THE SUPREME COURT

Record No. 348/2006

Murray J.
Denham J.
Hardiman J.
Geoghegan J.
Fennelly J.

BETWEEN/

RAMADAN HEMAT

PLAINTIFF/APPELLANT

AND

THE MEDICAL COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Fennelly delivered the 29th day of April 2010.

1. The question to be decided on this appeal from the High Court (McKechnie J) is whether the respondent, the Medical Council, was an association of undertakings for the purposes of competition law at the time when it disciplined the appellant for breach of ethical rules regarding advertising.

2. A principal plank of the appellant's case has always been that the Medical Council was, in the majority, composed, in accordance with the Medical Practitioners Act, 1978, of doctors carrying on medical practice and hence engaging in economic activity. The Medical Practitioners Act 2007 has radically altered the composition of the Medical Council. As a result, the question raised in this case is of largely historical importance and is of continuing interest only insofar as it affects the appellant.

3. In October 2002, the appellant advertised his skills as a self-employed practitioner of integrated medicine being a combination of conventional medicine with clinical ortho-molecularisation, a field of medical practice not conventionally practised in the state. He did so by circulating a leaflet entitled "The Functional Medical Clinic." The Fitness to Practice Committee of the Medical Council found the appellant guilty of professional misconduct in that he had breached provisions of the Council's "Guide to Ethical Conduct and Behaviour," which, for convenience I will call the "Ethical Guide." The Committee proposed to the Council that the appellant be struck off the register for a period of one month.

4. The appellant, in his action against the Council, invokes both national and European competition law. For that purpose, he alleges that the Medical Council is an "association of undertakings." The High Court set down for decision as a preliminary issue the question of whether the Council is an "association of undertakings." McKechnie J rejected the appellant's contention. In a comprehensive and reasoned judgment he held that the Medical Council was not an association of undertakings when it issued its Ethical Guide.

The Medical Council

5. The Medical Council was established pursuant to the Medical Practitioners Act, 1978 in succession to the Medical Registration Council. The following account is based on the legislation as it existed prior to the Act of 2007. The purpose of the Act is the regulation and supervision of the practice of medicine and medical education in the State. The Council maintains a register of medical practitioners. It is responsible for the discipline of members of the medical profession and, through its Fitness to Practice Committee, conducts inquiries into the conduct of practitioners, specifically where there are allegations of professional misconduct or of lack of fitness to practice. Section 69(2) of the Act of 1978 provides that:

> *" It shall be a function of the Council to give guidance to the medical profession generally on all matters relating to ethical conduct and behaviour."*

6. In the exercise of that power, the Council published its Ethical Guide and revised it from time to time.

7. Section 9 of the Act provided for the membership of the Council, 25 in number. Eight members were to be appointed by the universities, the Royal College of Surgeons in Ireland and the Royal College of Physicians of Ireland. The Minister was to appoint one person to represent psychiatry and one to represent general medical practice. Ten were to be elected registered medical practitioners. Four were to be appointed by the Minister for Health, of which three were not to be registered medical practitioners. The general effect of section 9 was that a majority of the members of the Council would inevitably be engaged in whole or in part in the practice of medicine. It has been accepted, for the purposes of the present appeal that they were, for the most part, medical practitioners in private practice.

The Ethical Guide

8. The Medical Council issued from time to time "A Guide to Ethical Conduct and Behaviour." Its fifth edition was approved by the Council on 30 June 1998 and published in November 1998. Paragraph 15 in Section D of the Guide is entitled "The Media and Advertising." The following provisions are relevant for the purposes of the appeal:

> "15.1 EDUCATING THE PUBLIC
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> *Doctors have an important part to play in educating the public in medical matters and in disseminating medical knowledge. However, doctors must not imply that they have unique solutions to health problems. Nor should they use health promoting publicity to attract patients to their care or to enhance or to promote their own professional reputation. Doctors are reminded that if they work in a clinic that makes claim about special expertise not found elsewhere they will be held responsible for such claims being made.*
>
> 15.2 INFORMATION FOR THE PUBLIC

Information given to the public should be expressed in a factual and lucid terms. It must never cause unnecessary public concern or personal distress nor should it raise unrealistic expectations.

15.3 . . .

15.4 PUBLISHING A NAME

If a doctor's name is mentioned when talking to or writing in the media on social, ethical, political, or research aspects of medicine, he/she must take personal responsibility for the views expressed and establish the basis for them.

15.5 ADJUDICATION

In adjudicating on complaints concerning doctors and the media, the Council will consider whether the benefit to the doctor has been greater than that to the public and whether there has been an element of self advertisement or a claim of possession of special skills, either of which could be interpreted as canvassing for patients. In all circumstances benefit to the patient must outweigh any incidental advantages to the practitioner concerned. Self advertisement or publicity to enhance or promote a professional reputation for the purpose of attracting patients is professional misconduct".

9. In addition, Appendix A to the Guide included, under the heading, "In-Practice Information," the following;

"3. No individual doctor is permitted to advertise nationally or locally in any form of public media on a personal basis, save as in 7 below.

5. In-house information to patients or prospective patients should be available but confined to surgery premises. Such information may be in the form of leaflets, posters, other displays. Special procedures may be specified.

7. Two discreet notices are permitted in the press, in relation to the establishment of a practice, change of location or personnel change. Information in relation to surgery hours is permitted in relation to public holidays or to duty rotas."

10. A new edition of the Ethical Guide was adopted in 2004, subsequent to the events giving rise to the present proceedings.

The Appellant and the Disciplinary Proceedings

11. In or about 1985 the plaintiff first became registered as a medical practitioner in Ireland. He continued to be so registered at least up to the date of the events arising in the present case. In 1989 he became a Fellow of the Royal College of Surgeons. Over several years thereafter, he has worked in a number of Irish hospitals performing a variety of functions. In the course of this work it is claimed that he has acquired significant experience in the 'conventional' medical fields of urology and oncology. In addition it is said that he also has a 'practice' in the area of integrated medicine which includes clinical ortho-molecularism. In these proceedings the appellant says that, while he is aware of

the limits of ortho-molecularism, he believes that there is a role for a combination in some cases of conventional medicine and clinical ortho-molecular practice.

12. As a result of a period of unemployment Dr. Hemat decided in October 2002 to advertise his skills as a self-employed practitioner of integrated medicine. This type of medicine consists of a combination of conventional medicine and clinical ortho-molecularisation.

13. He circulated or caused to be circulated to the public an advertisement headed "The Functional Medical Clinic - clinical ortho-molecularism – integrated medicine." The text was as follows.

> THE FUNCTIONAL
> MEDICAL CLINIC
> CLINICAL ORTHOMOLECULARISM
> I N T E G R A T E D M E D IC I N E
> ALLOWS YOU TO FUNCTION BETTER
> THIS IS THE AGE OF PLURALISTIC MEDICINE, IN WHICH EFFECTIVE INTERVENTIONS ARE SELECTED REGARDLESS OF THEIR ORIGINS
> CHILD'S HEALTH, WOMEN'S HEALTH, MEN'S HEALTH.
> THIS COULD BE THE BEGINNING OF A WHOLE NEW QUALITY OF LIFE. SEEING YOU IN THE COMFORT OF YOUR OWN HOME. PROPER HEALTH CARE FROM A FUNCTIONAL PERSPECTIVE AIMED TO DISCOVER THE ROOT CAUSE OF THE PROBLEM AND TO PROVIDE INTERVENTION. HELPING YOU TO REACH YOUR GOAL OF ULTIMATE HEALTH AND WELL-BEING AT YOUR HOME ENVIRONMENT.
> INTEGRATED MEDICINE MEANS CAREFUL COMBINATION OF INTERVENTIONS NECESSARY TO THE HEALTH OF INDIVIDUALS. WE TAILOR INTERVENTION TO A PATIENT'S NEED, PROVIDED BY MEDICALLY QUALIFIED SKILLED IN COMPLEMENTARY MEDICINE.
> CANCER-RELATED ILLNESSES, CHRONIC FATIGUE SYNDROME, EATING DISORDERS, CARDIAC CONDITIONS, PSYCHIATRIC CONDITIONS, BOWEL ILLNESSES, CHRONIC LEG ULCERS, ALLERGIES, DIABETES MELLITUS, ASTHMA, AGEING-RELATED PROBLEMS, ARTHRITIS, MULTIPLE SCLEROSIS, ALCOHOL-RELATED ILLNESSES, PARKINSON'S DISEASE, DEMENTIA, ALZHEIMER DISEASE, NEUROPATHY, OSTEOPOROSIS, RECURRENT URINARY TRACT INFECTION, RECURRENT RESPIRATORY TRACT INFECTION, SKIN PROBLEMS, DELAYED WOUND HEALING, BED SORE, STRESS-RELATED ILLNESSES, PANIC ATTACKS, ADJUSTMENT AND COPING DIFFICULTIES, ASSISTING CAREGIVERS TO COPE, MENOPAUSE AND ANDROPAUSE-RELATED PROBLEMS, PROSTATIC ILLNESSES, RECURRENT URINARY TRACT STONES.SLEEPING APNOEA, SLEEPING-DISORDERS, PWA, HIV, Hep-C, and more.
> Combining conventional and complementary approaches will give you the proper support you need with a profound sense of accomplishment. It's not symptomatic treatment being given. The Functional Medical Clinic has the potential to improve and sustain the functionality at work. Has the potential to reduce the burn-out at work. The Functional Medical clinic has the potential to improve the quality of life.

Has the potential to reduce the risk of diseases including cancer. Has the potential to cure diseases including cancer in conjunction with other modalities of intervention. The Functional Medical Clinic may not cure every one.
The Functional Medical clinic is an inexpensive way to receive personalised attention. You will receive an evaluation focusing on risk factors with the goals of disease prevention and intervention of the whole person. Based on the results of your initial medical history and physical examination we will design an individualised evaluation program.
CONSULTATION BY APPOINTMENT
2 8 8 0 5 2 8"

14. In January, 2003, the appellant was advised by the Fitness to Practise Committee of the Medical Council that it had received a complaint in respect of the circular. The letter invited his observations and comments and referred him to Section D of the Ethical Guide.

15. On 7th May the Committee wrote to inform the appellant that it had considered correspondence from its complainant and from the appellant himself and that it had decided that there was a *prima facie* case for the holding of an inquiry into his conduct pursuant to section 45 of the Act of 1978. The Committee later gave him notice of its inquiry, which took place on 15th July 2003. The appellant did not attend and was not legally represented, though he had made a written request for an adjournment which the Committee refused.

16. The material part of the Committee's decision was as follows:

> "On the evidence the Committee was satisfied that the purpose of the circular:
>
> a) was for the purpose of advancing the doctor's professional reputation;
> b) purported to imply that the doctor had unique solutions to health problems which were liable to raise unrealistic patient expectations;
> c) was designed for the purpose of advertising;
> d) was in breach of the relevant provisions of the Ethical Guide. (See particularly Section D, paragraph 6.1, 6.2, 15.2, 15.5 and Appendix A, paragraph 3, five and seven).
>
> Furthermore, the Committee was satisfied that the circular brought the medical profession into disrepute.
> The committee was satisfied that the circulation of this advertisement to the public was particularly serious having regard to the fact that it appeared specifically aimed at vulnerable and elderly people. Again, reference is made to the contents of the circular itself."

17. The Committee found that the facts were proved and, by a majority, recommended the erasure of the appellant's name from the Register.

18. The appellant was invited to attend a meeting of the Medical Council on the 26th of August, 2003, when it would proceed to determine what sanction to be taken under Part V of the Act on foot of the Report of the Fitness to Practice Committee. Subsequently, he was advised that his name was to be struck off the register for a period of one month,

that certain conditions were to be imposed as regards his ongoing registration, and he was directed to comply with the provisions of the Guide to Ethical Conduct and Behaviour, he was to bear the costs of compliance and he was censured regarding professional misconduct.

The Appellant's Claim

19. Separately from the present proceedings, the appellant has sought judicial review of the decision of the Committee.

20. The appellant claims in the present proceedings that the Medical Council, by its decisions and practices, restricts and/or distorts the practice of medicine in the state. He claims that the Ethical Guide amounts to a ban on advertising which has the object or effect of restricting or distorting competition and constitutes a decision by an association of undertakings. Similarly, the finding that he has been guilty of professional misconduct by reason of his advertisement of his services has a similar object and/or effect.

21. It is common case that, in order to be able to advance this case, the appellant must establish that the Medical Council is an association of undertakings for the purposes of competition law.

22. The appellant, in his pleadings, invokes both the provisions of the Competition Act, 2002 and Article 81 of the Treaty Establishing the European Community. While the statement of claim makes mention of abuse of a dominant position, both by reference to section 5 of the Competition Act and Article 82 of the Treaty, that issue does not arise on this appeal. It appears dependent on an assumption that the Medical Council is itself an undertaking in a dominant position in the market for the delivery of medical services, a contention which is scarcely arguable.

23. Moreover, the pleadings contain no mention of any effect on trade between Member States, which is essential if the Treaty provisions are to be relevant. When this matter was raised at the hearing, neither party had any observation to make. It would clearly have important implications with regard to the obligation of this Court to refer questions for preliminary ruling to the Court of Justice. Neither party made any submissions with regard to such a reference. On the state of the pleadings and of the agreed facts, I am satisfied that the matter must be considered entirely within the ambit of national competition law. That does not affect the answer to the preliminary question. The relevant provisions of the Competition Act are closely modeled on the corresponding articles of the Treaty. Thus the case-law of the Court of Justice provides important guidance.

The High Court Judgment

24. The agreed preliminary question is:

> *"Whether the Medical Council is an undertaking and/or an association of undertakings for the purposes of ss. 4 and 5 of the Competition Act, 2002 and/or articles 81 and 82 of EC".*

25. For the reasons given above, both section five of the Competition Act and the Treaty articles can be ignored. McKechnie J delivered judgment on 11th April 2006. I propose to cite from that judgment *in extenso*, since it constitutes a very clear exposition of the issues.

26. Having outlined the statutory functions of the Medical Council, the learned judge said that he could not *"see any room for suggesting that the aim, nature and purpose of such provisions is otherwise than in the public interest."* He continued:

> *"True, one might say that a system of registration, coupled with maintaining and enforcing high standards is also in the interests of the profession, but in the context of the issue under discussion, this consequence could not conceivably be equated with an association whose aim was to protect, conserve or look after the personal interests of its members. In fact I can see nothing in the provisions, not even something remotely similar, to what one would typically find in the rules of a trade association or indeed of a professional association. Donovan and Others v. ESB [1997] 3 I.R. 570 is a good example of the former whereas bodies like the I.M.O. and the Irish Hospital Consultants Association are examples of the latter. It seems to me that the 1978 Act is entirely different from such bodies and by its structure and provisions is focused almost exclusively on those who receive service from the medical profession and not on the profession itself."*

27. The learned judge cited, with approval, a statement from the judgment of Costello J in *Philips v. Medical Council* [1991] 2 I.R. 115 at page 119 for his own conclusion that *"the general underlying intention of the legislation was to protect the public interest."* He also cited the decision of Gilligan J in *Kenny v. Dental Council* [2004] IEHC 29. That principle applied, in particular, to the power conferred by s. 69(2). He added: *"In my view the Council is not there as a service to the profession and even less so as a personal benefit to the individual members thereof."*

28. The learned judge gave careful consideration to the composition of the Council and whether the mere fact that a majority of its members were undertakings was sufficient for the purposes of competition law. He did not think that, in the final analysis, the question could "substantially turn on the numbers game…" He thought that:

> *"…the decisive and ultimate question must always centre on the nature of the activity carried on. Unless that activity can be correctly categorised as an economic activity then the body cannot be an association of undertakings.*

29. He made the important point that "in publishing the Guide on Ethical Conduct and Behaviour, the Medical Council was at all times acting solely in the public interest as it was statutorily obliged to do so." He added: *"To do otherwise would be to act ultra vires."* He continued:

> *"…when enforcing the restriction on advertising, of which complaint is made, the Council was not and could be said to have engaged in economic activity. The mere*

fact that some economic consequences may follow cannot alter the status of the body as the existence of such consequences is not the test."

30. The learned judge drew a distinction between the carrying on of an economic activity and the mere fact that some economic consequences may follow from its decisions. He held that the *"Medical Council in issuing the Guide on Ethical Conduct and behaviour is not an undertaking or an association of undertakings for the purposes of competition law."*

The Appeal

31. The submissions of the appellant are predominantly and, indeed, necessarily referable to the case-law of the Court of Justice. Section 4 of the Competition Act reflects very closely the provisions of Article 81 of the Treaty. The principal cases are Case C-41/90 *Höfner and Elser v. Macrotron* [1991] E.C.R. 1-1979; Case C-364/92 *Sat Fluggesellschaft* [1994] ECR I-43; Case C-342/95 Cali and *Figli v. Servizi Ecologoci Porto di Genova [SEPG]* [1997] ECR I-01547; Joined Cases C-180/98 to C-184/98 *Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I – 6541; Case C-309/99 *Wouters v. Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. The appellant makes the following principal points on the appeal.

32. Firstly, he submits that the learned trial judge failed to address satisfactorily the fact that the membership of the Council was dominated by persons who were engaged in economic activity in the provision of medical services. In reality, some twenty two of the twenty five members were medical practitioners. Even if the majority of the doctors on the Council are not in private practice or not all members of the Council are practicing doctors, they may be expected to be sympathetic to the general interests of the profession.

33. Secondly, the learned trial judge failed sufficiently to appreciate that that an activity which consists of or controls the offering of goods or services on the market is an economic activity and that, in restricting advertisement in relation to offering goods or services, the Council involves itself in economic activity and shapes and influences the conduct of doctors on the market in medical services. The ethical rules restricting advertising are clearly linked to economic activity. Counsel accepted that the fact that a decision such as the adoption of those restrictions has economic consequences does not necessarily mean that the body making it is an association of undertakings. If it makes rules with dual justification, the fact that it is partly in the public interest does not prevent it being an association of undertakings. If it is made partly in the interests of its members, it may be such an association.

34. Thirdly, relying, in particular on *Wouters*, the appellant argued that the Court of Justice exhibited a willingness to hold that regulatory bodies are associations of undertakings. The question is whether the relevant rule is clearly connected with the sphere of economic activity.

35. Fourthly, and largely for the same reason, the appellant seriously questioned whether the enforcement of a prohibition on advertising can be construed as the exercise of a power in

the public interest, particularly in the absence of any statutory mandate to restrict advertisement.

36. The Medical Council, as respondent on this appeal, fully supports the findings of the learned trial judge, invokes the decision of Costello J in *Philips v Medical Council*, cited above and says that there is a heavy onus on the appellant to show that a public body such as the Medical Council exercising a public function is, at the same time, for the purpose of competition law, an association of undertakings. It cites *Cali and Figli v. SEPG,* cited above, for the proposition that a distinction must be drawn between a situation where a State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature.

Consideration of the Appeal

37. I propose to examine, in the first instance, the decisions of the Court of Justice. It is patent that the Oireachtas has used the language of Articles 81 and 82 in sections 4 and 5 of the Competition Act, 2002. Accordingly, the judgments of the Court of Justice must be taken as authoritative in the interpretation of notions such as "undertaking" and "association of undertakings," which are fundamental to the operation of both the Treaty articles and the Competition Act. Section 3(1) of the Act defines an undertaking as *"a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service."* It does not define an "association of undertakings."

38. The Court of Justice seeks, by its judgments to ensure the useful effect of the competition rules. Thus it does not permit the Member States to escape from their effects by designating or creating bodies in accordance with public law which, at the same time, engage in economic activity.

39. *Höfner and Elser,* already cited, concerned a public employment agency which had a legal monopoly in the provision of employment-procurement services in Germany. The German government contended that the agency was not an undertaking: its employment procurement services were provided free of charge; its activities were financed mainly by contributions from employers and employees. The Court, however, explained that *"in the context of competition law…… the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed."* The court has consistently restated this proposition. (*Pavel Pavlov,* already cited, at paragraph 74), insisting that *"any activity consisting in offering goods and services on a given market is an economic activity."* (*Pavel Pavlov* paragraph 75). In reality, it was quite obvious that employment procurement was an economic activity and the Court so held.

40. The court reached a different conclusion in two other relevant cases. *Sat Fluggesellschaft v. Eurocontrol*, already cited, was concerned with the operations of Eurocontrol. A number of states entered into a Convention under which they established Eurocontrol as an international organisation. Its principal function is to establish and collect charges levied on users of a navigation service in accordance with an international agreement. In the

view of the court, Eurocontrol "*carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation and safety."* The Court ruled (see paragraph 30 of the judgment):

> *"Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition."*

41. *Cali & Figli,* cited above, concerned an anti-pollution service consisting of surveillance of the maritime environment provided by SEPG in the port of Genoa. Cali, a user of the port, refused to pay an invoice from SEPG in respect of anti-pollution services performed on its behalf. Questions were referred to the European Court. The court drew the following crucially important distinction at paragraph 16 of its judgment:

> *"As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial in nature by offering goods or services on the market."*

42. The court expressed the view that the *"anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas."* Therefore, this activity was *"not of an economic nature justifying the application of the Treaty rules on competition."*

43. Before turning to the question of an association of undertakings, I would point to a number of useful conclusions which can be drawn from this case-law. The essential question is whether the particular body being considered engages in or carries on an economic activity. If it does, the competition rules apply and it will not matter that it is established under public law, or that it has a legal monopoly or that it is financed in any particular way. If, on the other hand, that body performs a task or function, which in its nature is that of a public body, the competition rules do not apply. But the fact that the activities of the body have an economic effect does not alter that conclusion. That is not the test. The question is whether it is engaged in an economic activity in the ordinary sense of providing goods or services which are the normal indicia of market behaviour.

44. The appellant contends not that the Medical Council is an undertaking but that it is an association of undertakings. An association of undertakings does not itself, or at least does not necessarily engage in economic activity. It suffices that its members do so.

45. Two decisions of the Court of Justice, both on references from the Netherlands, are of central relevance, namely *Pavel Pavlov* and *Wouters*, both cited above. The first concerned a compulsory pension scheme for the medical profession; the second related to

a rule of the Dutch Bar restricting partnerships between practising lawyers and other professionals.

46. In *Pavel Pavlov*, the Court of Justice was asked by the Dutch referring court whether the representative body of a liberal profession, when setting up a pension fund responsible for managing a supplementary pension scheme for the members of that profession and membership of which had, upon request to the responsible government Minister, been made compulsory for those members, was an association of undertakings.

47. The principal dispute in *Pavel Pavlov* concerned whether the medical pension scheme, organised by members of the profession, fell entirely outside the scope of the competition rules in the same way as had been held in cases of decisions to set up a compulsory pension fund for workers as a result of collective bargaining between employers and workers in a particular sector. (see Case C-67/96 *Albany* [1999] ECR I-5751; Case C-115/97, C116/97, C-117/97 *Brentjens'* [1999] ECR I-6025; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.). The Court held that body of case-law not to be applicable since the agreement at issue (to set up the pension scheme) had not arisen from collective bargaining between employers and workers.

48. It was fairly obvious that the medical specialists were themselves undertakings. The Court noted particularly that the body which established the pension fund was *"solely made up of self-employed medical specialists."* They *"provide[d] in their capacity as self-employed economic operators, services in a market."* The Court added: *"They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity."*

49. Of most interest for the present case is the reasoning which led to Court to conclude that the medical pension body was an association of undertakings. The Court accepted that a regulatory body might fall outside the scope of the competition rules where it was *"composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria."* It decided, nonetheless, that the body (LSV) which established the pension fund was an association of undertakings on the following basis:

> *" However, that is not the situation in the present cases for at the time when the LSV decided to set up the Fund and to apply to the public authorities for a decision making membership compulsory, it was composed exclusively of self-employed medical specialists, whose economic interests it defended."*

50. *Wouters* concerned a rule of the Dutch bar prohibiting members from practising as members of the Bar in full partnership with accountants. The Bar of the Netherlands was established under a general Dutch law providing for the establishment and public recognition of professional bodies. That Bar was both a public body and the representative body of the profession. In 1993, it adopted a rule prohibiting members from entering into professional partnerships except with other members of the bar. This rule was challenged by a member of the bar together with an accountancy firm. The Dutch court of first

instance held that the Treaty provisions on competition did not apply since the Bar of the Netherlands was a body governed by public law, established by statute in order to further the public interest. However, the Raad van Staate on appeal referred questions to the Court of Justice concerning the definition of an association of undertakings. The latter Court pointed out that registered members of the bar carried on an economic activity and were, therefore, themselves undertakings. The court identified the question to be determined as being *"whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings, or on the contrary, as a public authority."* (paragraph 56).

51. Throughout the key passages of the judgment, there runs the distinction, mentioned at paragraph 41 above, between the exercise of powers which are typically those of a public authority, on the one hand, and the adoption of rules expressing the intention of the members of the profession as to how they should act in carrying on their economic activity, on the other. The Court noted that the Bar of the Netherlands was composed exclusively of members of the Bar elected solely by members of the profession and that it was not required to act in accordance with any specified public-interest criteria.

52. As is clear from an examination of these cases, the Court has refrained from laying down a set of rules from which it could be deduced a *priori* whether a particular body was an association of undertakings. Rather the underlying principle is that the competition rules apply to any body whether an individual undertaking or an association of undertakings provided that it is engaged in economic activity. The association of undertakings is in a slightly different situation, insofar as it is not normally engaged in the activity itself. But the principle remains. For that reason, a body does not escape the application of the rules because it is established by public law or carries on some public law functions. It is evident from *Wouters* that a body may be a hybrid: it may exercise some powers of a public nature, while acting, in other respects, in protection of the economic interests of its members. That is why the court repeatedly asked itself the combined question whether the Bar of the Netherlands was an association of undertakings *"when it adopts a regulation such as the 1993 Regulation."*

53. I now turn to some Irish case-law. In *Kenny v. Dental Council*, cited above Gilligan J had to decide whether the Dental Council was an association of undertakings for the purposes of the Competition Act, 2002. The plaintiff, who described himself as a denturist, complained that the Dental Council, established under the Dentists Act 1985, had failed to establish a scheme providing for the practice of the profession of denturism and maintained that it was thus in breach of the Act of 2002. Gilligan J concluded, following an analysis of the provisions of the Act of 1985 that the Dental Council was *"a public body concerned with the regulation of education and standards in the dental industry rather than a trade Association which represents the private commercial interests of dentists."* The Dental Council was not, in his view, engaged in economic activity.

54. There are obvious points of comparison between the nature, status and composition of the Dental and Medical Councils. Hence the views of Gilligan J, expressed as follows, are very much in point:

> *" These provisions [of the Act of 1985] illustrated that the Dental Council is a public body concerned with the regulation of education and standards in the dental industry rather than a trade association which represents the private commercial interests of dentists. It is not engaged in an economic activity. The Council exercises its functions not for the benefit of the dentists but in the public interest. In this respect it can be contrasted with a professional association such as the Irish Dental Association whose role is inter-alia to represent the interests of its members. Dentists simply register with the Council under the terms of the Act of 1985. They are not members of the Council."*

55. Having cited a passage from the judgment of Costello J in *Philips v. Medical Council*, cited above, Gilligan J continued: *"likewise the function of the Dental Council is not to protect the interests of dentists but to perform the functions assigned to it under the act of 1985 in the public interest."* In his view, accordingly, the Dental Council was not an association of undertakings. Gilligan J distinguished *Wouters* by contrasting the *"the economic nature of the regulation"* at issue in that case and the "*making of a scheme for auxiliary dental workers [which] does not fall within the sphere of economic activity but rather is the exercise of a power in the interests of public health."*

56. In reaching that conclusion, Gilligan J, like the learned trial judge in the present case, was influenced by the view expressed by Costello J in *Philips v. Medical Council,* as follows:

> *"The Council is not a body established to manage the affairs of the medical profession or to protect its interests; it is a statutory body entrusted with important statutory functions to be performed in the public interest. In particular the register of medical practitioners which it is required to maintain has been established to ensure that those who practise medicine in the State are properly qualified to do so. Important duties are conferred on the Council to ensure that proper standards of medical education and training are maintained in the medical schools in the State and in addition that the qualifications and training of doctors who do not graduate from these schools but who may wish to practise in the State are adequate for that purpose."*

57. While that statement was made in the context of an application for registration and no question of competition law arose in the case, it is a clear and correct and authoritative statement of the nature and function of the Medical Council as a matter of law. It also provides an appropriate point of departure for consideration of the present case, for the following reason. It is necessarily implicit in the appellant's submissions that the Medical Council, when adopting its Ethical Guide, was engaging in economic activity on behalf of medical practitioners, i.e, in the economic interests of such members of the Council as were themselves carrying on private medical practice, i.e. were acting as undertakings. But, as Costello J pointed out, the statutory functions of the Council could only be

performed *"in the public interest."* Even assuming that a majority of the members of the Council were in fact engaged in private practice, which has not been shown, they would be abusing their power and would be acting *ultra vires* if they were to allow themselves to be motivated by the economic interests of the medical profession. Any ruling or decision adopted for such purposes would be amenable to being quashed on judicial review.

58. The appellant relies on two matters in particular: firstly, the Medical Council is, in the majority, composed of medical practitioners; secondly, the restrictions on advertising imposed by the Ethical Guide concern the economic behaviour of medical practitioners. These points relate respectively to the composition of the body and the nature of the impugned measure. As has been shown by the analysis of the decisions of the European Court, these two matters are not considered in isolation from each other or in watertight compartments. The court has tended to look at a combination of the nature of the body, its decision and its functions, on the one hand, and whether the measure in question relates to the economic activities of the member undertakings or the public interest, on the other.

59. Firstly, I will refer to the argument based on composition of the Medical Council. I have summarised the statutory rules laying down the composition of the Medical Council earlier in this judgment. Perhaps the dictum of the European Court which most favours the appellant is that from paragraph 87 of the judgment in *Pavel Pavlov*, already quoted, where following the adverb *" admittedly,"* the court stated that a body *"having regulatory powers within a given sector might fall outside"* the competition rules if it was *"composed of a majority of representatives of the public authorities and where, on taking a decision, it must observe various public-interest criteria."* I do not think that this linking paragraph in the reasoning of the Court should be read as laying down any rule of general application regarding composition of bodies. A comprehensive evaluation is required and I attach particular weight to the statutory context. It is true that, at the relevant time, ten members of the Council were elected by the profession, but eight were to be appointed to represent the universities and the two Royal Colleges. Two also were to be appointed by the Minister to represent particular areas of medicine. Finally, three were to be unconnected with medicine. Looking at the composition of this Council as a whole, it could not be described as a representative body of the medical profession. It simply is not that. It is, in this way, in sharp contrast with the respective Dutch bodies representing the medical and legal professions, which were considered by the Court in *Pavel Pavlov* and *Wouters*.

60. Thus, it is not possible to conclude from the composition of the Medical Council and the Act which establishes it that it is an association of undertakings. I find both the analysis of the Gilligan J, in the case of the Dental Council, and of the learned trial judge in the present case compelling. I agree, in particular with McKechnie J in declining to countenance a *"numbers game."* He rightly held that *"the decisive and ultimate question must always centre on the nature of the activity carried on."*

61. The high water mark of the appellant's case concerning the nature of the impugned measure is that it restricts advertising. I fully accept that restrictions on advertising, in the ordinary way, fall within the economic field. It is beyond question that any restriction on the promotion or sale of economic goods and services is capable of reducing competition. However, these views may be heavily qualified in the case of advertising in the liberal professions. The closer the professional service is to ordinary market activity in the sale of goods or services, the more difficult it will be to justify any restrictions. The services of accountants, economic consultants, engineers and architects would tend to fall at one end of the scale, while medical and legal services would be at the other. There has been some ebb and flow in thinking with regard to rules on advertising in the legal profession. What was once seen as a desirable liberalisation is now seen, by some at least, as leading to the promotion of services in a manner not necessarily in the public interest. In my view, advertising of medical services undoubtedly falls into a special category. No doubt, a medical doctor, charging a fee is providing an economic service. But it is of a special kind: it concerns the health and life of individual patients and of the public. One does not need to delve very deeply into history to discover examples of sellers of quack medicine and dubious remedies. There is an indisputable public interest in discouraging the promotion of unproven or fraudulent medical practices.

62. The European Court has had occasion to consider a Belgian restriction on advertising by a dental technician in Case C-445/05 *Doulamis* (judgment 13th March 2008), though in a somewhat different legal context. Belgian law imposed a broadly worded ban on advertising of treatment of dental or oral ailments. The applicant wished to challenge it but could not attribute the ban, which was imposed by a public law of general application, to any undertaking or association of undertakings. He invoked the principle that the Member States, by virtue of Article 10EC must not introduce rules which tend to render ineffective the competition rules applicable to undertakings. As I endeavoured to explain in my opinion as Advocate General in Case 140/94 to 142/94 *DIP and others v. Cumune di Bassano del Grappa* [1995] ECR 1-32597:

> *" Accordingly, in what is now well established line of case-law…….. it has been held that Member States are bound by Article 5 of the Treaty [now Article 10EC] to abstain from adopting any measures, including legislative measures, which could jeopardise the attainment of the objectives of the treaty. Consequently, since Articles 85 [now 101] and 86 [now 102] are concerned with the maintenance of effective competition between undertakings, Member States must not undermine the full application and effectiveness of those articles."*

63. The court in *Doulamis*, having recalled this principle, held that the Belgian law at issue did not fall within that prohibition. This was because there was no evidence that the law *"encourages, reinforces or codifies concerted practices or decisions by undertakings."* Nor, it held, was there anything *"to suggest that the law at issue had been divested of the character of legislation in that the Member State in question has delegated to private economic operators responsibility for taking decisions affecting the economic sphere."*

64. Advocate General Bot in his opinion in *Doulamis* expressed views about advertising restrictions related to medical services. He regarded the Belgian ban on advertising as justifiable in the general interest. He explained:

> *"In the first place, healthcare services differ from other services. They affect the physical integrity and psychological balance of the recipient. Moreover, a patient who avails himself of those services is responding to a genuine need related to the restoration of his health and, in some cases, the protection of his life. Bearing in mind the importance of what is thus at stake, when having to decide whether or not to avail himself of treatment, the patient does not have the same freedom of choice as he does with other services. When he avails himself of treatment, the patient is not satisfying a desire but responding to a need.*
>
> *In the second place, the dental care sector, as with all activities in the healthcare sector, is one in which, in my opinion, the degree of "asymmetry of information" between the provider and the recipient of the service…… is at its highest. This means that, in his area of activity, the service provider has a level of competence which is very much higher than that of the recipient, so that the latter is not in a position to make a genuine assessment of the quality of the service he is purchasing."*

65. The remarks of the Advocate General did not deal directly with the question of an association of undertakings. That was not an issue in *Doulamis*. Nonetheless, they are helpful in deciding whether the advertising restrictions are of a purely economic character. The European Court, as has been shown, does not base its conclusions on any rigid set of rules. Rather it assesses the totality of each situation, looking at the legal, economic and, where appropriate, social aspects of any impugned measure. The end in view is to see whether the competition rules of the Treaty are engaged.

66. It is material to recall that the decision of the Fitness to Practice Committee was based, in large part on the findings that the appellant had been engaged in a self promotion and advertising and that he purported to imply that he had unique solutions to health problems which were liable to raise unrealistic patient expectations. These findings did not relate purely to activity in what the European Court calls the *"economic sphere."* Rather the Committee was predominantly concerned with the use of advertising to mislead potential patients into the belief that the appellant had special and unusual skills and that he could solve their health problems. The application of the Ethical Guide in these circumstances was characteristic of the exercise of power in the public interest rather than an action taken in the economic sphere in protection of the interests of medical practitioners as undertakings.

67. In my view, the advertising restrictions imposed by the Ethical Guide were predominantly motivated by considerations of the interests of patients which is in the public interest. They were only incidentally concerned with economic matters.

68. When one looks at the provisions of the Ethical Guide in combination with the provisions of the Act of 1978 regarding the functions and composition of the Medical Council, it is clear that the Council cannot be considered to be an association of undertakings. Accordingly, I would dismiss the appeal and affirm the order of the High Court