

Case Note. Medical Professionals as Digital Marketeers and the Advertising Ban

Case C-339/15, *Openbaar Ministerie v. Luc Vanderborght*, Judgment of the Court of Justice European Union (third chamber) of 4 May 2017, EU:C:2017:335

André den Exter*

Lecturer in Health law and Jean Monnet chair EU Health law, Institute of Health Policy and Management, Erasmus University Rotterdam

1. Introduction

Until recently, advertising medical services was generally considered to be potentially unethical, misleading and likely to result in higher prices. As the healthcare market is ever more competitive, healthcare marketing – i.e. branding, promotion and advertising healthcare services – is a new and rapidly growing trend. One clear example of true marketing brilliance is a campaign by Luc Vanderborght, a Belgian dentist who launched a digital marketing offensive to attract new patients from the internet and build his reputation on-line by using patient testimonials. In essence, his campaign was based on ‘patient empowerment’. Patients no longer blindly accept what the doctor tells them. They go on-line to do their homework before visiting the physician and to research their condition(s) and possible treatment(s). They see healthcare as a collaboration between themselves and their doctor. Vanderborght’s smart marketing strategy understood that new reality by targeting consumers directly. A medical professional as a marketeer. Unfortunately, the Belgian medical establishment was not ready for such a seismic shift allowing direct-to-consumer advertising but Vanderborght successfully challenged the Belgian ban on advertising for dentists in the Court of Justice.

2. Factual and legal background

Luc Vanderborght is a qualified dental practitioner in Opwijk (Belgium). He is accused of having advertised dental services in a way that was deemed contrary to Belgian legislation. The relevant provisions of the Royal Decree regulating the practice of dentistry sets out the requirements for placing a plaque at the entrance of a dental practice, reading:

‘For the purpose of informing the public, it is permissible to affix only an inscription or a plaque of modest dimensions and appearance to the building in which a competent person ... practises dentistry, stating the name of the

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practitioner and possibly his legal designation, opening hours, the name of the undertaking or healthcare organisation where the practitioner carries out his professional activity; it may also state the dentist's specialty: surgical dentistry, oral prosthesis, orthodontics, dental surgery.'

In a criminal proceedings brought against him, Vanderborght was accused of 'having affixed, a large advertising pillar, of immodest size and appearance, at the entrance of his surgery, for the purpose of informing the public. This sign consisted of three printed sides, each 47 centimetres high and 75 centimetres wide, which showed the practitioner's name, his designation as a dentist and the dental practice's website and telephone numbers.'

The criminal proceedings follow a complaint by Verbond der Vlaamse Tandartsen (VZW), a professional association. In the same case, Vanderborght was accused of engaging in advertising dental services to the public by promoting his services via local newspapers, his website, and using social media and photographs. According to Article 1 of the Law on advertising in dental care (1958):

'No person may, whether directly or indirectly, engage in advertising of any kind a view to treating or providing treatment, whether or not by a qualified person, in Belgium or abroad, for dental or oral ailments, injuries or abnormalities, by means, inter alia, of displays or signs, inscriptions or plaques liable to be misleading as to the lawful nature of the activity advertised, leaflets, circulars, handouts and brochures, via the media of the press, radio or cinema ...'.

Vanderborght argued before the criminal court that the 1958 Advertising Act and the Royal Decree are contrary to EU legislation, in particular, Directive 2005/29, Directive 2000/31 and Articles 49 and 56 of the TFEU.¹ The Court holds that the main proceedings have a border-crossing element due to the internet advertising activities and patients treated from other Member States, as claimed by Vanderborght.²

Under these circumstances the criminal court of first instance raised in essence several questions for a preliminary ruling:

- Whether the national rules at issue may come under the Unfair Commercial Practices Directive (Directive 2005/29/EC), and, if so, whether the Directive precludes, in absolute terms, any advertising, by anyone, relating to oral or dental care?
- The compatibility of the provisions of the Law on Advertising in dental care (1958) with the electronic Commerce Directive (Directive 2000/31/EC), and more specifically, whether an absolute ban on commercial advertising by electronic means, constitutes a restriction on the freedom to provide commerce services.

¹ Judgment of the Court, para. 18.

² Ibid., para. 19.

- And finally, whether the freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU) allow a complete ban on dental advertising by electronic means (website) in order to protect public health?³

3. Opinion of the Advocate General

Starting by explaining the Unfair Commercial Practices Directive, Advocate General Bot concluded that the legislation falls outside the scope of the directive because of the limitations laid down in Article 3(3) and (8) of that directive. Despite the very wide scope, ‘to any commercial practice (including advertising, *AdE*) directly connected with the promotion, sale or supply of a product (or service, *AdE*) to consumers’, the EU legislature included several limitations to the application of that directive. According to Article 3(3), the directive ‘is without prejudice to Community or national regulations regarding the health ... aspects of products’. In recital 9 of that directive, the EU legislature thus makes clear that ‘Member States will ... be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health ... of consumers’.⁴ Secondly, Article 3(8) of the directive reads that ‘the directive is without prejudice to ... the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals’.

Consequently, Advocate General Bot concludes that, although the service falls under the scope of the Unfair Commercial Practices Directive, Member States remain free to adopt stricter rules as regards the practices provided by the members of a regulated profession, including dentists. As long as these rules are aimed at protecting public health and the dignity of the profession of dentists.⁵ Advertising practices designed to attract patients may harm the integrity of health practitioners and compromise the trust between the dentist and their patients. Therefore the rules uphold the dignity of the profession and indicate a health issue instead of an economic issue.⁶

The second question addresses the compatibility of the national advertising ban with the eCommerce Directive. Electronic advertising can be generally considered as ‘information society services’, as it includes any service normally provided for remuneration, at a distance, by electronic means and at the indi-

³ Ibid., para. 20.

⁴ Opinion A.G., ECLI:EU:C:2016:660, para. 35.

⁵ Ibid., paras 39-42.

⁶ Ibid., para. 42.

vidual request of a recipient of services (recital 18). Also covered are services provided free of charge to the recipient and funded, for example, by advertising or sponsorship.⁷

The Advocate General argues that the restriction of on-line advertising can be based on Article 3(1) and 8(1) of the directive. On-line 'commercial communication', such as electronic advertising is subject to the laws of the Member State in which the service provider is established. Moreover, when provided by a member of a regulated profession such as dentists, on-line advertising must comply with the professional rules, regarding, in particular, 'the independence, dignity, and honour of the profession...' (Article 8(1)). This includes the deontological rules as defined by the professions.⁸ As the Belgian national regulations clearly ensure the rules of deontology for dentists, there is no doubt that the prohibition of any form of advertising aims to ensure the independence, dignity and honour of the profession.

Regarding the compatibility with the free movement principles, Articles 49 and 56 of the TFEU, the Advocate General's view is that on-line advertising is, by its nature, borderless and should be distinguished from the regional distribution of printed media. On-line advertising has therefore an inherent cross-border interest as it is 'capable of reaching a public situated in another Member State than the Member State of establishment'.⁹

He examines the issue considering the freedom of providing services and argues that the advertising activities not only cover local newspapers but also a website aimed at attracting new clientele abroad.¹⁰ Although the advertising ban can also be considered as a serious barrier to entry to the market and thus the freedom of establishment, Bot considers that freedom to be secondary to the freedom to provide dental services.¹¹ Secondly, the total advertising ban deprives health providers from a rapid and direct technique for marketing and contacting potential clients abroad, and is thus a restriction to the freedom guaranteed under Article 56 of the TFEU, which is in line with the *Alpine Investments* ruling.¹² In addition, the prohibition deprived providers of the possibility to advertise services abroad and offering their services to professionals

7 Commission press release of 8 December 1999 (document IP/99/952) and the First report on the application of the Directive on electronic commerce (COM(2003) 702 final, p.4; confirmed in: joined cases C-236 & 238/08, *Google France SARL and Google*, EU:C:2010:159, para. 110); *L'Oréal and Others* (C-324/09, EU:C:2011:474, para. 109); and *Papasavas* (C-291/13, EU:C:2014:2209, paras 28 and 29), quoted by A.G. Bot, para. 48.

8 Ibid., paras 53-64.

9 Ibid., para. 77. See also *Berlington Hungary and Others* (C-98/14), EU:C:2015:386.

10 Referring to *Gourmet International Products* (C-405/98), EU:C:2001:135, para. 37.

11 Ibid., para. 83.

12 Case C-384/93, EU:C:1995:126, paras 28-30.

established in Belgium, and prevents health professionals from using the services of such providers.¹³

In line with the *Doulamis* Opinion, the Advocate General argues that the prohibition of all advertising of dental care constitutes a justified restriction for reasons of protecting public health, whereas national legislation does not exclude dentists from giving basic information to the public.¹⁴ The main reason for this is that advertising their services undermines the relationship of trust ('would necessarily be undermined').¹⁵ Relying on the professional's expertise the patient agrees to a recommended treatment option that is merely motivated by economic rather than health reasons. A rather questionable argument that will be addressed later on in the Comment section.

Whether or not this argument is convincing, it is for the Member States to decide on the degree of public health protection to justify a ban in the absence of EU legislation on advertising dental care services. The preservation of trust therefore justifies the restriction, whereas the advertising ban does not prevent health professionals from providing basic factual information about their professional existence to the public.

4. Judgment of the Court

With respect to the Unfair Commercial Practices Directive, the Court follows the Advocate General's reasoning, confirming that advertising practices as challenged in the main proceedings constitute 'commercial practices' under Article 2(d) of Directive 2005/29, but that Article 3(8) derogates national regulations regarding the deontological codes of conduct, upholding standards of integrity and health and safety aspects of regulated professions.¹⁶ But contrary to the Advocate General's stance, the Court rules that a general and absolute advertising ban altogether goes against Article 8 of the eCommerce Directive,¹⁷ as the aim of that provision is to enable members of a regulated profession to use the internet in order, for example, to launch a website to promote their activities.¹⁸ Although that provision allows Member States to restrict the use of commercial communications for regulated professions, the Court interprets that restriction narrowly, i.e. excluding a general and absolute ban on advertising. Another interpretation (an absolute prohibition) would 'deprive (Article 8(1), *AdE*) of practical effect and impeding the attainment of the objective pur-

¹³ See Opinion A.G. Bot in *Doulamis* case (C-446/05), EU:C:2007:701, para. 101.

¹⁴ *Ibid.*, para. 103.

¹⁵ *Ibid.*, para. 107.

¹⁶ Judgment of the Court, paras 27-28.

¹⁷ *Ibid.*, paras 44, 49.

¹⁸ *Ibid.*, para. 42.

sued ...'.¹⁹ According to the Court, that interpretation is supported by Article 8(2) ... to establish professional codes formulating the conditions for on-line advertising in conformity with paragraph 1.²⁰

Finally, as a preliminary point, the Court considers the applicability of Articles 49 and 56 of the TFEU of such national legislation as it prohibits advertising which is not on-line, since internet advertising is covered by the eCommerce Directive.²¹ Similarly, under the directive, the Court cannot accept a total advertising ban under Article 49 of the TFEU as it exceeds what is necessary to attain the objectives pursued by national legislation.²² There is however, one exception: advertising contrary to the rules of professional ethics, i.e. 'misleading, deceptive or promoting inappropriate and unnecessary care',²³ but that however, is not the type of advertising at issue in the main proceedings.

5. Comment

This is the second time the EU Court of Justice has dealt with the Belgian advertising ban. In 2005, Mr Doulamis, a dental technician, was accused of unlawfully advertising in dental matters.²⁴ Unlike in the Vanderborght case, Doulamis argued that Belgian legislation undermined the effectiveness of competition rules applicable to undertakings, based on the combined application of Article 81 EC (now 101 TFEU) and Article 10 EC (4(3) TEU), the so-called *effet utile* doctrine.²⁵ At that time, both the Advocate General and the Court found no evidence that the national measure did encourage, reinforce or codify a measure attributable to undertakings.²⁶ Nor was there anything to suggest the law had delegated to private economic operators the responsibility for taking decisions affecting the economic sphere.²⁷ So the Court 'upheld' the advertising ban, at least temporarily. It did not follow the Advocate General's approach on the freedom of establishment/services as it was simply not raised in the preliminary questions.

Since then, times have changed. Like medicine dentistry is a profession, but healthcare is a business nowadays. To be a successful entrepreneurs invest in marketing. But how should a dentist's practice be marketed? That could have

¹⁹ Ibid., para. 44.

²⁰ Ibid., para. 45.

²¹ Ibid., para. 52.

²² Ibid., para. 73.

²³ Ibid., para. 69.

²⁴ Case C-446/05 (*Doulamis* case), ECLI:EU:2008:157.

²⁵ Ibid., para. 5.

²⁶ Ibid., para. 22; A.G. paras 71-73.

²⁷ Ibid., para. 22.

been the title of a marketing book. Instead, Vanderborcht applied the basics of marketing strategy to communicate with prospective and existing patients both in Belgium and abroad. An on-going process of finding, attracting, and retaining patients. Besides being a skilled clinician, he may be considered to be a savvy entrepreneur. He is someone who understands the new reality of patients who are informed consumers and do research on-line for the best quality dental care, request on-line information and electronic consults (e-consults), and shop across borders if necessary. Patient empowerment and shared decision-making are the latest buzzwords in healthcare, greatly influencing the physician-patient relationship. New marketing tools such as testimonials reflect that new reality, helping people and ... attracting patient revenue.

This approach of practising the medical and dental profession, in which health professionals compete for patients based on quality and fair prices, with a maximum of transparency, in which patients can check the physician's credentials, is certainly not common in all EU Member States. The healthcare market is different from selling and buying cars or other products. It is not a regular commodity but a service – sometimes a public service – based on mutual trust between the patient and health professional, and affecting human health. Personal advertising and promoting specific skills and medical services compromise that principle, threaten the integrity and ethical responsibility of the profession by commercialising it. That is the traditional claim of professional bodies in most European countries, reflected by the Association of Flemish Dentists VZW, and supported by the Advocate General's opinion. That approach considers advertising unethical.

Not necessarily, I would argue. Personal advertising restricted to objective information about the profession, specialisation, and quality of care is not necessarily detrimental to professional integrity and public health. This has been proven by more liberal systems, including the Netherlands. In a competitive healthcare market (both the insurance and providers markets), quality indicators and standards have been developed providing objective tools to support patient's choice of provider and health insurer. Health professional associations, the (Dutch) Healthcare Inspectorate (IGZ), and the (Dutch) National Healthcare Institute (ZiN) have formulated various standards for quality of care, including guidelines on personal advertising.²⁸ Transparency in quality of care and patient

²⁸ See for instance the websites www.knmg.nl/advies-richtlijnen/dossiers/kwaliteitskader.htm (physician association); www.knmt.nl/search/site/kwaliteit (dentists); 'Beroepsethiek en Gedragsregels voor de Fysiotherapeut', (physiotherapists) setting rules on advertising, no. 48: www.kngf.nl/vakgebied/kwaliteit/beroepsethiek.html; Health Care Inspectorate quality of care indicators: www.igz.nl search for subjects, quality indicators; ZiN supporting providers defining quality standards and relevant measuring instruments, see 'Ontwikkeling algemene indicatoren' (developing general indicators, in Dutch), January 2016, www.zorginstituutnederland.nl/publicaties/rapport/2016/01/15/ontwikkeling-algemene-indicatoren-transparantie-kwaliteit-van-medisch-specialistische-zorg.

choice therefore *requires* (personal) information on the professional services offered. According to Article 38(4) of the Healthcare Market Regulation Act (*Wet marktordening gezondheidszorg, Wmg*), health providers have an obligation to transparency, i.e. they must inform the public about the characteristics of services offered, in such a manner that it helps patients to compare the data. The information provided, including representations of advertising should be in line with the entitlements covered by social health insurance, and may not be misleading (Article 39 Wmg). Acting as a health care market supervisor, the Healthcare Market Authority (NZa) can hold health providers accountable for non-compliance to the transparency requirement, for giving incorrect information and misleading or deceptive advertising. Advertising in terms of providing objective information on the quality of care provided is therefore not contrary to professional integrity, ethics or even public health. This is confirmed by the Court ruling *a contrario* that ‘the extensive use of ... aggressive promotional messages ... to mislead patients on the care being offered, by damaging the image of the dental profession, by distorting the relationship ... , and by promoting ... unnecessary care, may undermine the protection of health and compromise the dignity of the dental profession’.²⁹ As this is not the issue; a general and absolute prohibition of any advertising is disproportionate. It is therefore likely that Belgium – along with other Member States like Germany and Poland – will have to liberalise its “no advertising rule” allowing appropriate forms of communication and information, making objectively true statements on provided services. As long as personal promotion does not discredit other providers and is not misleading, such advertising will not undermine the dignity of the profession.

²⁹ Judgment, para. 69.