



Reports of Cases

Case C-339/15

**Criminal proceedings
against
Luc Vanderborght**

(Request for a preliminary ruling from the
Nederlandstalige rechtbank van eerste aanleg te Brussel, strafzaken)

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Provision of oral and dental care — National legislation prohibiting, in absolute terms, advertising for oral and dental care services — Existence of a cross-border element — Protection of public health — Proportionality — Directive 2000/31/EC — Information society service — Advertising via an internet site — Member of a regulated profession — Professional rules — Directive 2005/29/EC — Unfair trading practices — National provisions relating to health — National provisions governing regulated professions)

Summary — Judgment of the Court (Third Chamber), 4 May 2017

1. *Approximation of laws — Unfair business-to-consumer commercial practices — Directive 2005/29 — National legislation prohibiting, in absolute terms, advertising for oral and dental care services — Lawfulness*

(European Parliament and Council Directive 2005/29, Art. 8)

2. *Approximation of laws — Electronic commerce — Directive 2000/31 — Provision of information society services — Permissibility of commercial communications which are part of such a service provided by a member of a regulated profession — Concept of commercial communication — Advertising via an internet site created by a dentist relating to oral and dental care services — Included*

(European Parliament and Council Directive 2000/31, Recital 18 and Arts 2(f) and 8)

3. *Approximation of laws — Electronic commerce — Directive 2000/31 — Provision of information society services — Permissibility of commercial communications which are part of such a service provided by a member of a regulated profession — National legislation prohibiting, in absolute terms, a dentist from advertising, including by electronic means, oral and dental care services — Not permissible*

(European Parliament and Council Directive 2000/31, Art. 8(1))

4. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits — Question raised concerning a dispute confined within a single Member State — Jurisdiction in the light of the possible posting of persons from other Member States*

(Art. 267 TFEU)

5. *Freedom to provide services — Freedom of establishment — Provisions of the Treaty — Examination of a national measure affecting both those fundamental freedoms — Criteria for determining the applicable rules*

(Arts 49 TFEU and 56 TFEU)

6. *Freedom to provide services — Restrictions — Dental services — National legislation prohibiting, in absolute terms, advertising for oral and dental care services — Not permissible — Justification — Protection of public health — Absence — Infringement of principle of proportionality*

(Art. 56 TFEU)

1. 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 ('the Unfair Commercial Practices Directive') must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which protects public health and the dignity of the profession of dentist, first, by imposing a general and absolute prohibition of any advertising relating to the provision of oral and dental care services and, secondly, by establishing certain requirements of discretion with regard to signs of dental practices.

(see para. 30, operative part 1)

2. Recital 18 of Directive 2000/31 states that the concept of 'information society services' spans a wide range of economic activities which take place online and that it is not solely restricted to services giving rise to online contracting but also, in so far as those services represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications. In those circumstances, it must be considered that online advertising may constitute an information society service for the purposes of Directive 2000/31 (see, to that effect, judgment of 15 September 2016, *Mc Fadden*, C-484/14, EU:C:2016:689, paragraphs 41 and 42).

Furthermore, Article 2(f) of that directive stipulates that the concept of 'commercial communication' covers, inter alia, any form of communication designed to promote, directly or indirectly, the services of a person practising a regulated profession. It follows that advertising relating to the provision of oral and dental care services by means of a website created by a member of a regulated profession constitutes a commercial communication which is part of an information society service or which constitutes such a service for the purposes of Article 8 of Directive 2000/31.

(see paras 36-39)

3. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a general and absolute prohibition of any advertising relating to the provision of oral and dental care services, inasmuch as it prohibits any form of electronic commercial communications, including by means of a website created by a dentist.

It must be pointed out that the EU legislature has not excluded regulated professions from the principle of the permissibility of online commercial communications laid down in Article 8(1) of Directive 2000/31. Therefore, although that provision makes it possible to take into account the particularities of health professions when the relevant professional rules are drawn up, by supervising, closely if necessary, the form and manner of the online commercial communications referred to in that provision with a view, in particular, to ensuring that the confidence which patients have in those professions is not undermined, the fact remains that those professional rules cannot legitimately impose a general and absolute prohibition of any form of online advertising designed to promote the activity of a person practising such a profession.

(see paras 48-50, operative part 2)

4. See the text of the decision.

(see paras 53, 56)

5. See the text of the decision.

(see para. 58)

6. Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a general and absolute prohibition of any advertising relating to the provision of oral and dental care services.

As regards the need for a restriction on the freedom to provide services such as that at issue in the main proceedings, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is, in principle, for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion (see, to that effect, judgments of 2 December 2010, *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 58, and of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, paragraph 118). It must therefore be found that, notwithstanding that measure of discretion, the restriction resulting from the application of the national legislation at issue in the main proceedings, imposing a general and absolute prohibition of any advertising relating to the provision of oral and dental care services, exceeds what is necessary to attain the objectives pursued by that legislation, as referred to in paragraph 66 above.

All the advertising messages prohibited by that legislation are not, in themselves, likely to produce effects that are contrary to the objectives referred to in paragraph 69 above. In those circumstances, it must be held that the objectives pursued by the legislation at issue in the main proceedings could be attained through the use of less restrictive measures supervising, closely if necessary, the form and manner which the communication tools used by dentists may legitimately have, without imposing on them a general and absolute prohibition of any form of advertising.

(see paras 71-73, 75, 76, operative part 3)