those freedoms in order to protect a legitimate interest such as public health, the measure in question must, none the less, be appropriate for the purpose of achieving that objective and must not go beyond what is necessary for that purpose. I will state that, since the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments is permitted, under certain conditions, on local television networks, the prohibition of such advertisements on national television networks does not satisfy the requirement of proportionality and is thus incompatible with Community law.

1 — Original language: French.

I — Legal framework

A — *Community law*

1. The EC Treaty

5. The first paragraph of Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. According to the second paragraph of Article 43 EC, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings.

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

7. Pursuant to Articles 48 EC and 55 EC, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are also to enjoy the rights conferred by Articles 43 EC and 49 EC.

8. According to Article 47(3) EC and pursuant to Article 55 EC, the abolition of restrictions which infringe Articles 43 EC and 49 EC in the case of the medical and allied and pharmaceutical professions is dependent upon co-ordination of the conditions for their exercise. However, the Council of the European Union and the Commission of the European Communities have acknowledged that the direct effect of Articles 43 EC and 49 EC, recognised in the *Reyners* [2] and *Van Binsbergen* [3] judgments respectively, with effect from 1 January 1970, the end of the transitional period, also applied to health care professions. [4] Moreover, medical and allied and pharmaceutical professions have been the subject of co-ordinating directives. [5]

9. According to Article 46(1) EC and Article 55 EC, Articles 43 EC and 49 EC do not prohibit restrictions justified on public health grounds.

2 — Case 2/74 [1974] ECR 631.

3 — Case 33/74 [1974] ECR 1299.

4 — Thus, the first recital in the preamble to Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1975 L 167, p. 1) states that, pursuant to the Treaty, all discriminatory treatment based on nationality with regard to establishment and provision of services is prohibited as from the end of the transitional period.

5 — See, with regard to the activities of doctors, Directive 75/362 and Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors (OJ 1975 L 167, p. 14). The directives adopted in these areas were repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

2. Secondary legislation

10. In Directive 89/552/EEC, [6] the Community legislature coordinated the national legislation governing television advertising.

11. 'Television advertising' is defined in Article 1(c) of Directive 89/552 as 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

12. According to Article 12(d) of the directive, television advertising and teleshopping are not to encourage behaviour prejudicial to health or safety.

13. According to Article 14(1) of the directive, '[t]elevision advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited'. Article 14(2) provides that teleshopping for, inter alia, medicinal products is to be prohibited.

14. By virtue of Article 3(1) of the directive, Member States remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by the directive.

B — *National law*

15. Advertising concerning the medical professions and private clinics is governed in Italy by Law No 175 of 5 February 1992, [7] as amended, initially, by Law No 42 of 26 February 1999, [8] subsequently by Law No 362 of 14 October 1999, [9] and finally, by Law No 112 of 3 May 2004, [10] ('the 1992 Law').

6 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60), ('Directive 89/552').

7 — GURI No 50 of 29 February 1992, p. 4.

8 — GURI No 50 of 2 March 1999, p. 4.

9 — GURI No 247 of 20 October 1999, p. 3.

10 — Ordinary Supplement to GURI No 82 of 5 May 2004.

16. The relevant provisions of the 1992 Law for the purpose of the present proceedings are as follows:

'*Article 1*

1. Advertising relating to the exercise of the medical professions auxiliary medical professions provided for and regulated by the legislation in force shall be permitted only by means of notices affixed to the building in which the professional activity is carried out, advertisements placed in telephone directories, in general professional directories, in periodicals intended exclusively for medical practitioners, in daily newspapers and journals in the relevant fields and on local radio and television stations.

2. The notices and advertisements referred to in Article 1(1) may contain only the following information:

(a) surname, first name, address, telephone number, professional address, if any, opening hours or consulting hours;

(b) qualifications, academic qualifications, specialist and vocational qualifications, without any abbreviations which could be misleading;

(c) honorary distinctions awarded by, or recognised by, the State.

3. The use of the title of specialist shall be permitted only for persons who have obtained the relevant diploma in accordance with the rules in force. Qualifications obtained abroad, including specialist qualifications, may be used only if they are recognised by the State.

4. A non-specialist doctor may refer to a particular area in which he specialises by the use of words which reflect the official definition of the specialisation and are not misleading or ambiguous as to whether the doctor holds the specialist qualification …

5. The provisions of this article shall also apply to associations of doctors and to the information placed on prescriptions by surgeons, dentists, dental technicians and veterinarians, and on the business cards of persons exercising the professions referred to in Article 1(1).

Article 2

1. Advertising in the form of notices and advertisements referred to in Article 1 must be authorised by the Mayor, with the approval of the professional body of which the applicant is a member. …

2. In order to obtain municipal authorisation, the person concerned must make an application to the competent professional association or organisation, providing a detailed description of the type, characteristics and contents of the advertisement. The professional association or organisation shall forward the application to the Mayor, together with its approval, within 30 days of the date on which it was submitted.

3. In order to grant its approval, the professional association or organisation must establish that the provisions in Article 1 have been complied with and that the aesthetic format of the notice, advertisement or signs referred to in Article 4 complies with the provisions laid down by a special regulation adopted by the Minister of Health, after obtaining the opinion of the Consiglio Superiore di Sanità [Italian Board of Health] and, where appropriate, of the professional associations or organisations, which shall deliver their opinion within 90 days of the date on which the application was made.

3a. The authorisations provided for in Article 2(1) must be renewed only if modifications are made to the original text of the advertisement.

…

Article 4

1. Advertising relating to private health care establishments and to surgeries and outpatient centres specialising in one or more areas of health care which are subject to statutory authorisation shall be permitted only by means of notices or signs affixed to the building in which the professional activity is carried out, advertisements placed in telephone directories, in general professional directories, in periodicals intended exclusively for medical practitioners, in daily newspapers and in journals in the relevant field and on local radio and television stations and shall be authorised to indicate the specific medical and surgical procedures and the diagnostic and therapeutic services actually provided, on condition that those details are accompanied by the first name, surname and professional qualifications of those responsible for each specialisation.

2. In every case, the first name, the surname and the professional qualifications of the doctor in charge of medical administration must be indicated.

…

Article 5

1. The advertising referred to in Article 4 shall be authorised by the region, after seeking the opinion of the regional federations of the professional associations or organisations, where so established, which must ensure that the practitioners in question possess valid scientific and other academic qualifications, and the notice, sign or advertisement, complies with the aesthetic format laid down in Article 2(3).

…

3. The advertisements covered by this provision must indicate the conditions of the regional authorisation.

4. The proprietors and health care directors responsible for the establishments referred to in Article 4 who place advertisements in the forms permitted, but without regional authorisation, shall be subject to the disciplinary penalties of a reprimand or suspension from medical practice …

5. Where the advertisement contains false information on the activities in which the establishment in question is authorised to engage or the services it is authorised to provide or contains no mention of the health care director, the administrative authorisation to engage in medical practice shall be suspended for a period of between six months and one year.

…

Article 9a

Those engaged in the medical professions referred to in Article 1 and the health care establishments referred to in Article 4 may engage in advertising in the forms permitted under this law, incurring expenditure thereon only to an extent equivalent to 5% of income declared for the preceding year.'

17. The national court also refers to Law No 248 of 4 August 2006, entitled '[c]onverting into law, with amendments, Decree-Law No 223 of 4 July 2006 laying down urgent measures for social and economic recovery, containing and rationalising public expenditure and measures relating to income and combating tax evasion', [11] adopted offer the facts in the main proceedings.

11 — Ordinary Supplement to GURI No 183 of 11 August 2006.

18. Article 2 of that law is worded as follows:

'1. In accordance with the Community principle of free competition, freedom of movement of persons and freedom to provide services and in order to guarantee consumers a proper choice in exercising their rights and the ability to compare services offered on the market, upon the date of entry into force of this decree shall be abolished the laws and regulations which impose, with regard to the professions and those engaged in intellectual work:

...

(b) a prohibition, even a partial one, on placing advertisements providing information relating to professional qualifications and specialisations, the features of the services provided as well as the price and overall costs of the services, in accordance with the principles of transparency and accuracy in advertising, the observance of which shall be guaranteed by the relevant professional association;

...

2. The provisions relating to practitioners operating within the national public health service or by virtue of a contractual relationship with that service and any maximum charges fixed in advance as a general rule in the interests of consumer protection shall not be affected by this provision ...'

II — The facts

19. The present proceedings originate in a dispute between Corporación Dermoestética SA, [12] a company constituted under Spanish law with the object of providing cosmetic treatments and medical and surgical services in that field, and To Me Group Advertising Media Srl, an advertising agency. [13]

20. Dermoestética started its business in 2003 in Italy, where it has 24 beauty centres and 21 medical centres, located in 23 cities.

21. On 10 October 2005, Dermoestética entered into an agreement with Advertising Media under which the latter was to arrange for five television advertisements to be broad-

12 — 'Dermoestética'.

13 — 'Advertising Media'.

cast in prime time during the programme '*Verissimo*' on Canale 5, a national Italian station. The agreed price was EUR 46 000, before tax, plus agency fees of EUR 4 000.

22. After taking receipt of a payment on account of EUR 2 000, Advertising Media informed Dermoestética that, in view of the applicable Italian legislation, it would not be possible to broadcast the advertisements proposed in the contract on the national television network. It proposed finding advertising slots on local television stations, subject to an increase in the agreed price.

23. Dermoestética asked for its payment on account of EUR 2 000 to be refunded. When Advertising Media refused to do so, it brought an action against it before the Giudice di Pace di Genova (Italy) for payment of that sum.

24. Before that court, Cliniche Futura Srl, a subsidiary of Dermoestética established in Genoa, at whose premises the contract at issue had been signed, applied for leave to intervene, arguing that the Italian legislation on television advertising for medical activities was contrary to the freedom of establishment enshrined in Article 43 EC.

III — The questions referred to the Court

25. It was in those circumstances that the Giudice di Pace di Genova decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is it incompatible with Article 49 EC for national legislation, such as that under Articles 4, 5 and 9a of [the 1992 Law] and Ministerial Decree No 657 of 16 September 1994, and/or administrative practices to prohibit the broadcasting on national television networks of advertisements for medical and surgical treatments carried out in private health care establishments duly authorised for that purpose, even though that same advertising is permitted on local television networks, and, at the same time, to impose, in relation to the broadcasting of those advertisements, a ceiling on expenditure of 5% of declared income for the preceding year?

(2) Is it incompatible with Article 43 EC for national legislation, such as that under Articles 4, 5 and 9a of [the 1992 Law] and Ministerial Decree No 657/1994, and/or administrative practices to prohibit the broadcasting on national television networks of advertisements for medical and surgical treatments carried out in private health care establishments duly authorised for that purpose, even though that same advertising is permitted on local television networks, and, at the same time, to require in relation to the broadcasting of those advertisements,

prior authorisation from each individual municipally and the opinion of the provincial professional association and to impose a ceiling on expenditure of 5% of declared income for the preceding year?

(3) Is it contrary to Articles 43 EC and/or 49 EC for the broadcasting of advertisements providing information on medical and surgical treatments of a cosmetic nature in private health care establishments, duly authorised for that purpose, to be made subject to additional prior authorisation by the local authorities and/or professional associations?

(4) By adopting a code of conduct which imposes limits on the advertising of professional health care services and by construing the legislation in force concerning the advertising of medical services in a manner which considerably restricts the right of doctors to advertise their own activities, both measures being binding on all doctors, have the Federazione Nazionale degli Ordini dei Medici (National Federation of Associations of Doctors, Surgeons and Dentists) ('FNOMCEO') and the associations of group practices restricted competition beyond what is permitted under the relevant national legislation and in breach of Article 81(1) EC?

(5) In any event, is the interpretative practice adopted by FNOMCEO incompatible with Articles 3(1)(g) EC, 4 EC, 98 EC, 10 EC, 81 EC and, possibly, Article 86 EC, in so far as the practice is permitted by a national law which requires the competent provincial professional associations to verify that advertisements by medical practitioners are transparent and accurate without indicating the criteria and procedures to be applied in exercising that authority?'

IV — Analysis

A — *The purpose of the questions referred to the Court and their admissibility*

26. The questions referred by the Giudice di Pace di Genova may be divided into two groups. The first group is composed of the first, second and third questions. By those three questions, the national court is seeking to ascertain whether the 1992 Law is compatible with Articles 43 EC and 49 EC in so far as it prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature on national television networks.

27. The second group of questions covers the fourth and fifth questions. Those two questions concern a code of conduct adopted by FNOMCEO and the practice adopted by that federation in applying the code. Their purpose is to ascertain whether the code and the practice are compatible with a number of provisions of the Treaty, in particular Article 81 EC, which prohibits agreements between undertakings which are incompatible with the common market.

28. The Italian Government argues that all of the questions are inadmissible, on the ground that the national court did not take account of the fact that Decree-Law No 223 of 4 July 2006, [14] repealed the laws and regulations prohibiting the professions and those engaged in intellectual work from providing information by way of advertising.

29. It also contends that the third to fifth questions are not relevant to the resolution of the main proceedings because the non-performance of the contract between Dermoestética and Advertising Media is due to the position adopted by the latter and not to a refusal on the part of the Canale 5 television company.

30. The Commission considers that the first group of questions is admissible. On the other hand, it has doubts as to whether the second group is admissible.

31. I share the Commission's opinion as to the admissibility of both groups of questions.

32. By way of preliminary remark, it must be recalled that, according to settled case-law, in proceedings for a preliminary ruling, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [15]

33. It is only where it is quite obvious that the interpretation of a provision of Community law that is sought by the national court bears no relation to the actual facts of the main action or its purpose or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it that those questions may be declared inadmissible. [16]

14 — GURI No 153 of 4 July 2006, p. 4, hereinafter referred to as 'Decree-Law No 223/2006'.

15 — See, in particular, Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41 and the case-law cited.

16 — *Ibidem* (paragraph 43 and the case-law cited therein).

34. In addition, in the procedure laid down in Article 234 EC providing for cooperation between the national courts and the Court of Justice, the functions of the Court of Justice and the national courts are clearly separate and the latter has exclusive jurisdiction to interpret its national legislation. [17]

35. In the light of those considerations, the first group of questions is indeed admissible. It is for the referring court to assess the effects of Decree-Law No 223 on the resolution of the main proceedings and not the government of the Member State from which the reference is made. [18] In referring these questions to the Court of Justice for a preliminary ruling, the Giudice di Pace di Genova considered that Decree-law No 223, Article 12 of which it sets out, did not prevent the application of the 1992 Law to the case before it. It is not for the Court to challenge that assessment.

36. The Italian Government's argument that Decree-law No 223 repealed the provisions of the 1992 Law prohibiting advertising, as it did all laws and regulations prohibiting the professions and those engaged in intellectual work from providing information by way of advertising, cannot therefore be accepted and deprive the first group of questions of their purpose.

37. In addition, the question whether the contested provisions of the 1992 Law are compatible with Articles 43 EC and 49 EC is not manifestly irrelevant to the outcome of the dispute in the main proceedings.

38. If those articles, or one of them, must be interpreted as meaning that they preclude provisions, such as those introduced by the 1992 Law, which prohibit television advertising, the national court must set aside such provisions, in accordance with the case-law on the primacy of rules of Community law which are directly applicable. [19]

39. On the other hand, I share the Commission's doubts as to the admissibility of the second group of questions.

40. The purpose of that group of questions is to ascertain whether a code of conduct adopted by a federation of doctors and that federation's practice in applying the code are compatible with Community law. However, the Giudice di Pace di Genova has not provided any details as to the content of that code or that practice. Nor did it explain how the Court's examination of that code and that practice would be relevant to the outcome of the main proceedings.

17 — See, in particular, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 29 and the case-law cited.

18 — Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 35.

19 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21.

41. Indeed, it would appear to be obvious that those questions are irrelevant since, according to the information supplied by the referring court, Advertising Media explained that it was impossible for it to fulfil its contractual obligations because of the 1992 Law, in so far as it prohibited the broadcasting of all advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, and not because of the code adopted by FNOMCEO or its practice in applying it.

42. That is why I propose that the Court should decide that the fourth and fifth questions are manifestly irrelevant to the outcome of the main proceedings and should be declared inadmissible.

B — *The first three questions*

43. By its first three questions, the Giudice di Pace di Genova asks whether the 1992 Law, to the extent that it prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, while permitting such advertisements, under certain conditions, on local television networks, is compatible with Articles 43 EC and 49 EC.

44. Since rules on television advertising for medical treatments have been harmonised in Directive 89/552, it is necessary to consider whether the compatibility of the provisions of the 1992 Law at issue must be examined in the light of that directive or the provisions of the Treaty on freedom of movement.

1. The relevant provisions of Community law

45. Article 14(1) of Directive 89/552 expressly prohibits television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls.

46. The question is therefore whether the 1992 Law, to the extent that it prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, is an implementation of Article 14(1) of Directive 89/552.

47. The directive does not give a more precise definition of the medical treatments which are covered by the ban on television advertising laid down in Article 14(1).

48. At the hearing, the Commission stated that the concept of 'medical treatment' in that article must be interpreted by analogy with that of 'medicinal products available only on prescription'. The concept at issue thus corresponds to acts performed by a doctor on the basis of a prescription issued by another doctor. In the field of plastic surgery, it covers, for example, operations intended to rectify the consequences of an accident or to correct a congenital deformity. On the other hand, it does not apply to acts performed solely at the patient's request.

49. For its part, the Netherlands Government argues that, by definition, all medical treatment requires the intervention of a doctor, with the result that the words 'available only on prescription' adds nothing to the concept of medical treatment. It also points out that the Member States may adopt stricter rules than those provided for in Article 14 of Directive No 89/552.

50. Unlike the Netherlands Government, I am of the opinion that the words 'available only on prescription' are totally relevant for the purpose of determining the scope of the prohibition laid down in Article 14(1) of Directive 89/552. In addition, I do not believe that the criterion of a prescription should be interpreted as the Commission proposes.

51. If the question whether plastic surgery is or is not covered by Article 14(1) of Directive 89/552 were to be decided on the basis of whether the operation was prescribed by another doctor or decided upon by the patient himself, it would not be possible to determine in advance in every case whether the treatment is covered by the prohibition in that article. An operation, such as the re-modelling of the nose or the breasts, could be prescribed by a doctor in order to rectify the consequences of an accident or following an illness. It could also be performed solely at the request of the patient, because that person has decided, for purely aesthetic reasons, to alter his face or that part of his anatomy and, in that case, the doctor's role is to ascertain whether the operation is in fact compatible with the patient's state of health.

52. The criterion of a prescription, as presented by the Commission, does not therefore permit a correct implementation of the prohibition laid down in Article 14(1) of Directive 89/552. Implementation of the prohibition requires the types of treatment for which television advertising is prohibited to be identified in advance. The concept of 'medical treatment' within the meaning of Article 14(1) of the directive, in the same way as that of 'medicinal product' in the same article must, in my opinion, be understood as covering treatments in respect of which, as such, all forms of television advertising are prohibited. In order to determine the scope of that provision, the criterion of a prescription must therefore be interpreted differently.

53. By referring in Article 14(1) of Directive 89/552 to medicinal products and medical treatment available only on prescription, the Community legislature intended, in my opinion, to limit the prohibition of television advertising to medicinal products and medical treatment which may be administered only with the authorisation of a doctor, in accordance with the legislation of the Member State concerned. The medicinal products and medical treatment in question are thus those of such a nature that the use of them cannot be left solely to the judgment of the patient or the consumer.

54. That view is confirmed by the 30th recital in the preamble to Directive No 89/552 which, in the French-language version, states that television advertising for medicinal products and medical treatment available 'only' on prescription in the Member State concerned must be prohibited.

55. It is also supported by the reasons which underlie such a prohibition. The prohibition of advertising for medicinal products and medical treatment laid down in Article 14(1) of Directive 89/552 follows a prohibition of all forms of advertising for cigarettes and other tobacco products, laid down in Article 13 of the directive, and precedes the provisions governing television advertising for alcoholic beverages, set out in Article 15 of the directive. The purpose of all of those provisions is to protect public health.

56. The prohibition of television advertising for medicinal products and medical treatment available only on prescription is explained by the fact that they must be consumed or carried out only in case of necessity, as determined by a doctor, for strictly therapeutic purposes and under conditions determined by the therapist. The Community legislature thus intended to prohibit actions designed to promote the acquisition of such medicinal products and medical treatment which, if they are not really necessary and not consumed or carried out in accordance with the instructions of a doctor, could endanger the consumer's health.

57. I deduce from this that the Community legislature intended to limit the prohibition of television advertising to medical treatments which can be carried out only on a doctor's instructions. It follows that, if a medical treatment can be carried out solely at the request of a patient, as the re-modelling of the nose or the breasts can be in the case of cosmetic surgery and under Italian law, I am of opinion that it does not fall within the scope of Article 14(1) of Directive 89/552.

58. The prohibition of television advertising laid down in the 1992 Law is thus much wider than that laid down in Directive No 89/552. The 1992 Law prohibits the broadcasting on national television networks of advertisements relating to the medical profession and ancillary medical professions and for private clinics. In particular, according to the first three questions, the effect of the law is to prohibit all advertising on national television networks for medical and surgical

treatments of a cosmetic nature carried out in private health care establishments, whereas, as we have just seen, not all such treatments are available only on prescription, within the meaning of Article 14(1) of Directive No 89/552.

59. However, the fact that those provisions in the 1992 Law introduced a wider prohibition of television advertising than that imposed in Directive No 89/552 does not make those provisions contrary to Community law.

60. As the Netherlands Government pointed out, Article 3(1) of that directive permits Member States to lay down more detailed and stricter rules in the areas covered by it. That provision has been interpreted as applying to all the provisions in Chapter IV of the directive, [20] which includes Article 14(1). The Member States are therefore entitled to lay down more restrictive rules than those laid down in Article 14(1) regarding television advertising for medicinal products and medical treatment.

61. However, in the exercise of that power to adopt stricter or more detailed rules, as in the exercise of the powers reserved to them, the Member States must not inhibit freedom of movement. It is settled case-law that, where the conditions for the exercise of a profession have not been harmonised, Member States remain competent to define the conditions for the exercise of the profession, but must, when exercising their powers in that area, respect the basic freedoms guaranteed by the Treaty. [21]

62. Whether the contested provisions of the 1992 Law are compatible with Community law must therefore be considered in the light of the freedoms of movement established in the Treaty.

63. The Giudice di Pace di Genova considers that, in the circumstances of the main proceedings, that assessment must be carried out in the light of both freedom of establishment and freedom to provide services. I agree with that analysis.

64. The dispute in the main proceedings arises from the failure to perform a contract entered into by Advertising Media and Dermoestética, a company constituted under Spanish law, for the purpose of broadcasting advertisements on an Italian television station.

20 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 37 to 44.

21 — Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 26 and the case-law cited.

65. Dermoestética's legal position appears to me to be covered by Article 43 EC, read together with Article 48 EC, since the purpose of the advertising contract concluded with Advertising Media was to promote Dermoestética's activities in Italy through its secondary establishments. [22]

66. Similarly, Dermoestética is clearly the party for which the services requested from Advertising Media were intended and may therefore, as such, rely on the provisions of Article 49 EC. [23]

67. I am inclined to think that the centre of gravity of the present case is more in the direction of freedom of establishment, bearing in mind the objective which Dermoestética was seeking to achieve in its contract with Advertising Media and the effects of the 1992 Law on competition. None the less, since the referring court also raises questions as to the scope of freedom to provide services in this case and since the Court, in its judgment in *Gourmet International Products*, [24] considered legislation on advertising for alcoholic beverages in the light not only of the articles of the treaty on free movement of goods but also of Article 49 EC, I will also analyse, briefly, the interpretation of that article.

22 — See, to that effect, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 25.

23 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 10.

24 — Case C-405/98 [2001] ECR I-1795.

68. By its first three questions, the Giudice di Pace di Genova asks, essentially, whether Articles 43 EC and 49 EC, read in conjunction with Articles 48 EC and 55 EC, are to be interpreted as precluding the legislation of a Member State which prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, while at the same time permitting such advertisements, under certain conditions, on local television networks.

69. I am of the opinion that the answer to that question should be in the affirmative on the grounds, first, that such a prohibition on advertising constitutes a restriction on freedom of establishment and freedom to provide services within the meaning of Articles 43 EC and 49 EC and, secondly, that that restriction is not justified, since such advertising is permitted, under certain conditions, on local television networks. I shall examine each of those points.

2. The existence of a restriction

70. The freedom of establishment established in Articles 43 EC and 48 EC confers upon companies or firms in accordance with the law of a Member State the right to pursue an independent activity in another Member State and to exercise that activity permanently under the same conditions as companies or firms whose registered office is in that

State. Article 43 EC thus requires the abolition of discriminatory measures.

71. In accordance with the Court's case-law, all measures which prohibit, impede or render less attractive the exercise of that freedom are also to be regarded as constituting restrictions on freedom of establishment. [25] Among those measures are those which, even though they apply without distinction, affect the conditions for pursuing the activity concerned and have the effect of depriving an economic operator of an effective means of competing with a view to penetrating a market. [26]

72. The Court has decided that that is so in the case, for example, a measure which prohibits a credit institution which is in receipt of funds from the public from remunerating sight accounts. [27] It adopted the same analysis, in the context of freedom to provide services, in regard to legislation containing an absolute prohibition of derogation by lawyers from minimum scale fees. [28] Those measures were held to be unfavourable to foreign economic operators because they deprived them of a means which would have permitted them to compete more effectively with professionals already established in the host Member State. [29]

73. It is therefore the effects which they have on market access which make it possible for such measures to be classified as 'restrictions' within the meaning of Articles 43 EC and 49 EC. Those measures constitute restrictions on the freedoms of movement because, by hindering access by new operators to the market in question, they constitute, from an objective point of view, barriers to the freedoms of movement. Measures which prohibit or render more difficult access to the market by new economic operators freeze the market concerned in its present state and are therefore, by their nature, incompatible with the freedoms of movement and free competition on which the common market is based.

74. Remuneration of sight accounts by credit institutions and freedom to fix fees have thus been held to be legitimate means of competition necessary in order to have access to the market of the host Member State. In my

25 — Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11 and the case-law cited.

26 — *Ibidem* (paragraph 12).

27 — *Idem*.

28 — Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraphs 58 and 59.

29 — *CaixaBank France* (paragraph 13) and *Cipolla and Others* (paragraph 59). In its judgment in *CaixaBank France*, the Court pointed out, where credit institutions which are subsidiaries of foreign companies seek to enter the market of a Member State, competing by means of the rate of remuneration paid on sight accounts constitutes one of the most effective methods to that end, so that access to the market by those establishments is made more difficult by the prohibition in question (paragraph 14). Similarly, in *Cipolla and Others*, it held that an absolute prohibition of derogation from the minimum scale deprived lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by that scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad (paragraph 59).

view, that analysis must be applicable to the right to advertise.

75. The importance of advertising in order to gain access to a market has already been highlighted by the Court in the area of free movement of goods.

76. In that area, the national provisions governing advertising have been analysed as selling arrangements in accordance with the rule laid down in *Keck and Mithouard*, [30] with the effect that they do not constitute restrictions within the meaning of Article 28 EC, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [31]

77. However, in its judgment in *De Agostini and TV-Shop*, [32] the Court considered that it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

78. In the judgment in *Gourmet International Products*, the Court ruled on legislation prohibiting all advertising of alcoholic beverages addressed to consumers, subject to a few minor exceptions. The Court considered that such a prohibition on advertising must be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 28 EC. [33]

79. The Court based that analysis on the consideration that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar. [34]

80. In its judgment in *Douwe Egberts*, [35] the Court reached the same conclusion as in *Gourmet International Products*, in

30 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

31 — *Leclerc-Siplec* (paragraphs 21 to 23).

32 — Joined Cases C-34/95 to C-36/95 [1997] ECR I-3843, paragraph 42.

33 — *Gourmet International Products* (paragraph 25).

34 — *Ibidem* (paragraph 21).

35 — Case C-239/02 [2004] ECR I-7007, paragraph 53.

relation to national legislation prohibiting references in advertisements for foodstuffs to slimming and to medical recommendations, attestations, declarations or statements of approval.

81. National legislation which limits in a significant way the advertising of a product is therefore such as to prevent that product gaining access to the market. I believe that that analysis may be applied to services.

82. Indeed, advertising is an essential instrument enabling economic operators to inform consumers of their existence and their activities. It thus plays a decisive role in enabling a company to establish itself in a new Member State and develop its business there. Advertising is also the means by which economic operators seek to persuade consumers to purchase their services rather than those of their competitors. It thus enables consumers to break with their habits and, consequently, promotes competition.

83. The importance of advertising for the professions was also highlighted by the Commission in its Report on Competition in Professional Services. [36] According to that report, advertising, and in particular comparative advertising, can be a crucial competitive tool for new firms entering the market. [37]

84. As Advocate General Jacobs pointed out in his Opinion in the case which gave rise to the judgment in *Leclerc-Siplec*, measures that prohibit or severely restrict advertising tend inevitably to protect domestic manufacturers already established and to make the entry into the market of foreign undertakings more difficult. Freedom to advertise thus appears to be an essential corollary to the fundamental freedoms laid down in the Treaty. [38]

85. The purpose of this analysis is not to demonstrate that any prohibition or severe restriction of advertising will necessarily be contrary to Community law. The freedoms of movement may be restricted by the Member States. However, such restrictions must be justified on legitimate grounds, such as public order, public safety, public health or an overriding requirement of general interest.

86. It is simply an acceptance of the fact that, having regard to the importance of

36 — COM(2004) 83 final/2.

37 — Paragraph 43.

38 — Paragraphs 21 and 22.

advertising in establishing the common market, a prohibition of advertising or a very severe restriction in that field, constitutes, in principle, a restriction on the freedoms of movement guaranteed by the Treaty and can be compatible with Community law only if it is justified.

87. In the main proceedings, a company like Dermoestética, which pursues its activities in the field of beauty treatment and has treatment centres in a number of Italian cities, needs to build up a client-base and, in order to do so, to become known to the general public.

88. In addition, television is a means of information which reaches a very wide audience. It allows an undertaking to make all its products and services known throughout the territory of a Member State in a very effective way. Moreover, the success of that form of communication for professionals has led the Community legislature to lay down, in Directive 89/552, minimum rules and standards with which television advertisements must comply in order to protect consumers against excesses in that domain, in addition to the obligations laid down in other secondary legislation governing advertising in general [39] or advertising of specific products, such as tobacco or medicinal products.

89. The prohibition of advertising on national television networks laid down in the 1992 Law thus deprives a company such as Dermoestética of the opportunity of using a particularly effective means of communication for informing the general Italian public about the medical and surgical treatments of a cosmetic nature offered in its many branches in Italy. In my opinion, therefore, that prohibition is a restriction on freedom of establishment.

90. I consider that that analysis is supported by the fact that the effects of that prohibition on an undertaking with a registered office in another Member State are not compensated for or even attenuated by the possibility, provided for in the 1992 Law, of advertising such services on local television networks in Italy or through other means of communication.

39 — Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17). That measure was amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) so as to include comparative advertising, and by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22). Directive 84/450, as amended, was repealed and replaced by Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

91. That possibility is subject to two conditions, which undeniably limit its scope for a foreign undertaking wishing to establish itself in Italy. The first of those conditions is the need to obtain authorisation from the competent local administrative authority.

92. The broadcasting of an advertisement throughout the Italian Republic by means of local television networks would therefore require a company such as Dermoestética to obtain as many authorisations as there are competent regional authorities, which is obviously more complicated and burdensome. In addition, on the basis of the information supplied by the referring court, the Italian legislation does not lay down the conditions for obtaining the authorisation, with the result that those conditions may vary from one region to another and an economic operator such as Dermoestética cannot easily be familiar with them in advance.

93. The second condition is that the expenditure incurred in such advertising must not exceed 5% of declared income for the preceding year.

94. As the Commission has pointed out, that condition also constitutes a barrier to companies established in other Member States establishing themselves in Italy because, first, its limits their freedom to incur expenditure which they consider necessary to make themselves known in the most appropriate way. Secondly, by fixing the limit at a percentage of income for the previous year, the legislation at issue produces a 'knock on' effect, in that the limitation on advertising reduces the undertaking's income, which, itself, determines the amount of the expenditure which may be devoted to advertising. In addition, the lack of precision in the concept of declared income constitutes an additional difficulty for a foreign undertaking.

95. Finally, the main proceedings show that Dermoestética did not regard the possibility provided for in the 1992 Law of broadcasting advertisements on local television networks or through other means of communication, under the two conditions laid down in Articles 5 and 9a of that law, as a satisfactory solution to their being unable to advertise on national television networks.

96. In so far it as prohibits all broadcasting of advertisements on national television networks for medical and surgical treatments of a cosmetic nature carried out in private health care establishments, the 1992 Law therefore constitutes a restriction on freedom of establishment.

97. Moreover, those provisions may also be analysed as a restriction on freedom to provide cross-border services within the meaning of Article 49 EC.

98. By preventing Advertising Media and the national television networks from advertising

Dermoestética's branches in Italy, the 1992 Law prevents the latter from taking advantage of those services. Such a ban on advertising, even though it is applied without distinction to private medical establishments owned by Italian companies and those of companies whose registered office is in another Member State, thus has an effect on the cross-border supply of television advertising. [40]

3. Lack of justification

99. The Italian Government puts forward no ground capable of justifying the restrictions in the provisions of the 1992 Law that have been considered. On the contrary, it implicitly admits that the restrictions are indeed incompatible with Community law, inasmuch as it states that the provisions at issue were repealed by Decree-Law No 223/2006, which was adopted, according to Article 2 thereof, in accordance with the principle of free competition so as to guarantee consumers a proper choice by enabling them to compare services offered on the market.

100. Advertising Media States that the restrictions at issue are justified by overriding requirements of general interest, such as the protection of public health.

101. It is true that the protection of public health is one the reasons which may, pursuant to Articles 46 EC and 55 EC, justify a restriction on freedom of establishment and freedom to provide services. The Court has held that the health and life of humans rank foremost among the interests protected by the provisions of the Treaty laying down permissible derogations from the prohibition of restrictions on the freedoms of movement. [41] The protection of public health is also one of the overriding requirements of general interest which can justify restrictions on the exercise of the freedoms of movement guaranteed by the Treaty.

102. In addition, since there are no common or harmonised rules at Community level governing the advertising of medical and surgical treatments of a cosmetic nature, it is for each Member State to decide on the degree of protection it intends to afford to public health in that field and on the way on which that level of protection is to be achieved. [42]

103. In my Opinion delivered on 22 November 2007 in Case C-446/05, *Doulamis*, which is still pending before the Court, I argued that the protection of public health could justify a prohibition on advertising, other than in a purely informative manner, by health care professionals such as providers of dental care. I based my position on the fact that health-care services differ from other services, inasmuch as they

40 — See, to that effect, *Gourmet International Products* (paragraph 39) and Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 26.

41 — Case C-320/93 *Ortscheit* [1994] ECR I-5243, paragraph 16.

42 — *Idem*.

affect the physical integrity and psychological equilibrium of the recipient. I also referred to the fact that the field of health-care is one in which the difference in the level of knowledge between the person providing the service and the recipient is of the highest, so that the latter is not in a position to make a genuine assessment of the quality of the service he is purchasing.

104. I think that those considerations can be extended to cosmetic treatments, since such treatments are not limited to services which promote well-being, such as relaxing massages or waxing, but can take the form of actual surgical operations, such as the re-modelling of part of the face or the body.

105. Even though such surgical operations may be carried out at the request of the patient, without there being any real therapeutic need, I am of opinion that, because of the risks inherent in that type of medical procedure and its possible psychological repercussions, a Member State may legitimately impose restrictions on the advertising of such procedures to the public. I consider therefore that a Member State is perfectly justified in prohibiting or restricting advertising intended to persuade people to alter their face or their anatomy.

106. The measures in question must, however, be appropriate for the purpose of achieving the objective sought and must not go beyond what is necessary for that purpose. [43]

107. The effect of a prohibition on broadcasting advertisements on national television networks for medical and surgical treatments of a cosmetic nature is indeed to limit the advertising of such services to the public and, consequently, to protect public health. However, where such advertising is permitted, under certain conditions, on local television networks, the proportionality of the prohibition of all advertising on national television networks is difficult to defend.

108. If the Italian legislature considered that the conditions imposed on such advertising on local television networks were appropriate to protect public health, I do not see why such conditions should not also apply to national television networks. There is no reason to believe that viewers should be less protected when they watch local television stations.

43 — See, to that effect, Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 16.

109. As the Commission pointed out, the 1992 Law is thus vitiated by a definite inconsistency inasmuch as, if the intention of the Italian legislature had really been to protect viewers' health by prohibiting television advertising for medical and surgical treatments of a cosmetic nature, it should have extended the prohibition to local television networks.

110. In that regard, the 1992 Law contains the same contradiction as the Italian legislation at issue in *Payroll and Others*.

111. That legislation required undertakings with fewer than 250 employees which wished to entrust the preparation and printing of their pay slips to outside data-processing centres to have recourse only to centres established and staffed exclusively by persons registered with certain professional associations in Italy. That legislation was found to be a restriction on the freedom of establishment of companies having their registered office in another Member State which intended to establish themselves in Italy in order to provide computer services for the preparation and printing of pay slips there.

112. The Italian Government contended that the restriction was justified by the need to protect of workers' rights. The Court pointed out that under the Italian legislation in question, the data-processing centres which were not established and staffed only by employment consultants or persons of equivalent status could offer services of calculating and printing pay slips to undertakings with more than 250 employees, who did not appear to require less protection in that regard than those who worked for undertakings with smaller work forces. It concluded that, since the tasks in question could not be any less complex when the number of salaried staff concerned increased, the disputed provision went, in any event, beyond what was necessary to attain its objective of protection. [44]

113. The prohibition of all broadcasting of advertisements for medical and surgical treatments of a cosmetic nature on national television networks thus appears to go beyond what is necessary to protect public health. That analysis is further confirmed by the fact that, as the Italian Government explained at the hearing, the prohibition applies only to private medical establishments.

114. Consequently, the legislation of a Member State which prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, while permitting such advertisements, under certain conditions, on local television networks, is incompatible with Articles 43 EC and 49 EC, read in conjunction with Articles 48 EC and 55 EC.

44 — *Payroll and Others*, paragraph 37.

V — Conclusion

115. Having regard to the foregoing considerations, I propose that the Court should answer the questions referred to it by the Giudice di Pace di Genova as follows:

The legislation of a Member State which prohibits the broadcasting of advertisements for medical and surgical treatments of a cosmetic nature carried out in private health care establishments on national television networks, while permitting such advertisements, under certain conditions, on local television networks, must be regarded as incompatible with Articles 43 EC and 49 EC, read in conjunction with Articles 48 EC and 55 EC.