



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
CRUZ VILLALÓN  
delivered on 31 January 2013<sup>1</sup>

**Case C-475/11**

**Kostas Konstantinides**

(Reference for a preliminary ruling from the *Berufsgericht für Heilberufe bei dem Verwaltungsgericht Gießen* (Germany))

(Freedom to provide medical services — Situation in which the service provider travels occasionally to another Member State to provide a medical service — Applicability of the rules of professional conduct of the host Member State — Directive 2005/36 — Article 56 TFEU — Rules of professional conduct relating to fees and advertising)

1. By the present reference for a preliminary ruling, the *Berufsgericht für Heilberufe bei dem Verwaltungsgericht Gießen* ('the *Berufsgericht*') asks the Court whether the disciplinary rules applicable to medical professionals in the *Land* of Hesse, Germany, are compatible with European Union law. More specifically, the present case concerns national disciplinary rules based on rules of professional conduct adopted by a doctors' professional association and applied to a medical professional established in Greece who occasionally provides services in Germany.

2. The Court must consider, first, whether that situation is governed by Directive 2005/36 on the recognition of professional qualifications.<sup>2</sup> Second, the case will make it possible to define more precisely the suitability of the rules governing fees and advertising, and the penalties related thereto, in the case of a cross-border provision of medical services.

### **I – Legal framework**

#### *A – European Union law*

3. Article 5 of Directive 2005/36 provides as follows:

'Principle of the free provision of services

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

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

<sup>1</sup> — Original language: Spanish.

<sup>2</sup> — Directive of the European Parliament and of the Council of 7 September 2005 (OJ 2005 L 255, p. 22).

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

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

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

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

#### B – *National law*

4. The Code of Professional Conduct for Doctors in Hesse, adopted by the doctors' professional body of that *Land*, provides as follows in Paragraph 12:

'The fee claimed must be reasonable. The official Regulation on Doctors' Fees is the basis of calculation, except where other statutory rules on remuneration apply. The doctor must not unfairly charge less than the rates laid down in the Regulation. When concluding an agreement on fees, the doctor must take account of the income and wealth situation of the person liable for payment.'

5. Under the heading 'Permitted information and unprofessional advertising', Paragraph 27 of the Code provides as follows:

'1. The purpose of the following provisions of the Code is to ensure the protection of patients by means of appropriate and reasonable information and to avoid any commercialisation of the medical profession contrary to the image that doctors have of themselves.

2. On that basis, the doctor is allowed to provide objective information relating to the profession.

3. The doctor is prohibited from effecting unprofessional advertising. In particular, advertising which is laudatory, misleading or comparative in content or form is unprofessional. The doctor must not cause or tolerate such advertising by other persons. Prohibitions of advertising on the basis of other statutory provisions are not affected.

...'

#### II – **Facts**

6. Dr Kostas Konstantinides, a Greek doctor who is resident in Greece, practises medicine in Greece where he has his principal establishment. As a doctor qualified in Greece, he is a member of the relevant professional association of that country.

7. Since 2006, Dr Konstantinides has been travelling to Germany on average one or two days per month, specifically to the *Land* of Hesse where he performs surgical operations at the Elisabethenstift medical centre in Darmstadt. Dr Konstantinides' activity is confined exclusively to the performance of highly specialised surgical operations while the other services linked to the operations, such as the arrangement of appointments and post-operative care, are dealt with by staff of the medical centre.

8. One of Dr Konstantinides' patients who was operated on in Germany lodged a complaint with the Hesse doctors' professional association, querying the amount of the invoice issued by Dr Konstantinides. As a result of that complaint, the association initiated an investigation which led to the commencement of disciplinary proceedings before the *Berufsgericht*.

9. In its submissions to the referring court, the professional association requested the imposition of a penalty based on two infringements. The first infringement concerned the rules on fees, in that, according to the association, Dr Konstantinides had charged an excessive price which was incompatible with the association's rules in that regard. The second infringement related to the advertising effected by Dr Konstantinides. The association submitted that Dr Konstantinides advertised himself in Germany by means of a website using terms such as 'German Institute' and 'European Institute' to cover his professional activity. The association submits that such a practice generates confusion in the minds of recipients of the service, by creating the impression that the service is provided within a permanent institutional structure which is linked to scientific research.

### III – The procedure before the Court

10. On application by the Hesse doctors' professional association, the *Berufsgericht* brought disciplinary proceedings against Dr Konstantinides. During those proceedings, the *Berufsgericht* considered that there was sufficient evidence of uncertainty for a reference to be made to the Court of Justice for a preliminary ruling.

11. On 19 September 2011, the Registry of the Court received from the *Berufsgericht* a reference for a preliminary ruling on questions which are worded as follows:

- 'A. With regard to Article 5(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Directive 2005/36/EC):
- (1) Is Paragraph 12(1) of the *Berufsordnung für die Ärztinnen und Ärzte in Hessen* (Code of Professional Conduct for Doctors in Hesse) of 2 September 1998 (*Hessisches Ärzteblatt* (HÄBL.) 1998, p. I–VIII), last amended on 1 December 2008 (HÄBL. 2009, p. 749) – 'the Code of Conduct' – a professional rule the breach of which by the service provider in the host State may give rise to professional disciplinary proceedings for serious professional malpractice which is directly and specifically linked to consumer protection and safety?
  - (2) If so, does this also apply in the event that no relevant fee code exists for the operation performed by the service provider (in this case the doctor) in the Regulation on doctors' fees applicable in the host State?
  - (3) Are the provisions on unprofessional advertising (Paragraph 27(1)–(3) in conjunction with Part D, point 13, of the Code of Conduct) professional rules the breach of which by the service provider in the host State may give rise to professional disciplinary proceedings for serious professional malpractice which is directly and specifically linked to consumer protection and safety?

B. With regard to letter (a) of the first sentence of Article 6 of Directive 2005/36/EC:

Do the rules adopted in implementation of Directive 2005/36 amending Paragraph 3(1) and (3) of the Hessisches Gesetz über die Berufsvertretungen, die Berufsausübung, die Weiterbildung und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Tierärzte, Apotheker, psychologischen Psychotherapeuten und Kinder- und Jugendlichenpsychotherapeuten (Hesse Law on professional representations, professional practice, further training, and professional tribunals of doctors, dentists, veterinarians, pharmacists, psychological psychotherapists and child and youth psychotherapists ('Law on health professions')), in the version published on 7 February 2003 (Gesetz- und Verordnungsblatt (GVBl.) I, p. 123), last amended by the Law of 24 March 2010 (GVBl. I, p. 123), by the Drittes Gesetz zur Änderung des Heilberufsgesetzes (Third Law amending the Law on health professions) of 16 October 2006 (GVBl. I, p. 519), represent the correct implementation of the above provisions of Directive 2005/36, in that both the relevant codes of professional conduct and the provisions on professional disciplinary tribunals in Section VI of the Law on health professions are declared to be fully applicable to service providers (in this case doctors) who exercise an activity temporarily in the host State in the context of freedom to provide services under Article 57 TFEU (formerly Article 50 EC)?

12. Written observations were submitted by Dr Konstantinides, the Hesse doctors' professional association, the French, Greek, Netherlands, Czech, Spanish and Portuguese governments, and the Commission.

13. At the hearing, held on 19 September 2012, oral argument was presented by the representatives of Dr Konstantinides, the Hesse doctors' professional association, and the agents for the French Republic, the Portuguese Republic and the Commission.

#### IV – Admissibility

14. Although none of the parties to the main proceedings or the Member States which have participated in these proceedings have questioned the admissibility of the present reference for a preliminary ruling, the Commission has expressed uncertainty as to whether the Berufsgericht satisfies the condition of being a 'court or tribunal' laid down in Article 267 TFEU.

15. Since the Court may examine of its own motion whether or not the requirements laid down in the Treaties for making a reference for a preliminary ruling are satisfied, I shall confine myself to stating very briefly, in the terms set out by the Commission, that the referring court is a 'court or tribunal' within the meaning of Article 267 TFEU.<sup>3</sup> As the Commission points out, the Berufsgericht is a body established by law, it is permanent, its jurisdiction is compulsory, and its procedure fully satisfies the *inter partes* principle. In addition, it is a body responsible for applying rules of law and its members have a status which guarantees its independence. All those features were set out in detail by the Commission in its written observations,<sup>4</sup> without any of the parties or the participating Member States having disputed them.

16. Accordingly, I believe that the Court has jurisdiction to rule on the present reference for a preliminary ruling.

17. The admissibility of two of the four questions formulated by the referring court raises a different problem.

3 — See, in particular, Case 61/65 *Vaassen-Goebbels* [1966] ECR 377; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; and Case C-118/09 *Koller* [2010] ECR I-13627, paragraph 22.

4 — The Commission bases its assessment on Paragraphs 49 to 73 of the Hessisches Gesetz über die Berufsvertretungen, die Berufsausübung, die Weiterbildung und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Apotheker, psychologischen Psychotherapeuten und Kinder- und Jugendlichenpsychotherapeuten.

18. Question A.2) referred by the *Berufsgericht* asks whether a professional regulatory framework in which no fee code exists for the service at issue is compatible with European Union law. As the referring court and also the parties to the main proceedings have pointed out, this uncertainty is derived from the specific nature of the professional association rules of the *Land* of Hesse, which, according to a number of the participants in these proceedings, may raise questions of constitutionality in German domestic law.

19. However, those issues cannot affect the reply which is appropriate in the light of European Union law. It is clear that questions of national constitutionality or legality, which may warrant a particular legislative technique, cannot be analysed in the light of European Union law unless they impede the effective exercise of the rights which that law confers. As I shall explain below, the regulatory framework established by the Hesse doctors' professional association may affect the way in which the Treaty should be interpreted in the specific case of Dr Konstantinides, but that will form part of the analysis of the justification for the restriction of the freedom to provide services and is not an autonomous matter capable of being analysed independently.

20. Therefore, in accordance with the case-law of the Court<sup>5</sup> and since it has no direct connection with the other questions and is not useful for the purposes of replying to the issues of European Union law raised by the referring court, I believe that the second question must be ruled inadmissible.

21. Likewise, the question in Part B asks whether Paragraph 3(3) of the *Heilberufsgesetz* is compatible with Article 6 of Directive 2005/36. In particular, the referring court has doubts concerning the lawfulness of national rules which, in terms of 'rights and obligations', treat cross-border service providers in the same way as providers established in the host Member State. Those doubts specifically relate to the case of a cross-border service provider who is subject to the pro forma membership referred to in Article 6, first paragraph, letter (a) of Directive 2005/36.

22. However, the referring court does not explain the extent to which those doubts are relevant in relation to the particular situation of Dr Konstantinides. It is not clear from the order for reference whether German law in general, the *Land* of Hesse, or the doctors' professional association of that *Land* laid down the requirement of pro forma membership or whether this applies to Dr Konstantinides. Since the question refers in very general terms to a hypothetical incompatibility between the German legislation and Directive 2005/36, I believe that the referring court has failed to explain the extent to which the question contributes to resolving the legal situation of Dr Konstantinides in the main proceedings. To my mind, it is a hypothetical question which it is not appropriate for the Court to answer in the present proceedings.

## V – Preliminary remarks

23. Before addressing the two remaining questions referred to the Court by the *Berufsgericht*, it is necessary to make a preliminary point.

<sup>5</sup> — See, inter alia, Case 244/80 *Foglia v Novello* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-314/96 *Djabali* [1998] ECR I-11499, paragraph 19; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22.



24. The questions submitted by the referring court ask whether Paragraph 12(1) and Paragraph 27(1) to (3) of the *Berufsordnung für die Ärztinnen und Ärzte in Hessen* are compatible with Directive 2005/36. However, as stated in the observations submitted in these proceedings, it is far from clear whether it is possible to apply that directive in the present case. That means that it is necessary to define the European Union legal framework applicable to the present case, a matter on which there is a considerable difference of opinions between the parties, the participating Member States and the Commission.

25. Dr Konstantinides maintains that the provision concerned refers exclusively to service providers who are members of a professional association in the host Member State, an interpretation which would exclude him from the personal scope of Article 5(3) of Directive 2005/36. On the other hand, the professional association argues that, pursuant to that provision, the German legislation is applicable in its entirety where a medical service is provided on its territory.

26. The Member States and the Commission have put forward similar positions, albeit based on different arguments. The Netherlands, the Czech Republic, the Portuguese Republic and the Commission submit that Article 5(3) of Directive 2005/36 is concerned exclusively with national provisions relating to *access* to a regulated activity in another Member State. That is not the case of the rules of professional conduct applicable to the activity, such as those in the present proceedings, which are concerned with the price and the advertising of the *activity* and not with access to that activity. Accordingly, the European Union provision applicable to the case is Article 56 TFEU and not Directive 2005/36. The French Republic disagrees with that interpretation and maintains that the directive is fully applicable to the present case, since the reference to ‘disciplinary provisions which are applicable in the host Member State’ encompasses the disciplinary rules of regulated professions, whatever their purpose. However, all the Member States agree that German law, including the professional association rules, is compatible with European Union law.

27. On a first reading, Article 5(3) of Directive 2005/36 is a source of some perplexity. At first sight, it appears to be a provision divided into two sections, one governing rules of professional conduct linked to professional qualifications and the other governing the disciplinary rules applicable to the professionals concerned. However, the provision only appears to be divided, since it refers to the same legislative framework in which both substantive and disciplinary provisions are laid down. That is confirmed by Recital 8 in the preamble to the directive, which states that ‘[t]he service provider should be subject to the application of *disciplinary* rules of the host Member State having a direct and specific link with the professional qualifications’.<sup>6</sup>

28. There is further cause for perplexity in that the article provides that all professionals are also subject to rules which are linked to ‘serious professional malpractice which is directly and specifically linked to consumer protection and safety’. The provision is surprising because Directive 2005/36 has a material scope which is strictly confined to the harmonisation of the conditions for *access* to a regulated profession in another Member State, and not to the conditions for *pursuit* of that profession. That is specified in Article 1, which provides that its purpose is to establish ‘rules according to which a Member State ... makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications ...’ In fact, the harmonisation of professional activities is one of the functions assigned to Directive 2006/123/EC<sup>7</sup> on services in the internal market, which, as the Commission has correctly indicated, does not apply to medical services.<sup>8</sup>

6 — Emphasis added.

7 — Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 (OJ 2001 L 376, p. 36).

8 — Article 2(2)(f) of Directive 2006/123.

29. I therefore consider that Directive 2005/36, in particular Article 5(3) thereof, must be interpreted uniformly, as meaning that it contains a single requirement directed to the Member States, pursuant to which service providers may be subject to all provisions (governing professional conduct and disciplinary matters) which are closely linked to professional qualifications. To give meaning to the provision under which rules relating to ‘serious professional malpractice’ apply, I believe that these words must be understood as a reference to situations in which disciplinary rules aimed at certain types of professional conduct entail disciplinary penalties affecting the holding or the use of a title. Thus, where serious professional malpractice resulting from the pursuit of medical activities leads to the revocation or temporary suspension of a title, this will be a disciplinary measure which combines access to the profession and pursuit of the activity. Article 5(3) of Directive 2005/36 supports Member States whose legal systems provide for measures of this kind but, in view of their onerous nature, it restricts such measures to ‘serious’ cases.

30. In the light of the interpretation which I propose of Article 5(3) of Directive 2005/36, I consider that the disciplinary provisions relating to the rules on fees and to the advertising of a regulated professional activity, as is the case of medical services, do not fall within the material scope of the directive. The conduct alleged against Dr Konstantinides relates to the business strategy used to win clients and charge for his services. None of that has any connection with a disciplinary measure linked to professional qualifications or serious professional malpractice, the disciplinary consequences of which would affect his title. Accordingly, in view of the fact that Directive 2005/36 does not apply to the case of Dr Konstantinides, the provision of European Union law applicable to the present case is Article 56 TFEU, which guarantees the freedom to provide services in the internal market.

31. Having established the legal framework applicable to the facts, it is necessary to reply to questions A.1) and A.3) submitted by the referring court.

## VI – Question A.1)

32. By question A.1), the *Berufsgericht* essentially asks whether a professional rule like Paragraph 12(1) of the *Berufsordnung für die Ärztinnen und Ärzte in Hessen*, in the version amended in 2008, pursuant to which medical fees are required to be reasonable on pain of a disciplinary penalty, is compatible with European Union law and more specifically with Article 56 TFEU.

33. As a starting point and in order to provide the referring court with a helpful reply, it is necessary, first, to set out the basic features of the rules on fees in Paragraph 12 of the *Berufsordnung für die Ärztinnen und Ärzte in Hessen*.

34. As the referring court states, Paragraph 12 provides that doctors who are members of the professional association in the *Land* of Hesse must calculate their fees in accordance with the ‘official list of fees’ for medical procedures adopted by the professional association. Where a service is not one of the ones included in the list, Paragraph 12 requires the conclusion of an ‘agreement on fees’ or the adoption of ‘reasonable’ fees, and the financial situation of the recipient of service must always be taken into account.

35. The referring court points out that the service provided by Dr Konstantinides is not among the services included in the list of fees for medical procedures. Precisely because there was some latitude for determining it, the fee was challenged by a patient of Dr Konstantinides. The professional association agrees with the patient and also considers that the fees charged by Dr Konstantinides are excessive and justify the imposition of a disciplinary penalty. However, as Dr Konstantinides pointed out and the professional association acknowledged, the criterion he applied took account of the fee code for equivalent medical services.

36. In the light of that legislative and factual framework, it is necessary to assess whether the application of the national legislation, as proposed by the professional association, leads to a restriction of the freedom to provide services laid down in Article 56 TFEU, and whether that restriction is justifiable.

*A – Restriction of the freedom to provide services*

37. First, it must be noted that the fact that the national legislative framework is the result of corporate self-regulation adopted by a professional body in no way precludes the application of the provisions of the Treaty relating to the fundamental freedoms. As the Court has repeatedly observed, the freedoms of movement must also be respected ‘in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services.’<sup>9</sup> Otherwise the abolition as between Member States of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.<sup>10</sup>

38. In the context of the freedom to provide services, the Court has reiterated on many occasions that service providers, in particular in the case of regulated professional activities, may be subject to the rules of the host Member State where the application of those rules is justified in the general interest. In 1974, in *Van Binsbergen*,<sup>11</sup> the Court confirmed the lawfulness of ‘specific requirements imposed on the person providing the service ... where they have as their purpose the application of professional rules justified by the general good – in particular rules relating to organisation, qualifications, professional ethics, supervision and liability – which are binding upon any person established in the State in which the service is provided’.<sup>12</sup> With regard to cross-border, occasional services, the *Van Binsbergen* judgment added that Article 56 TFEU cannot be used ‘for the purpose of avoiding the professional rules of conduct which would be applicable to [a service provider] if he were established within that State’.<sup>13</sup> That basic approach has been reiterated on many occasions until now.<sup>14</sup>

39. However, as I have just stated, that is merely the starting point for the analysis of Article 56 TFEU, since, as the *Van Binsbergen* judgment itself and subsequent case-law acknowledge, making a service provider subject to professional rules will be compatible with the Treaty only to the extent that to do so is not restrictive and, in the event that it is restrictive, that it is justified.<sup>15</sup> This means, therefore, that the professional rules in question may restrict the freedom to provide services and may, possibly, be justified pursuant to one of the exceptions provided for in the Treaties and in the case-law of the Court.

40. As regards fee scales adopted by professional associations, the Court confirmed in *Cipolla and Others*<sup>16</sup> that such measures are liable to be restrictive in the light of Article 56 TFEU. Referring to the Italian prohibition of derogation, by agreement, from the minimum fees for lawyers set by a scale laid down by the national legislation, the Court added that such a measure ‘is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in

9 — See, inter alia, Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120; and Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, paragraph 33.

10 — Ibid.

11 — Case 33/74 [1974] ECR 1299.

12 — Ibid., paragraph 12.

13 — Ibid., paragraph 13.

14 — See, inter alia, Case C-154/89 *Commission v France* [1991] ECR I-659, paragraph 14, and Case C-255/04 *Commission v France* [2006] ECR I-5251, paragraph 38.

15 — See, inter alia, *Van Binsbergen*, paragraphs 15 and 16, and Case C-154/89 *Commission v France*, paragraph 14.

16 — Joined Cases C-94/04 and C-202/04 [2006] ECR I-11421, paragraph 25.



that Member State.’<sup>17</sup> Referring to the judgment in *CaixaBank* (and therefore extending the reasoning set out therein on the subject of freedom of establishment to the services sector),<sup>18</sup> the *Cipolla* judgment observes that the prohibition concerned deprives lawyers from other Member States of the possibility ‘of competing more effectively’ and therefore constitutes a restriction of the freedom to provide services.<sup>19</sup>

41. In the case of Dr Konstantinides, the Hesse doctors’ professional association alleges that he applied an excessive fee to the provision of a service, as a result of which it claims that a disciplinary penalty should be imposed on him. It is clear that what is sought is not a ruling on the regulatory framework for fees charged by doctors in the *Land* of Hesse in the abstract but rather the specific application of that regulatory framework in a case such as that of Dr Konstantinides.

42. In that particular context, it should be noted that the service provided by Dr Konstantinides is not included in the so-called list of fees. Accordingly, under the rules of professional conduct, he is required to charge a reasonable fee, taking account of the financial situation of the recipient of the service. According to the referring court, Dr Konstantinides applied to the operation the fee code which was closest to the operation performed, something which the referring court states is, in principle, permitted by the code.

43. The fact that an independent professional risks the imposition of a disciplinary penalty because he charged a fee within the scope of the discretion allowed by the professional association rules clearly creates for that professional a situation of legal uncertainty which is likely to limit or render less attractive his activity. Considered from the point of view of a service provider established in another Member State, the threat of a severe disciplinary penalty liable to amount to EUR 50 000, and even a declaration of his unfitness to pursue the profession, merely because he charged a fee equivalent to that applicable to one of the services included in the list of fees for medical procedures constitutes, without any doubt, a restriction of the freedom to provide services.

44. Accordingly, circumstances such as those in the present case, where a service provider established in another Member State who is permitted by the professional rules of the host Member State to determine the price of the service is alleged to have committed a disciplinary offence on the grounds that he charged a fee which is claimed to be excessive but which is based on the fees for equivalent services, constitute a restriction of the freedom to provide services.

## B – Justification

45. In order to justify the restriction of the freedom to provide services derived from the situation at issue, the Commission observes that it is possible that this situation may be justified by the objective of protecting health and consumers.

46. In that regard, as the Commission points out, there is little information to analyse. Since the referring court and the parties to the main proceedings have based their arguments on an alleged infringement of Directive 2005/36, there are few references to the objectives pursued by the rules of professional conduct and the disciplinary rules applied to doctors in the *Land* of Hesse. Accordingly, it will be for the referring court to assess, in the light of the arguments put forward by the parties, whether the situation of Dr Konstantinides may be justified on grounds of the protection of health and consumers.

<sup>17</sup> — Ibid., paragraph 58.

<sup>18</sup> — Case C-442/02 *CaixaBank France* [2004] ECR I-8961.

<sup>19</sup> — Ibid., paragraph 59.

47. When carrying out that analysis, the referring court must take into consideration, first, whether the objective in question is lawful and based on the public interest, a requirement which, in the case of the protection of health and consumers, will invariably be satisfied.<sup>20</sup> However, if other objectives which differ from those referred to above are relied on in the proceedings, such objectives must be ones which effectively satisfy public interest requirements.

48. Next, the referring court must assess whether the measure applied to Dr Konstantinides is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.<sup>21</sup> For those purposes, the review of suitability consists of assessing whether there is a logical consistency between the measure and the objectives, while the analysis of necessity calls for consideration of the severity of the measure chosen.<sup>22</sup> On this latter point, it is important that the referring court analyse the need for the measure from the point of view of a cross-border service provider and not from that of a provider established in the host Member State. Where there is some discretion when it comes to determining the price of the service, and where the service concerned is highly specialised and is provided by a professional from another Member State, it is necessary to ensure that such a professional, within the scope of the discretion conferred on him by the professional association rules, is not exposed to onerous procedures which restrict his rights and ultimately discourage him from moving to the host Member State.

49. Accordingly, having regard to the criteria set out above, it is for the referring court to assess whether the objectives pursued by the rules, as it is sought to apply them to Dr Konstantinides, are actually based on the public interest and whether the disputed measures are appropriate for attaining those objectives and do not go beyond what is necessary to attain them.

### *C – Recapitulation*

50. In the light of the foregoing, I propose that the Court declare that circumstances such as those in the present case, where a service provider established in another Member State who is permitted by the professional rules of the host Member State to determine the price of the service is alleged to have committed a disciplinary offence on the grounds that he charged a fee which is claimed to be excessive but which is based on the fees for equivalent services, constitute a measure restricting the freedom to provide services.

51. It is for the referring court to assess whether the objectives pursued by the rules, as it is sought to apply them to Dr Konstantinides, are actually based on the public interest and whether the disputed measures are appropriate for attaining those objectives and do not go beyond what is necessary to attain them.

### **VII – Question A.3)**

52. By its third question, the *Berufsgericht* asks whether European Union law, in this case Article 56 TFEU, precludes professional disciplinary rules which prohibit and penalise advertising which is contrary to the image of the profession or contrary to professional ethics, as prohibited by Paragraph 27(1) to (3) of the *Berufsordnung für die Ärztinnen und Ärzte in Hessen*.

20 — On justification based on the protection of health and humans, see, inter alia, Case C-320/93 *Ortscheit* [1994] ECR I-5243, paragraph 16, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior y Publivia* [1991] ECR I-4151, paragraph 16. As regards the protection of consumers, see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 27, and Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 50.

21 — See, inter alia, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21, and *Cipolla and Others*, paragraph 61.

22 — See, inter alia, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 62 and 67; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42; and Case C-28/09 *Commission v Austria* [2011] ECR I-13525, paragraph 126.

53. Although the referring court frames its uncertainties in general terms and by reference to the professional rules in force, the fact is that its uncertainties relate specifically to the penalty which the professional association claims should be imposed on Dr Konstantinides, in the light of the advertising activities in which he has engaged on the internet. According to the referring court, Dr Konstantinides' website advertised his services under the expressions 'German Institute' and 'European Institute', conveying to recipients of the service the impression that the service is provided in the context of a permanent research infrastructure, something which, according to the case-file, does not reflect the activities which Dr Konstantinides actually carries on, at least in Germany.

#### A – Restriction of the freedom to provide services

54. In order to reply to this question, it is necessary to refer again to the case-law of the Court relating to the specific conditions imposed on service providers, based on the application of professional rules justified in the public interest in the host Member State. In that connection, unless harmonising legislation of the European Union applicable to the service concerned exists, the national rules on the advertising of a regulated activity, such as the rules of professional conduct relating to advertising applicable to medical professionals, which are based on the legitimate interest of protecting the recipient of the service, are 'professional rules justified by the general good' within the meaning of the *Van Binsbergen* judgment.<sup>23</sup>

55. As Advocate Bot previously had occasion to explain in his Opinion in *Corporación Dermoestética*,<sup>24</sup> advertising 'plays a decisive role in enabling a company to establish itself in a new Member State and develop its business there', since '[i]t thus enables consumers to break with their habits and, consequently, promotes competition.'<sup>25</sup> That role becomes even more decisive in the case of the liberal professions which are subject to heterogeneous professional rules, thereby impeding even more, if that is possible, the ability of the professionals concerned to enter the market in another Member State. Therefore, it is no surprise that the Court analyses particularly closely whether this kind of measure is restrictive.

56. In the judgment in *Alpine Investments*, given in 1995, the Court observed that a prohibition which 'deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States ... can ... constitute a restriction on the freedom to provide cross-border services.'<sup>26</sup> That statement was consistent with the case-law handed down until that date on the subject of advertising in cross-border television broadcasts<sup>27</sup> but it had the virtue of focusing the review under Article 56 TFEU on an apparently internal service, since the Netherlands national rule in dispute in *Alpine Investments* affected only undertakings established in the Netherlands.

57. A few years later, the Court had the opportunity to rule specifically on the case of medical activities. In *Gräbner*,<sup>28</sup> the Court confirmed that a prohibition on the advertising of medical training activities was restrictive. Even more significant is the judgment in *Corporación Dermoestética*,<sup>29</sup> in which the dispute concerned whether national legislation prohibiting advertisements for medical or

23 — Judgment cited above, paragraph 12, and the case-law cited in footnote 14 of this Opinion.

24 — Case C-500/06 [2008] ECR I-5785.

25 — *Ibid.*, point 82. To the same effect, see also the Opinion of Advocate General Bot in Case C-446/05 *Doulamis* [2008] ECR I-1377, points 81 to 94.

26 — Case C-384/93 [1995] ECR I-1141, paragraph 28.

27 — See the case-law starting with Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, and followed by judgments in other cases, such as Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069; Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843; Case C-262/02 *Commission v France* [2004] ECR I-6569; and Case C-429/02 *Bacardi France* [2004] ECR I-6613.

28 — Case C-294/00 *Gräbner* [2002] ECR I-6515.

29 — Cited in footnote 24.

surgical treatments of a cosmetic nature was compatible with Article 56 TFEU. In that case, the Court confirmed that the disputed measure was ‘liable to make it more difficult for ... economic operators to gain access to the ... market’<sup>30</sup> and that it thus constituted a restriction on the freedom to provide services.

58. In *Corporación Dermoestética*, the Court went on to state, in line with settled case-law, that a restrictive measure which consists of prohibiting a particular type of advertising can be justified only if it fulfils four conditions: it must be applied in a non-discriminatory manner; it must be justified by overriding reasons based on the general interest; it must be suitable for attaining the objective pursued; and it must not go beyond what is necessary to attain that objective.<sup>31</sup>

59. Using those criteria from the case-law as a reference point and turning now to the case of Dr Konstantinides, it should be noted, as the Commission has observed, that this is not a case of advertising which is subject to harmonising legislation at European Union level. As pointed out above, Directive 2006/123 is not applicable to medical services and nor is Directive 2000/31 on information society services,<sup>32</sup> because medical and surgical services, since they require the provider and the recipient of the service to be physically present, cannot be considered to come under ‘information society services’ within the meaning of Article 2(a) of that directive. Therefore, the measure concerned is a national measure which must be examined solely and exclusively under Article 56 TFEU.

60. Further, before assessing whether the measure in question restricts the freedom to provide services, it is necessary to draw attention to a number of specific features of the present case. First, the disputed measure does not concern a total prohibition on advertising or a prohibition on a particular type of advertising, and is instead a measure which precludes medical professionals from effecting forms of advertising which are contrary to the image of the profession or professional ethics. It is, therefore, a *condition relating to content* which is applicable to forms of advertising a regulated professional activity. Second, it should also be pointed out that the restriction does not refer to the professional rules but rather to their application in a case such as the present one, in which a doctor who provides cross-border medical services in Germany risks a disciplinary penalty as a result of advertising on the internet under the wording ‘European Institute’ or ‘German Institute’.

61. In those circumstances, although a measure laying down standards of professional conduct does not of itself restrict the freedom to provide services, that conclusion changes radically if those standards are formulated in ambiguous and equivocal terms and are accompanied by strict disciplinary rules. The sum of those two features – ambiguity and penalties – is an outcome which clearly discourages medical professionals from other Member States from advertising, an activity which may be decisive for the purposes of securing their entry into the professional market in another State. Therefore, to my mind, the application of the national framework to the case of Dr Konstantinides, in the terms proposed by the professional association, constitutes a restriction of the freedom to provide services.

## B – Justification

62. Where there is a restriction of a freedom of movement protected by the Treaty, Member States may justify the compatibility of the restrictive measure if the conditions set out in point 58 above are satisfied.

30 — *Corporación Dermoestética*, paragraph 33.

31 — See, among many others, Case C-19/92 *Graus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57; and Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 26.

32 — Directive 2000/31/CE 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 (OJ 2000 L 178, p. 1), also known as the ‘Directive on electronic commerce’.



63. In that connection, the disputed rules on advertising apply regardless of the Member State of establishment of the professionals concerned, and it is therefore a measure which is applicable without distinction. In addition, as is clear from the observations submitted by the professional association, such a measure is aimed at protecting consumers and at guaranteeing the quality of medical services, which are essential to ensuring public health. Accordingly, regulation of the advertising of professional medical activities may be justified in relation to the objective of protecting consumers and public health.<sup>33</sup>

64. Next, it is necessary to examine whether the national measures are appropriate for attaining the objective of protecting public health. In that regard, it should be noted, albeit on a very general level, that the laying down of specific conditions concerning the content of advertising, which are linked to disciplinary rules, is not in itself inconsistent with the aim of ensuring the protection of consumers and public health.

65. However, now that we have reached the stage of analysing the need for or proportionality of the measure, the conclusion requires a number of qualifications.

66. A set of rules which lays down, in general and ambiguous terms, the requirement that advertising by professionals must be effected in accordance with ethical standards can be proportionate only if the infringement is clearly defined in the rules, or, where sufficient clarity is lacking, if the rules are applied to a situation which is unquestionably contrary to professional ethics.

67. It may be observed in the case before the Court that the infringement which Dr Konstantinides is alleged to have committed comes within the second category, since it involves an infringement which is not defined clearly enough to enable the identification of specific unlawful conduct. The referring court and the professional association submit, without Dr Konstantinides having argued otherwise, that the advertisement on the internet, where the medical services appear under the heading of a so-called ‘European Institute’ or ‘German Institute’, did not reflect the infrastructure available to Dr Konstantinides in Germany. On the contrary, the provision of services by Dr Konstantinides took place in a private clinic in collaboration with other medical professionals established in the *Land* of Hesse, but without the existence of any research or institutional activities matching those referred to on the website of the applicant in the main proceedings. Should those points be confirmed, it will be a case of advertising which is misleading to potential patients of Dr Konstantinides, who might believe that they will receive the service in conditions which do not subsequently reflect the true position.<sup>34</sup> Given the clear relationship between medical activities and the safeguarding of public health, which is closely linked to the protection of consumers as patients of medical services, conduct such as that of Dr Konstantinides is unlikely to meet the ethical advertising standards expected of a medical professional.

68. Accordingly, a measure of the kind at issue in the present case, pursuant to which non-discriminatory advertising rules based on the protection of consumers and public health are to apply to a medical professional established in another Member State, is justified provided there is the appropriate proportionality between the conduct under consideration and the disciplinary penalty which may be imposed. That assessment clearly falls to the referring court, which must take account of the specific circumstances of the case and the range of disciplinary penalties available within the national legal framework.

33 — See the case-law cited in footnote 20.

34 — In fact, attention should be drawn to Paragraph 27(7) of the Code of Professional Conduct for doctors in the *Land* of Hesse, which, as the Commission has stated in its observations, is worded as follows: ‘The title of “professor” may be used where it has been granted by the University or by the competent Ministry of the *Land* on a proposal from the medical faculty. The same applies to a title granted by a medical faculty of a foreign university, provided that the association considers that the title is equivalent to the German title of “professor”.’ This provision confirms the importance attributed in Germany to the use of titles or categories linked to the scientific research sector, which has an important attraction from a commercial point of view.



## *C – Recapitulation*

69. In short, I consider that Article 56 TFEU must be interpreted as meaning that a national measure, pursuant to which medical professionals who engage in advertising activities are required to comply with excessively ambiguous standards of conduct, which are accompanied by stringent rules on penalties, constitutes a restriction on the freedom to provide services.

70. However, a measure such as that at issue in the present case, pursuant to which non-discriminatory advertising rules based on the protection of consumers and public health are to apply to a medical professional established in another Member State, is justified provided there is the appropriate proportionality between the conduct under consideration and the disciplinary penalty which may be imposed. That assessment must be carried out by the referring court when it gives a ruling on the substance of the case.

## **VIII – Conclusion**

71. In the light of the arguments set out, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the *Berufsgesicht für Heilberufe bei dem Verwaltungsgericht Gießen*:

- (1) Article 56 TFEU must be interpreted as meaning that circumstances such as those in the present case, where a service provider established in another Member State who is permitted by the professional rules of the host Member State to determine the price of the service is alleged to have committed a disciplinary offence on the grounds that he charged a fee which is claimed to be excessive but which is based on the fees for equivalent services, constitute a measure restricting the freedom to provide services.

It is for the referring court to assess whether the objectives pursued by the rules, as it is sought to apply them to Dr Konstantinides, are actually based on the public interest and whether the disputed measures are appropriate for attaining those objectives and do not go beyond what is necessary to attain them.

- (2) Article 56 TFEU must be interpreted as meaning that a national measure pursuant to which medical professionals who engage in advertising activities are required to comply with excessively ambiguous disciplinary standards, which are accompanied by stringent rules on penalties, constitutes a restriction on the freedom to provide services.

However, a measure such as that at issue in the present case, pursuant to which non-discriminatory advertising rules based on the protection of consumers and public health are to apply to a medical professional established in another Member State, is justified provided there is the appropriate proportionality between the conduct under consideration and the disciplinary penalty which may be imposed. That assessment must be carried out by the referring court when it gives a ruling on the substance of the case.