Neutral Citation Number [2006] IEHC 187

THE HIGH COURT

[2004 No. 19901 P]

BETWEEN

RAMADAN HEMAT

PLAINTIFF

AND
THE MEDICAL COUNCIL

DEFENDANT

Judgment delivered by Mr. Justice William M. Kechnie on 11th day of April, 2006.

The Parties:
1. The plaintiff in these proceedings is a qualified medical doctor. The defendant is a statutory body having been established pursuant to the Medical Practitioners Act 1978, as amended, and is entrusted with the powers, duties and responsibilities, specified thereunder. In purported discharge of these responsibilities, the Council has from time to time, usually every five years, issued what it describes as "A Guide to Ethical Conduct and Behaviour". As a member of the medical profession, Dr. Hemat is bound by these guidelines. Alleging that a certain advertisement circulated by him was in breach of this code, the Council, following complaint, initiated a procedure which resulted in disciplinary proceedings being taken, and in a sanction being imposed on him. Being of the view, that under both domestic and European law, this Guide and its application to him is unlawful, Dr Hemat instituted judicial review proceedings, and in respect thereof, sought leave from O'Neill (J.) on 24th November, 2003. On the hearing of that application, the learned judge took the view that insofar as matters of community law were concerned, the same should more properly be pursued by way of plenary summons. Hence the institution of the present proceedings.

The Preliminary Issue:
2. In the Statement of Claim which followed, the plaintiff, having alleged that the defendant Council was an undertaking or an association of undertakings, claimed that certain provisions of the Guide and their application to him, constituted a breach of ss. 4 and 5 of the Competition Act, 2002 and/or articles 81, 82 and 86 of the EC Treaty. Having put in issue the assertion that the Council was an undertaking or an association of undertakings, within the meaning of these provisions, both the plaintiff and the defendant agreed that this matter should firstly be determined before the substantive action be embarked upon. Accordingly, the agreed question for my consideration 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". This judgment therefore is concerned solely with that issue.

The General Background:
3. In or about 1985 the plaintiff first became registered with the defendant council, and since then has continued to be so registered. 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 orthomolecularism.

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 orthomolecularisation. Under the heading "The Functional Medical Clinic - clinical orthomolecularism – integrated medicine" he circulated or caused to be circulated to the public an advertisement to this effect. This advertisement in its full form is reproduced at paragraph 12 of this judgment.

4. In January 2003, following the receipt of a complaint about this advertisement, the defendant council in correspondence with the plaintiff referred him to section "D" of its Guide on Ethical Conduct and Behaviour. On 7th May, 2003 the plaintiff was advised that the Fitness to Practice Committee considered that there was a prima facie case for the holding of an inquiry, into and concerning his conduct in publishing this advertisement (s. 45 of the 1978 Act). That inquiry, which he did not attend, found him guilty of professional misconduct and from the report of the Committee dated the 31st July, 2003, it would appear that its findings were based on a breach of certain specific provisions of the guidelines, which provisions are outlined at para11 of this judgment. Ultimately, the sanction imposed consisted of his name being removed from the register for one month and certain conditions being attached to his ongoing registration. He was also censured regarding professional misconduct and was directed to comply with the provisions of the Guide.

In essence therefore he was penalised for breaching the advertising provisions of this code and it is the validity of those provisions which is challenged in these proceedings.

The Regulatory System:
5. The Regulation of medical practice in this Country is governed by the Medical Practitioners Act 1978, as amended. This Act is divided into six parts, with Part I containing Preliminary and General matters. Part II provides for the establishment of the Medical Council with Part III setting out the rules for the establishment of a Register and for the registration of medical practitioners thereon. Part IV deals with Education and Training and the role of the Council in respect thereof; Part V, which is headed "Fitness to Practice", makes provision for the regulation of conduct and discipline within the profession with Part VI containing the Miscellaneous Section. Finally for the purposes of the Act, the relevant Minister is now known as the Minister for Health and Children.

6. Part II of the Act:

(1) The Medical Council was established under s. 6 of the Act "to fulfil the functions assigned to it by this Act".

(2) The members of the Council, which consist of 25 persons, are appointed or elected in the manner following:- (Section 9)

(a) one person is appointed by each of the following bodies, namely University College Cork, University College Dublin, University College Galway, the University of Dublin and the Royal College of Surgeons.

(b) two are appointed by the Royal College of Surgeons, one to represent surgical specialities and the second to represent jointly anaesthetics and radiology,

(c) two are appointed by the Royal College of Physicians, one to represent the medical specialities and the second to represent jointly the specialities of pathology, obstetrics and gynaecology.

(d) one person is appointed by the Minister, after consultation by him with such body or bodies as in his opinion, represent psychiatrist,

(e) one person is appointed by the Minister, after consultation by him with such body or bodies as in his opinion, represent general medical practice,

(f) ten registered medical practitioners engaged in the practice of medicine in this State, of whom at least –

(i) two shall be consultants in general hospitals not being consultant psychiatrists,

(ii) one shall be a consultant psychiatrist,

(iii) one shall be engaged in community medicine,

(iv) one shall be engaged in hospital practice, other than as a consultant, and

(v) two shall be general practitioners

These ten doctors shall be appointed by election by their fellow registered medical practitioners, and

(g) four persons are appointed by the Minister at least three of whom,

(i) shall not be registered medical practitioners, and

(ii) shall, in the opinion of the Minister, represent the interests of the general public.

(3) Those ten members, who are referred to at s. 9(1)(f) of the Act, shall be elected in accordance with regulations made by the Minister; (see Sec. 11)

(4) The Second Schedule to the Act contains detailed rules with regard to the Council, governing such matters as tenure of office, the holding of meetings, the procedures thereat etc.,

(5) If the Council should fail, refuse or neglect to perform its functions, the Minster may direct it to so do: and if it fails to comply with such a direction, the Minister may remove from office all members of the Council (s. 15).

(6) The Council must keep proper books of accounts, which must be audited by the Minister's appointee, at least once a year. The auditor's certificate and report, together with the accounts, must then be submitted to the Minister and a copy of such documents must be available for public purchase and must also be laid before each house of the Oireachtas, and

(7) The Council, is funded through the charging of fees for the various services which it provides, but such fees must have the approval of the Minister (s. 25).

7. Part III of the Act

The Council must establish and maintain a register of medical practitioners (s. 26) which covers provisional, temporary and full registration. The Council has a significant role in ensuring that only those statutorily entitled to be registered are in fact registered, and it may refuse to register, or to restore the name of a person to the register, on the grounds of his or her unfitness to practice. Sections 27 – 33.

8. Part IV

The Council has a duty to ensure the suitability of medical Education and Training, including post graduate education and training, in any establishment recognised by it and to set and maintain standards required for different levels of qualification.

9. Part V

(1) The Council, under s. 13 of the Act, may establish committees to perform any of its functions and duties, but must establish committees with regard to its educational and training role and also with regard to its regulatory role over the conduct and fitness to practice of its members. This latter committee is known as the Fitness to Practice Committee and is governed by Part V of the Act.

(2) The Council (or any person) may apply to the Fitness to Practice Committee for an inquiry into the conduct or fitness to practice of any medical practitioner and in certain circumstances the Council may direct that committee to hold such an inquiry, even if otherwise it did not intend to do so. When conducting such an inquiry the Fitness to Practice Committee shall have, in respect of the attendance and examination of witnesses and the compulsory production of documents, the same power as the High Court (section 45).

(3) The Council, following a finding of misconduct or unfitness (on the grounds of physical or mental disability) may erase a person's name from the register or may impose more limited sanctions but save for admonishment, the same must, for their validity, be confirmed by the High Court (section 46 and 47).

(4) Under s. 51 of the Act, the Council acting in the public interest, may apply to the High Court for an order suspending from registration the name of any registered practitioner, and

(5) Under s. 54 of the Act, the Council must notify the Minister when it proposes:- (a) to erase the name of a person from, or to restore the name of the person to, the register; (b) to suspend or remove the suspension of a person's name from the register or (c) to attach conditions to the retention of the registration of a person.

10. Part VI
This part contains a number of Miscellaneous provisions but only sections 63, 65 and 69 are material to this case. Under section 63 the Minister may assign additional functions to the Council on any matter relating to the practice of medicine or to persons engaged in such practice, with section 65 giving her power to make regulations for any purpose in order to give effect to the provisions of the Act. Section 69, which imposes certain functions on the Council reads as follows:

> "69(1) It shall be a function of the Council to advise the Minister either at the request of the Minister or on its own initiative, on all matters relating to the functions assigned to the Council under this Act.
>
> (2) It shall be the function of the Council to give guidelines to the medical profession generally on all matters relating to ethical conduct and behaviour.
>
> (3) It shall be the function of the Council to inform the public on all matters of general interest relating to the functions of accounts".

Section 69(2) contains the provision under which the Council issued its Guide on Ethical Conduct and Behaviour and accordingly is of direct relevance to this case.

The Guide:
11. The 1998 Fifth edition of the Council's Guide to Ethical Conduct and Behaviour is divided into six different sections and also has a number of appendices attached thereto. Matters such as the conduct and behaviour of doctors, their relationship with patients and their professional responsibilities are all dealt with. As are other issues such as confidentiality, patient consent and reproductive medicine. In addition, the rules deal with public announcements in the context of setting up practice, with a doctor's relationship with the media, and with advertising. See section D. More particularly, paragraphs 6.1 and 6.2 of the Guide set out instructions as to the type and number of announcements which a doctor may place in the national or local press or in a national or local directory when commencing practice. Paragraph 15, of the Guide which is headed, "The Media and Advertising" contains the following provisions:-

> "15.1 Educating the Public
>
> 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 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 to be 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 of personal distress nor should it raise unrealistic expectations.
>
> 15.3 …
>
> 15.4 …
>
> 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 that that to the public and whether there has been an element of self advertising 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 advertising, or publicity to enhance or promote a professional reputation for the purpose of attracting patients is a professional misconduct".

Finally reference must be made to Appendix A, which is headed "In Practice Information", and in particular to paragraphs 3, 5 and 7 thereof. These read as follows:-

> "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".

It will be recalled that the report of the Fitness to Practice Committee dated 31st July, 2003 found that in causing the publication of the advertisement next hereinafter quoted, the plaintiff was in breach of the Guide and in particular, it identified in that regard, paragraphs 6.1, 6.2, 15.1, 15.2, 15.5 and paragraphs 3, 5 and 7 of Appendix A, thereof.

The Advertisement in Question
12. This reads 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 PATEIENT'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"

13. The Evidence
Dr. Francis O'Toole from the Department of Economics at University College Dublin, and who is an expert in the economic aspect of competition law, was called to give evidence on behalf of the plaintiff. He told the court that in general, any restriction on advertising would have an impact on the demand curve for the particular product or service in question, and that in a functioning market, knowledge, to include information on price, quality of service and products on offer, was critical. This was from both the supplier's and the consumer's points of view. Accordingly, all economists would favour a high level of advertising.

14. In the market for medical services however, he acknowledged that perhaps some restrictions may be applicable but that when one considers for example para. 3 of Appendix A to the Guide, one finds virtually a blanket ban on all public advertising and not simply one based on price. This, in his view, was a very significant prohibition. Other similar examples can be found in Section D at para. 6 (Setting up Practice) and para 15 (The Media and Advertising). In all, the restrictions were both significant and substantial. Whether these rules were good or bad was not a matter for him; rather the purpose of his evidence was to show that such restrictions did have economic consequences.

15. In cross-examination he agreed that the effect of such restrictions was lessened, though certainly not eliminated, by the availability of information tools such as the Internet, where an abundance of raw material on virtually every topic, was readily and cheaply available to all. He acknowledged that the 1998 Guide allowed some, but limited advertising and did agree that the sentiments contained in para. 15.1 were laudable. These, however, were not sufficient in themselves as the form and means of getting that information across to the public was lacking. Moreover, when questioned about so called externalities, meaning non-priced benefits or losses to society as a whole, and also about the problem of asymmetrical information in the medical market, he did agree that these factors were present in such a market. Finally, he did not dispute the proposition that several acts or decisions of Government, to which the competition rules would not necessarily apply, could have economic consequences. Such decisions might be in the areas of planning, telecommunications, licensing, etc.

In summary, the focused purpose of Dr. O'Toole's evidence was to establish that the activity complained of in these proceedings, namely a restriction on advertising, did have economic consequences. That conclusion, which was not disputed by the Medical Council, is one which I clearly accept as any measure which impacts upon the participation of an economic operator on a relevant market would most likely have such consequences. The acceptance of this evidence however, cannot be said to dispose of the issue in question.

16. The second piece of evidence which is relevant, and which was obtained by way of documentary question and answer, shows to a high level of confidence, that at least 15 members of the Council are, in their own right, undertakings for the purposes of competition law; with perhaps also another three, although I have not included these. They are Professor Fitzgerald, Professor Tanner and Doctor Ni Rian. There are then three further doctors solely in public practice who were treated, at least provisionally, as not being undertakings, although there is considerable debate at competition level as to the correct categorisation of these "borderline cases". (See paras 17, 54 and 55 below). There are four lay persons who certainly are not undertakings for the purpose of this case. The numerical figures given herein, include Professor Kieran Murphy and Doctor Ni Rian whose terms of office had expired at the time of the institution of these proceedings. It can therefore be seen that at least the majority of the relevant members were engaged, at the appropriate time, in economic activity to such an extent as to be correctly described as individual undertakings for the Treaty purposes.

17. Submissions
Mr. Gerard Hogan, S.C., made the following submissions on behalf of the plaintiff:-

(1) The Medical Practitioners Act 1978 makes provision for the appointment and election of 25 members to the Medical Council. Ten of these, who have to be registered medical practitioners and in current practice, shall be elected by their fellow registered doctors. Only four members of the Council represent the public and only three of these are required not to be registered medical practitioners. The rest of the membership is appointed by the Universities and by the Minister and whilst the Act does not specifically require that these individuals should be doctors, nevertheless the practice has been and continues to be, that all such persons are qualified medical doctors. As the evidence shows, the majority of the Council are self employed persons offering services on the medical services market in return for a fee and accordingly are correctly described as individual undertakings. Even those who are exclusively engaged in providing public medical services, could also be described as undertakings on this market. This is due to the degree of clinical judgment which they enjoy, by reason of both their profession and the terms and conditions of the common contract. See what Advocate General Jacobs had to say on this topic at paragraph 112 of his opinion in *Pavlov and Others* (Case C-180/98) [2000] E.C.R. 1-6451.

delivered on the 23rd march, 2000. Accordingly given that the vast majority of the individual members are undertakings, it must be held that the Council itself is an association of undertakings, and furthermore, that its decision to restrict advertising is one which correctly should be categorised as an economic activity. It therefore must follow that the decision of the Council is within the purview of competition rules.

(2) Prior to the decision of the European Court of Justice in Pavlov and in *Wouters, and Others v. The Dutch Bar* (Case C – 309/99) [2002] E.C.R. 1-1577 judgment 19th February, 2002, it was assumed that regulatory bodies, which were governed by public law were outside the ambit of Article 81 of the EC Treaty. This applied even where a small fee was charged for the service in question. A case in point is *Carrigaline Community Television v. Minister for Transport* [1997] 1 ILRM 241 where, notwithstanding the imposition of a fee in return for the issue of a licence, the court held that the Minister in question was not acting privately but rather was exercising a public function. Accordingly decisions of such bodies were not captured by competition law principles. This view could also be seen at European level from decisions, such as Sat *Fluggescellschast v. Eurocontrol* (1994) ECR 1-43.

(3) Commencing however with the decision in *Pavlov*, one can see a growing tendency in European case law for incorporating decisions by regulatory bodies within the framework of competition principles. In *Pavlov* the court held that a representative body of medical specialists, by its decision to set up a pension fund to manage a supplementary pension scheme and to request a public authority to make membership of that fund compulsorily for all members of the profession in question, was engaged in economic activity and was thus acting as an undertaking within the ambit of Article 81, and other Articles of the Treaty. See paragraphs 50 - 53 and 57 – 65of the judgment.

(4) Perhaps of even more significance according to the submission, was the decision of the European Court of Justice in *Wouters*. The issue in that case turned on a decision by the Bar of the Netherlands to prohibit inter disciplinary practice between its members and those of the accountancy profession. That Bar, which was established pursuant to law, was described as a public body and had vested in it functions which could be similarly so described. Having referred with approval to its previous decisions in *Poucet* and *Pistre* and (Case C-159/91 & 160/91 [1993] E.C.R. 1-637 and *Eurocontrol*, and having pointed out that the principle of solidarity, through the existence of a social function did not exist (*Poucet* and *Pistre*) and neither could it be said that the powers exercised by the Bar of the Netherlands were those typically exercised by a public authority, (*Eurocontrol*) the court concluded, that whilst the Bar did act as a regulatory body of a profession, the practice of that profession itself however constituted an economic activity. In support of its findings it relied on the fact that the governing bodies of the Bar were composed exclusively of members of the profession, elected by fellow members and that when adopting the measure prohibiting inter-disciplinary practice, the Bar was not required to act in accordance with any specified public interest criteria. Accordingly the situation presenting in *Wouters* was very similar to that in this case and therefore the principles outlined therein, being those of general importance, should be applied to present circumstances. In consequence the Medical Council should be held to be an association of undertakings.

(5) Counsel also dealt in some detail with the *Eurocontrol* case and referred the court to paragraphs 20 – 31 of the judgment. He explained the rationale of the decision as turning on the fact that *Eurocontrol* was acting on behalf of Contracting States and in so doing was principally exercising a regulatory function, being one which was not economic in nature. That company was involved in air navigation control and air safety, and whilst the imposition of route charges, which was the subject matter of the action, could in itself constitute an economic activity, the same was nevertheless so intrinsically bound up with its other functions, that taken as a whole it could not be said that *EuroControl* was acting as an undertaking when exercising the disputed activity. Those other functions were carried out in the public interest, which interest was to protect the users of air transport and the populations affected by aircraft flying over them.

(6) The Irish decision of Gilligan J. in *Kenny v. Dental Council*, [2004] IEHC 29, was then referred to and discussed by Mr. Hogan S.C. That case, involved *inter alia* an allegation that the Dental Council, by failing to make regulations for rendering lawful the practice of denterurism, (being certain defined dental work carried out by persons who were not registered dentists), violated the provisions of the Competition Act 2002 and also certain Treaty provisions. In fairness to the Council it should be noted the absence of any such scheme was due to the Minister's failure to consent, but nothing turns on this point. The argument before the court, on this issue, turned on whether the Council was an Association of Undertakings.

(7) The decision of the learned trial judge, which was quoted extensively to the court, to declare the Dental Council exempt from the provisions of the competition rules was challenged in a number of aspects. Firstly it was pointed out, that just as in *Wouters*, the Dental Council was regulating the activities of persons, the majority of whom were undertakings in their own right. Secondly it was seriously doubted whether the making of a scheme for auxiliary dental workers, could correctly be described as the mere exercise of a power in the public interest. Thirdly it was submitted that the failure to make such a scheme had clear economic implications in that it continued the non recognition of denturism. Fourthly the composition of the Dental Council was looked at, and by reference to paragraphs 87 and 88 of the decision in *Pavlov*, it was suggested that the emphasis placed by Gilligan J. on the fact, that only six dentists in private practice sat on the Council for at least one period of time, was misguided. Moreover whilst it was acknowledged that differences did exist between *Kenny* on the one hand and *Wouters* and *Pavlov* on the other, it was nevertheless claimed that such differences could not affect the underlying principles outlined in such cases. Comment was also made on how unsatisfactory it was, to have such regard to the precise composition of a body such as the Dental Council, where that

composition was heavily influenced by the results of five year elections and/or periodic nominations. In addition the mere fact that the 1985 Dental Council Act expressly excluded professional exclusivity, so far as membership was concerned, could not be dispositive of the issue. If it was otherwise, avoiding measures for professional bodies would be relatively simple to devise and even easier to implement. Finally counsel did not agree that there could be found in the 1985 Act any compelling obligation on that defendant body to have true regard to the public interest when performing the relevant function, which was the subject matter of the litigation in *Kenny*. Likewise with regard to Section 69(2) of the Medical Practitioners Act 1978. Overall therefore it was suggested that Kenny could and should be distinguished from the present case but that if that was not possible, the same should not be followed by this court.

(8) In conclusion it was submitted that since the majority of members on the Medical Council were undertakings in their own right then the decision by it, which prevented the plaintiff from self advertising, was a decision taken by an association of undertakings, and thus given its economic significance, was a decision capable of challenge by reference to both the Competition Act 2002 and Articles 81 and 82 of the EC Treaty.

18. Mr. Eoin McCullagh S.C. appeared on behalf of the Medical Council and submitted as follows:-

(1). It is accepted that the decision in issue in this case is one capable of having economic consequences, but such consequences can equally arise where a power is exercised by Government or a Minister or other agency thereof. The *Carriagaline* case was referred to as containing an example of this, as were the general areas of planning, telecommunications and other licensing regimes. The fact that some persons may have to suffer an economic impact as a result of a government decision is one which regretfully may have to be suffered in the greater good. Such a concession however is not relevant to this case as the test of economic consequence is not the relevant criteria to decide the issue in question.

(2). The plaintiff, it is submitted, carries a heavy onus of proof, where as in this case, the body in question is a public authority.

(3). The 1978 Act was opened and in order to demonstrate its regulatory content various provisions thereof were referred to. The role of the Medical Council with regard to registration and education was highlighted, as was, the role of the Fitness to Practice Committee and that of the courts in the enforcement of its decisions through this public agency. All of the Council's functions were directed towards establishing, maintaining and serving the public interest. This included the Guide which was and could only have been issued for the common good. The case of *Philips v. The Medical Council* [1994] 2 I.R. 205 was referred to.

(4). The composition of the Council was looked at, as well as the inter-play between the statutory provisions involved in this regard and the actual status of the defendant's members. It was said that only ten members are required to be registered medical practitioners, and whilst it was possible to have a total of 22 doctors serving on the Council and possible to have a total of 21 being undertakings in their own right, the strict legal position was that apart from the ten who were directly elected, there was no requirement that any of the other member should have a medical qualification. In any event at least seven, if not more, of the relevant members were not self employed and accordingly over 30% of the full membership were not undertakings in their own right. Therefore given this substantial number, it could not be said that the body, as a whole, constituted an association of undertakings.

(5). The cases of *Pavlov* and *Wouters* were then referred to and the core issues upon which these cases were decided, were isolated and dwelt upon. These cases, it was suggested, have many distinguishing features from the present case. For example in *Pavlov* all the members of the LSV, the representative body, were undertakings and therefore the position of professional organisations, which had a mixture of self employed and employed persons, was not in issue and was not decided in that case. See paragraph 125 of the opinion of the Advocate General. Consequently it cannot be said that *Pavlov* is an authority for the proposition now advanced on behalf of the plaintiff. Likewise with *Wouters* where all were self employed economic operators acting on their own behalf when offering services in return for a fee and being obliged to carry the risk associated with there activity.

(6). The *Guy Clair* case, (C-123/85) 1985 E.C.R.

391, and the judgment in the *Commission v. Italian Republic*, ((Case C-35/96) [1988] ECR 1-3851 were also open to this court. The latter decision, at paragraphs 41 – 44 of the report, makes quite clear the basis upon which the court held, that the professional body known as the CNSD was an association of undertakings within Article 81 of the Treaty. That decision and the judgment of the court in the Road Transport Tariffs case, - *Centro Servizi Spedipoto Srl v. Spedizioni Marittima dell Golfo Srl*, (Case C-96/94) [1995] E.C.R. 1-2883 - outlines the effect and consequence which the exercise of power in the public interest has, on the courts evaluation of the competition status of any given body. From these cases it is claimed that no support can be drawn for the proposition now advanced on behalf of the plaintiff.

(7). There is no doubt but that a public authority can be an undertaking when exercising certain of his powers, but equally so it well not be where the activity in question is of a public nature and carried out in the public interest. See *Cali and Figli v. Serviz* (Case C- 343/35) [1997} E.C.R. 1-1547 where it was held that a distinction must be made between the State exercising its official authority and where it simply carries on an economic activity, as for example, by offering goods and services on a market. It could not be seriously claimed it was submitted, that the issuing of the ethical Guide was an economic activity. In this context it was suggested that the true test is the nature of the activity carried on rather than the precise composition of the body in question. See the decision of *Eurocontrol* in particular at paragraphs 18 – 31 thereof.

(8). In support of the proposition that the Medical Council was in fact a public authority in the sense of that term being understood in the present context, it was submitted that there were two Irish decisions which helped in this regard, namely *Phillips (supra)* and *Kenny (supra)*. In addition it is claimed that in deciding this issue, the court should not simply isolate one function entrusted to the body in question, in this case the Medical Council, but rather should look at the aim, nature and rules of the four major activities entrusted to the Council under and by direction of a public statute.

(9). Finally it was claimed that the decision of Gilligan J. *in Kenny v. The Dental Council* was correct and that his analysis and application of *Wouter* was equally correct.

(10). In conclusion therefore it was submitted on behalf of the Medical Council that its function were purely of a

regulatory nature not involving economic activity and therefore it could not be said that the decision taken by it, in respect of the plaintiff was a decision taken by an association of undertakings for the purposes of competition law.

Decision

19. Article 81 of the EC Treaty declares that certain agreements, decisions and concerted practices by undertakings or associations of undertakings are incompatible with the common market. Article 82 prohibits an undertaking, in a dominant position, from abusing that position within the market. The definition therefore of the term "undertaking" is critically important in this regard as it directly determines the scope of these competition rules. The Treaty itself gives no guidance on this point, (although Article 1 of Protocol 22 of E.E.A. Treaty does) and it has not been suggested that any reliance, for the purposes of this case, should be placed on the definition of "undertaking" as contained in s. 3 of the Competition Act 2002.

20. The basis definition, which has been used by the Courts and the Commission in numerous cases, is that as stated in *Hofner and Elser v. Macrotron* (Case C-41/90) [1991] E.C.R. 1-1979 where the court, at paragraph 21 of its judgment, said "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed". See also *Federation Francaise des Societes d'Assurance* (Case C-244/94) [1995] E.C.R 1-4013, (para. 14) The reference to the nature of the legal/financial structure as having no relevance is designed to prevent any advantage being taken from the precise form in which the economic activity is exercised. This is so, irrespective as to how the legal framework is style or titled under national law. See *BNIC v. Clair, Supra*. It is clear from this definition that the term "undertaking" must be construed in a broad and functional way. All the major textbooks on competition law recite examples of entities which, throughout the years, the E.C.J. and the Commission have held to either fall within or to fall outside the meaning of this term. Since our purpose is more specific than general, it is not necessary to set these out, although some general rules, ancillary to the above definition, must be considered.

21. For a considerable period after the competition rules came into being, there was a firm view that members of the liberal profession did not immerse themselves in commerce and accordingly could not be considered undertakings. But more recently that view, as a matter of principle has been abandoned and as a matter of practice has been reversed. See Monti: "Competition in Professional Services: New Life and Challenges", a speech delivered by the former Commissioner on 21st March, 2003. The fact that some, or indeed almost all to some degree, of these professions are regulated, is not by itself, a factor which alters this position. Entities, such as Customs agents (*Commission v. Italy* (Case C-35/96) ([1998] E.C.R. 1-3851): Opera Singers (Re *RAI v. UNITEL*, (Commission Decision 78/516) OJ 1978 L157/39) and self employed medical specialists (*Pavlov and Others, supra*) have all been held capable of constituting undertakings within Articles 81 and 82 of the EC Treaty. To underpin the irrelevance of legal structure, it matters not as a point of principle, whether the entity is publicly or privately owned. Accordingly public authorities, and bodies subject to public law have been held to come within the rules. See *Hofner (supra) and Banchero* (Case C-387/93) [1995] E.C.R. 1-4663. Bodies controlled by the State or those in semi government ownership or those to whom specific tasks have been statutorily entrusted , are all capable of coming within Article 81. See *Italy v. Commission* (Case C-35/96) [1985] E.C.R. 873 and the *Spanish Courier Service* case, (Commission Decision 90/456) OJ 1990 L233. With such bodies, as indeed with all such bodies, an entity may be treated as an undertaking for some purpose and not for other purposes. *Commission v. Italy:* (Case 118/85) [1987] E.C.R. 2599, para 7.

22. An entity or entities can also operate as an association of undertakings within the meaning of Article 81. The European Court of Justice clearly so decided in *Commission v. Italy* (Case C-35/96) [1988] ECR 1-3851 where it held, that despite its public law nature, the National Council of Customs Agents was still an association of undertakings within the scope of that Article. Another example is to be found in the *Wouters* case, which is considered in more detail at para.37 of this judgment.

23. But critical to all decisions where such bodies were held to be undertakings, was a finding by the court that the provision or decision in question, could correctly be categorised as an economic activity, as otherwise no matter how objectionable the conduct might be, an entity cannot be said to be an undertaking for competition purposes.

24. Unfortunately it has not been possible to date for the European Court of Justice to lay down a general set of rules by, or pursuant to which, this difficult question, as to what constitutes an undertaking, can be resolved. The court has a tendency to determine the issue on a case by case basis, which perhaps is not surprising given the widely varying nature of the circumstances which can present themselves. Particular problems arise however, with state owned or controlled entities, with bodies assigned special responsibilities under statute, with schemes in the social sphere of society, with professions and with bodies which, under varying degrees of legislative influence, regulate the practice of those who are members thereof. Diverse as it maybe, it seems to me that the starting point must be to consider some of the relevant case law, and therefrom to transpose, from what the court has said, some appropriate test or criteria by which the issue in this case can be resolved.

25. In *Hofner and Elser v. Macrotron, supra*, the question arose as to whether the practice of employment procurement of business executives, which was exclusively granted by legislation to a public employment agency, was captured by Articles 81, 82 and 86 of the Treaty. That in turn directly raised the issue as to whether employment procurement was an economic activity and even if it was, whether it could still be excluded from Article 82, as having been carried on by a public agency. The court answered both of these questions in a pro-competitive way. Having set out its definition of undertaking (see para.20 above) it went on to say at para 22:- "The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.." Therefore it can be seen the fact that the activity in question was carried on by a public body, did not by reason of that alone, exclude the operation of Article 81. Once the activity itself was clearly of an economic nature it was captured by that provision.

26. A number of cases involving schemes, under national social security systems, were referred to, including the joined cases of *Poucet* and *Pistre*(Case c-159/91) [1993] E.C.R. 1-637. At issue were sickness, maternity and old age insurance schemes. Under the social security system in question, all self employed persons, in non agricultural occupations, were subject to compulsory membership of these schemes. The plaintiffs, who did not object to the principle of compulsory affiliation, nevertheless claimed, that for this purpose, they should be free to approach private entities operating within the community market, and should not be forced to abide by the conditions imposed upon them by the defendants, who managed the above mentioned insurance schemes, and who it was claimed, also held and abused their dominant position in that regard.

27. The court, in deciding whether the organisation charged with managing these schemes was or was not an undertaking, applied to this question the principle of solidarity and held that these schemes pursued a social objective. It examined the details of the scheme in order to identify how and in what manner its provisions espoused this principle of social objective. It pointed out how the scheme was funded and how the benefit entitlement continued for a period of one year after a person ceased to be a member thereof. At para.10 of the judgment the court said "Solidarity entails the redistribution of income between those who are better off and those

who, in view of their resources and state of health, would be deprived of the necessary social cover".

In addition the court noted that the management of the scheme was entrusted by statute to social security funds, whose activities were subject to and controlled by the State. When performing their functions therefore, they had to apply the law and had no influence over the amount of the contributions, the use of the assets or the fixing of the level of benefits.

Taking all of these matters into account the court concluded at para 18 that the system "fulfil(s) an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of contributions."

Accordingly it held that the activity was not an economic activity.

28. A case of some significance is that of Pavlov and Others which again dealt with the question of compulsory affiliation of self employed persons. This time the employment sector was that of medical specialists and the scheme was a supplementary pension scheme. Before looking however at the facts of that case, it should be pointed out that the court refused to extend its previous decisions in the *Albany International* (Case C-67/96) [1999] E.C.R. 1-5751, *Brentjens* (Case C-117/97) [1999] E.C.R.1-6025 and *Drijvende Bokkens* (Case C- 219/97) [1999] ECR 1-6121), to cover agreements reached or schemes established, otherwise than those concluded in the context of collective bargaining between employer and employee.

29. The facts in *Pavlov* can briefly be outlined as follows. The pension system in the Netherlands is governed by national legislation. This provides for three types of pensions, namely the statutory basic pension, supplementary pensions connected with employment and the third, individual pensions. This case concerned the second type. These supplementary pension schemes usually cover a particular sector of the economy including professions, and are normally managed collectively by pension funds of which membership is compulsory. In 1973 the medical specialist's profession established a pension fund which was governed by statute and pension rules. At the request of the LSV, which set up the fund, and which was the professions representative body, the Minister for Social Affairs made membership of the scheme compulsory to all members of the profession. Article 1(2) of the funds rules, allows certain groups of medical specialists, including salaried employees, to apply for exemption from the otherwise compulsory requirement of the scheme. Mr. Pavlov and the other applicants, were refused exemption even though they claimed that as and from a certain date they practised their speciality only as salaried employees. Having challenged their continuing obligation to make payments to this fund, the court had to consider whether the decision by the LSV, to set up a pension fund to manage a supplementary pension scheme on behalf of the profession of medical specialists, and to request the Minister to make membership of that scheme compulsory, was in breach of Article 81 of the Treaty. The court in order to answer this specific question, firstly considered whether the medical specialists practitioners were individual undertakings in their own right and secondly whether by its actions the LSV was an association of undertakings.

30. The conclusion reached by the court can be summarised as follows:

(a) the LSV at the relevant time was an organisation made up solely of self employed medical specialists,

(b) these medical specialists

(i) offered their services on a relevant market,

(ii) received payment in return for such services, and

(iii) assumed the financial risk of their practice,

(c) the complex and technical nature of the services offered was not relevant; accordingly,

(d) such specialists, in accordance with the *Hofner* definition, were therefore in themselves undertakings within Article 81 of the Treaty,

(e) they were not however, for the reasons set out at paragraphs 79 and 80 of the judgment, acting as consumers when making contributions to the scheme,

(f) the fact that the LSV, or indeed any organisation was governed by public law, did not by itself preclude the application of Articles 81 or 82, and

(g) nor did the fact that the main task of the Association was to protect the interest of its members and in particular their economic interests in negotiations with the Netherlands authorities.

Accordingly, given these circumstances and the fact that at the relevant time the LSV was composed exclusively of self employed medical specialists whose economic interests it defended, the court held that the LSV was an association of undertakings.

31. This conclusion was arrived at, after the court made the following observation which, however, on the particular facts did not apply to the Pavlov case. It said, at para.87 of its judgment:-

> "87. Admittedly, a decision taken by a body having regulatory powers within a given sector might fall outside the scope of Article 85 of the Treaty where that body is composed of a majority representative of the public authorities and where, on taking a decision, it must observe various public interest right criteria". It cited as an authority for this proposition the case of *Centro Servizi Speedipoto v. Spedizioni Marittima de Golfo Slr* (Case C-96/94) [1995] E.C.R. 1-2883 (the *Road Transport Tariff* case) and *Commission v. Italy* (Case C-35/96) [1998] ECR 1-3851. (the Customs Agents case).

32. Although the full facts of the Road Transport Tariff case do not require outlining in this judgment, it should be pointed out that the business of road haulage in Italy is governed by statute law and to operate as such, one must be on a register and must, in respect of charges, comply with a set of "compulsory tariffs". These tariffs are proposed by a central committee, which consists of 17 public representatives and 12 representing the interests of the economic operators in this sector. The fixing of the tariffs is done by reference to specific criteria under Decree No. 56, which essentially uses as a yardstick, the market average cost of well managed operators under normal conditions of business, providing also for a fair return to the operator. On these facts the court at paragraphs

23 – 25 of its judgment ruled as followed:-

> "23. As regards national rules such as those laid down by Italian law, it should be noted first, that the central committee is composed of 17 representatives of the public authorities and of a minority of 12 representatives of associations of economic agents.
>
> 24. Moreover upon the adoption of its proposals the central committee is obliged to observe various criteria defined in the law and specified in Decree No. 56 of the President of the Italian Republic, cited above.
>
> 25. It follows from the foregoing considerations that, in a system for fixing road haulage tariffs such as that established by the Italian law, proposals discussed by the committee cannot be regarded as agreements, decisions or concerted practices between economic agents which the public authorities have imposed or favoured or the effects of which they have reinforced."

33. The second case cited by the court in *Pavlov* was *Commission v. Italy*. In Italy the business of Customs Agents which involves the provision of services regarding customs clearance procedures, is in general regulated by law. To conduct such business agents must be authorised and must be entered on a national register. That register is compiled of departmental registers which in turn are held by Departmental Councils of Customs Agents. The members of these councils are elected, by secret ballot, by all custom agents who are entered on the register. The head body of the Departmental Councils is an entity entitled to CNSD, which is governed by public law and whose members are elected, again by secret ballot, but this time by the membership of the Departmental Councils. This body, on proposals from the latter, sets tariffs for the various services provided by Custom Agents. Failure to observe such charges can expose an operator to a variety of disciplinary measures including the removal of his name from the register.

At two of its meetings the CNSD, on proposals from the Departmental Councils, firstly adopted a compulsory band of tariffs, which having been approved by the Minister for Finance, became law in July 1988 and secondly increased such charges as and from January 1990.

34. In proceedings taken by the Commission against Italy the court had to consider inter alia whether the imposition of these tariffs constituted a decision by an association of undertakings within the meaning of Article 81 of the Treaty. In its judgment the court held:-

> (a) that Customs Agents offer services on an identifiable market in return for which they receive a payment,
>
> (b) those agents assume the financial risk of the business or as it was put at para.37 of the judgment "if there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself".
>
> (c) the fact that the CNSD is subject to public law does not preclude the application of Article 81 of the Treaty, and
>
> (d) under the national legislation in question
>
> > (i) the CNSD, which is comprised of representatives of professional customs agents, was not precluded from acting in the exclusive interests of that profession
> >
> > (ii) the CNSD was not obliged to have regard to any public interest criteria in determining the tariffs in question and
> >
> > (iii) the Minister for Finance, had no role in the appointment of the members of the Departmental Councils or the CNSD.

On these facts the European Court of Justice held that in setting the tariffs the CNSD was acting as an association of undertakings.

35. There are then two cases which conveniently can be dealt with together. The first is *SAT Fluggesellfhast v. Eurocontrol* (Case C-364/92) [1994] E.C.R. 1-43 and the second is the decision of *Cali and Figli v. Servizi Ecologi Poto Di Genova SpA* (Case C-343/95) [1997] E.C.R. 1-1547. *Eurocontrol* is a European international organisation, which was set up by Convention, to enhance air navigation safety. Included amongst its responsibilities was a function to establish and collect the charges levied on uses of air navigation services in accordance with the Multilateral Agreement relating to the Collection of Route Charges, done in 1981. The dispute which arose in the case resulted from Eurocontrol's attempts to recover route charges imposed on Sat, a German airline. The defence raised involved a question, the resolution of which determined whether or not Eurocontrol was an undertaking for the purposes of Article 82.

In approaching this question the court considered at length the nature of the activities assigned to Eurocontrol. It pointed out that its tasks included research, planning coordination of national policies and staff training. It also had the responsibility to establish and collect route charges levied on users of air space. These charges were calculated by reference to a preset formula to which a "rate per unit" was applied. That rate was not fixed by Eurocontrol but by each of the Contracting States. In addition Eurocontrol was also required in certain circumstances, to provide navigation control in air space, for the benefit of air craft travelling through such space. Given these activities the court held that the tasks assigned to Eurocontrol were carried out "in the public interest aimed at contributing to the maintenance and improvement of air navigation safety" (see para.27). Moreover at para.28 the court said that the activity of collecting these route charges could not be separated from the organisation's other activities, and accordingly taken as a whole, the business carried on by it was "by their nature, their aim and the rules to which they are subject, connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public body" (see para.30).

The activities therefore were not of an economic nature and accordingly the responsibility of establishing and collecting route charges did not render Eurocontrol an undertaking for the purposes of Article 82 of the Treaty.

36. The circumstances of *Cali and Figli* (supra) concerned the imposition of charges for the provision of preventative pollution services in the port of Genoa. Having made a distinction between situations where the State acts in the exercise of its official authority and where it carries on some economic activity, the court stated that the agency through which the act in question was carried on was not relevant. The body in question could be part of the State's administration, or as in that case, could be a company, to which, by way of exclusive concession, the task of performing the activity was statutorily entrusted to. Again concentrating on the nature of the activity in question, the court pointed out that anti pollution surveillance in the port of Genoa was a task in the public interest "which forms part of the essential functions of the State as regards protection of the environment in maritime areas" (at para.22)

Therefore in applying *Eurocontrol* it came to the conclusion that by its nature, its aims and its rules, the activity of protecting the environment was one typically of a public authority and not one of an economic nature justifying the application of Article 82. Hence the competition rules did not apply.

37. The case most heavily relied upon by the plaintiff is *Wouters*, (supra),which involved a challenge by its members to a decision by the Bar of the Netherlands, which had the effect of prohibiting its members from practising, as such, in full partnership with accountants. Under Article 134 of the Constitution of the Netherlands, statute law governs the establishment and dissolution of public professional bodies, as well as the duties, organisation, composition and powers of such bodies. In 1952 the Bar of the Netherlands, a public body, was established by law, which law also laid down the internal regulations and disciplinary rules applicable to such body. The Bar of the Netherlands is composed of all members of the profession, some of whom, if they register with the same court, also form the District Bars of the Netherlands. The governing body of the Bar of the Netherlands is the General Council with supervisory boards performing that function at District Bar level. The members of the General Council are elected by a College of Delegates who are themselves elected by the District Bars. Article 26 of the Law on the Bar provides that both governing bodies are charged with ensuring the proper practice of the profession and can adopt measures or regulations (Article 28) to that end. Those bodies must also defend the rights and interests of the members of the profession. Regulations may be made in the interests of the proper practice of the profession as well as making provision for members who are affected by old age or who are otherwise incapacitated from work. Provision may also be made for their next of kin. Such measures or regulations may be suspended or annulled by royal decree if there are in conflict with the law or if there are against public interest.

38. In 1993 a Regulation, on joint professional activities was adopted by and operated under the aegis of the Bar of the Netherlands. This contained rules as to when and in what circumstances members of the profession could enter into a professional partnership with other professions (Articles 4 and 6). Under the recitals to this regulation, it was stated that notaries, tax consultants and patent agents were bodies with whom members of the Bar could have this type of professional relationship, but accountants were mentioned as an example of a profession with whom such professional partnership was prohibited. In addition to these provisions there were also many other rules contained in the overall regime, which rules are fully outlined in the report of the court.

39. The dispute in the case arose when Mr. Wouters, who was already a partner in the tax consulting firm of Arthur Anderson, informed the Bar of his intention to enrol at the Rotterdam Bar and thereafter to practice law as an advocate in partnership with Arthur Anderson. The second plaintiff Mr. Savelbergh, also a member of the Bar, proposed a similar arrangement with Price Waterhouse who were tax consultants and accountants. The establishment of both relationships were in breach of Articles 4 of the Regulations and were thus prohibited by the Bar of the Netherlands. Thus proceedings were instituted which eventually gave rise to a reference to the European Court of Justice.

The first matter which the court considered was whether or not members of the Bar were undertakings in their own right. Applying its decision in *Commission v. Italy* (see para.34 above) the court held that members of the Bar offered services on a legal market in return for a fee and also assumed the financial risk of their activities. Accordingly each member was an undertaking. The court then considered whether the Bar of the Netherlands, in adopting the 1993 Regulations, was an association of undertakings, on whether it was in fact a public authority exercising public functions. When considering the activity in question the court referred with approval, to the test based on the principle of solidarity/social function, (*Poucet* and *Pistre*) and also to the distinctive power test (*Eurocontrol* and *Cali and Figli*). Having ruled out the existence of any social function based on the principle of solidarity, and having declined to hold that the powers were typically those of a public authority, the court then made the point that the practice of the profession, in respect of which the Bar of the Netherlands acted as a regulatory body, was by and in itself an economic activity. As the Bar of the Netherlands could not escape the ambit of Article 81 simply by reason of its responsibility to protect its members or as a result of its regulatory function, the Bar was therefore, in passing the 1993 Regulations, acting as an association of undertakings.

40. Having so concluded the court then seemed to advance three further reasons to support this finding. Firstly the governing bodies were composed exclusively of members of the Bar who were elected solely by their fellow colleagues. Secondly the Bar of the Netherlands was not required to have any regard to public interest criteria when adopting this measure; rather the only requirement was to act in the interests of the proper profession of the members of the Bar, and thirdly the court noted the effect of the prohibition on how the members of the Bar performed their services on the legal market. Finally at para.64 of the report it said "Such a regulation constitutes the expression of the intention of the delegates of the members of the profession that they should act in a particular manner in carrying on their economic activity".

On a distinct but related interesting see the Article by Rosemary O'Loughlin *Wouters* at p. 62 of E.C.L.R. 24.

41. From this brief survey of some of the case law, it seems to me to be very difficult to lay down a precise formula by which an entity may be classified for the purposes of Articles 81, 82 and 86 of the EC Treaty. Undoubtedly there will be several cases which can evidently be assigned to one or other side of this divide, but there will also be many which will have to be decided on an individual basis, or at most by way of loose categorisation. It is not difficult to state that Articles 81 and 82 of the EC Treaty, are designed to capture conduct by bodies which is inimical to healthy competition and, save in most limited circumstances, have no application to sovereign acts of individual states including their laws and regulations. (See para.20 of *Centro Servizi Speoipor Srl*. – the *Road Transport Tariffs* case). It is however much more difficult to apply this distinction in practice, particularly when State owned or controlled bodies are involved, or as here, when a regulatory body, heavily influenced by public law, is said by its actions to have engaged in economic activity which distorts competition.

42. From the findings, decisions and observations made by the European Court of Justice in its case law, some of which is quoted above, it seems to me that the following general propositions can be stated:-

> (1) The primary test, which must be applied in every case in which the issue arises, is that as contained in the Hofner decision. All of the other tools developed by the court are auxiliary and supplementary to this criteria. These other rules however, can offer considerable assistance, and can be particularly useful as a means of eliminating, from the economic sphere, the decision or practice in question. So reference must be had to such rules,
>
> (2) The *Hofner* definition must be given a broad and purposeful application,
>
> (3) In applying this definition, the nature, aims and rules of the activity in question may, and in many cases must, be considered (*Poucet and Pistre, supra*). with the scope of such inquiry being general but also of necessity being case or category specific.
>
> (4) The legal and financial structure in which the activity is carried on, is irrelevant as is how that structure is treated in domestic law (*BNIC v. Clair*).

(5) Public authorities, bodies under state ownership or control, bodies to which specific functions have been assigned either exclusively or otherwise, and other entities subject to public law, are all capable of being undertakings for competition purposes. See *Banchero* (supra); *Italy v. The Commission* (Case 41/83) [1985] E.C.R. 873; *Deutsche Pos AG* (Case 147 & 148/97) [2000] E.C.R. 1-825 and *Spanish International Express Courier Services* (Commission Decision 90/456) [1991] 3 CMLR 560.

(6) Bodies, even though created by and subject to public law and even though regulatory of a business or profession, are still capable of being an undertaking or an association of undertakings within Articles 81, 82 and 86 of the Treaty. (*Commission v. Italy* (Case C-35/96) [1988] ECR 1-3851).. *Pavlov and Others* (supra)and *Wouters* (supra).

(7) Self employed persons normally are undertakings but those in an employer/employee relationship are not. This is because the former are capable of being independent economic operators, whereas for the duration of their employment, employees are not: see *Becu (Jean Claude)*(Case C-22/98) [1999] ECR 1-5665, and

(8) Any entity may be an undertaking for some purposes and not for others: *Commission v. Italy* –(Case 118/85) 1987 E.C.R. 2599

43. In addition to these general points the E.C.J. has also identified more particular criteria in many of the reported cases. Examples of such specific tests are as follows:-

(1) Where a social system fulfils a social function incorporating the principal of solidarity, the same was excluded from the competition rules (*Poucet* and *Pistre*– para.26 above),

(2) Where an agreement was reached during the course of collective bargaining between employer and employee, a similar result followed (*Albany, Brentjens* and *Borkens* – para.28 above),

(3) Where powers are exercised, which are typically those of a public authority or which form part of the essential functions of the State, thus involving an exercise of official authority, than the bodies in question were held not to be undertakings for the purposes of Articles 81, 82 and 86 of the Treaty. (*Eurocontrol*: *Cali and Figli* – paras. 35 and 36 above),

(4) Where the activities complained of, cannot truly be distinguished from an entity's other responsibilities, than the entire functions of such a body may be treated as one (*Eurocontrol* – see para.35 above),

(5) Where goods or services are offered on a market, the same constitute an economic activity (*Commission v. Italy* (Case 118/85) [1987] E.C.R. 2599*, Commission v. Italy* (Case C-35/96) [1998] ECR 1-3851 see para.22:33 above).

(6) Where professional services are offered on a market in return for a fee and where the financial risk is individually assumed, the performer of such a service is an economic operator (*Pavlov* – see para.28 above), and

(7) The role or influence of public interest considerations is a significant factor in evaluating the activity in question; this at whatever point in the process it may be relevant to consider it (*Centro Servizi Spediporto Srl v. Spedizioni Marittima de Golfo Slr the Road Transport Tariffs* case, see para.32 above).

44. In view of the specific reliance placed upon them, it is I think worthwhile to recall once again the principle points in *Pavlov* and *Wouters*. In *Pavlov*, the L.S.V body was comprised exclusively of self employed medical specialists who in their own right were economic operators. Secondly its main or principle task was to protect the interests of its members, in particular with regard to their income and thirdly, the court held, at least inferentially, that this body did not have to observe, when making the decision complained of, any public interest criteria.

In *Wouters* the court applied the same test as it did in Pavlov (see para.43(6) above) in order to determine whether the individual members of the Bar were undertakings and it concluded that they were. It then outlined a number of further reasons as to why the Bar of the Netherlands was an association of undertakings when establishing and maintaining the restriction complained of. These included the facts that it was a regulatory body of a profession, the practice of which constituted an economic activity, the fact that the governing bodies were comprised exclusively of the members of the Bar (who were elected solely by their colleagues), the fact that in adopting the Regulation the Bar was only required to act in the interests of the proper practice of the profession and lastly, reference was also made to the influence which the restriction would have on how the members practised their profession.

45. It seems to me from the above analysis, that depending on the circumstances in question, the European Court of Justice has used a multiple of different criteria in order to determine the question at issue. This criteria is not rigidly defined or immovably fixed, but rather is interchangeable in both its flexibility and application. The various tests outlined can therefore be used separately or accumulatively depending on the presenting model. In my opinion therefore, what should be done is apply to the particular structure in this case, the most appropriate criteria available which fits that structure.

46. In that regard one can immediately say that the Medical Council, in issuing its Guide to Ethical Conduct, and Behaviour was not fulfilling a social function embodying the principle of solidarity as was the case in - *Poucet* and *Pisrte*. Therefore it is not necessary to determine the extent of which this question of solidarity permeates the Council. Nor is it immediately apparent how the defendant body could comfortably be taken as exercising powers typically those of a public authority or powers forming part of the essential functions of the State, as these terms have been used, in for example *Eurocontrol* and *Cali and Figli*. However, having said, it must equally be said that the powers of the Council are most certainly not typical of the private sector nor indeed even suitable for control or operation by that sector. If therefore, a choice had to be made in this context of approach, these power in my view, by way of analogy or extension could be said to fall within the former category rather than the latter.

47. In any event when one continues the search for the appropriate criteria, one can again immediately see that there are no other bodies competing with the defendant Council in respect of the activity in question. Likewise there is no market in which the Medical Council participates for the purposes of discharging its functions. In addition it does not offer any goods or services in return for a fee, nor does it assume the financial risks involved. In this context its entitlement to charge a fee, subject to ministerial sanction, under s.25 of the 1978 Act is not material. Moreover it is non profit making and does not seek to acquire assets.

Whilst all of these factors are helpful in demonstrating that the council could not be categorised as an undertaking by reference to such matters, they do not by themselves conclusively determine the issue. Nor does the fact that the defendant is a regulatory body

governed by public law, however important that might be. See the *Deutsche Post* and *Pavlo*, *(supra)*. What therefore in my opinion must be done, in order to apply the *Hoffner* definition, is to firstly determine whether, by its nature, aims and rules, including its statutory responsibilities and its powers under s. 69(2) of the 1978 Act, the Medical Council is driven by public interest considerations, and if so the extent of such considerations. Either as part of this exercise or separately, I will then consider the relevance of the members' status and of the fact that a majority in their own right are individual undertakings. Thereafter a number of further matters must be looked at, before deciding whether the defendant body is an undertaking or an association of undertakings for the purposes of this case.

48. As can be seen from the above (see para.5 – 10 supra) the Medical Council was established under the 1978 Medical Practitioners Act. Having been so established it was given responsibility for registration, education and training, fitness to practice as well as the matters referred to in s. 69 of the Act. The purpose of preparing, establishing and maintaining a register and of continuously monitoring the appropriateness of those who remain thereon, can only have been directed towards the general good. The obligation of each doctor whose name is included on the register, to display at his or her place of business a certificate to that effect, can only be interpreted as a representation to the public that such doctor is authorised by law to practice medicine in this State. The reason for having different types of registration, including one for medical specialists, is to accurately reflect the varying degrees of recognition which the law ascribes to different qualifications and experience. This measure is I feel one clearly designed with patient safety and well being in mind.

49. Its role on education and training is designed to ensure that certain standards of excellence, in both the academic and clinical fields, must be reached at all levels prior to qualification and prior to a doctor engaging with the public. The Fitness to Practice Committee deals with the conduct of a registered medical practitioner, being either professional misconduct or else conduct relating to a person's fitness, either physical or mental, insofar as it impacts upon his or her ability to practice medicine. The Council itself or any member of the profession or of the wider public may avail of the relevant statutory provisions in this regard. The Committee is given considerable powers with regard to such enquiries and ultimately have available to it a range of sanctions including, (but subject to court approval), the erasure of a doctor's name from the register.

50. In these statutory functions I cannot see any room for suggesting that the aim, nature and purpose of such provisions is otherwise than in the public interest. 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.

51. This general view of the Act is well supported by the decision of Costello J. in *Philips v. Medical Council* [1991] 2 I.R. 115 where at p. 119 the learned judge said "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 practice medicine in a 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 qualification and training of doctors who do not graduate from those schools but who may wish to practice in the State are adequate for that purpose". See also *Casey v Medical Council* [1999] 21R 534 to 549. Accordingly I believe that the general underlying intention of the legislation was to protect the public interest.

52. Given therefore this public interest dimension which the substantial body of the Act is focused on, it would be surprising in my view, if any provisions of the Miscellaneous Section should be directed otherwise. In that part, namely Part VI of the Act there is contained s. 69 which is quoted in full at 10 above. It was under subs. (2) of this section that the Council issued the Guide which is challenged in this case. I read that subsection in the context of the entire Act and also as containing a requirement similar in nature to that placed on the Council under both subs. (1) and subs. (3) of that section. Under subs. (1) of s. 69 the Council must advise the Minister on matters relating to the functions assigned to it under the Act. These functions, are as I have held public in nature. Under subs. (3) the Council must inform the public of general interest matters, again relating to its statutory functions. The subsection in question in this case is in my view also directly related to the Council's statutory functions and must likewise be so interpreted. As the Courts have frequently said, all statutory powers must be exercised for the purposes, either express or implied, for which they were enacted. See the *East Donegal* case [1970] I.R. 317. In my opinion therefore the purpose, aim and direction of the Guide on Ethical Conduct and Behaviour is to serve the general good. This is made abundantly clear from the Introduction to the Guide where it is stated that the "Medical Council exists to protect the interest of the public when dealing with Doctors", and also where it confirms that "The welfare of our patients is paramount". 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. Accordingly I am satisfied that public interest criteria, without there been any further need to individualise the constituent elements thereof, is inherent in the exercise by the Medical Council of any power under s. 69(2) of the Act. Illness like nothing else demonstrates how vulnerable we all are.

53. In addition to the above, the level of input, influence, supervision and ultimate control which the Act vests in the Minister is very significant. The following are but examples of these reserved powers:-

> (a) the Second Schedule contains detailed rules in relation to the members and meetings of the Council. No person may hold office for more than two consecutive periods of five years and the Minister may at anytime terminate the engagement of a person appointed by him: in all six members fall into this category.
>
> (b) the provisions of s. 9, which deal with the manner in which the 25 members of the Council are elected/appointed, may with the consent of the Council be varied, but only with the approval of each House of the Oireachtas,
>
> (c) the election of the ten registered medical practitioners, provided for in s. 9(1)(f), takes place only in accordance with Regulations made by the Minister: S.I. No. 197/1978
>
> (d) the Council is funded through charging fees which must have ministerial control (s. 25),
>
> (e) the members of the Council, whilst on Council duty, are paid only an allowance for travel and subsistence which must have ministerial approval,

(f) the Minister can direct the Council to perform its functions under the Act and if it fails to do so, the Minister may remove the entire Council and in its stead may appoint a person to discharge its function (s. 15)

(g) the accounts of the Council, must be audited by the Minister's appointee and must be available both to the public and to the Houses of the Oireachtas,

(h) the High Court has a significant role under the Act

(i) offences are created and penalties provided for various infringement of the Act; section 61

(j) the Minister under s. 63 of the Act may assign further and/or additional functions to the Council in matters relating to the practice of medicine and to those engaged in such practice, and

(k) the Minister has power to make regulation under the Act in order to give an effect to the provisions thereof

It seems to me therefore that the State, through the Minister for Health and Children, has retained substantial powers over significant areas relating to the preparation for, and thereafter to the practice of medicine; which on an executive basis have been entrusted to the Medical Council. This in my view is an important factor in determining the issue in these proceedings.

54. Lastly in this context, we know from the relevant statutory provisions, quoted at paragraph 6 above, that the Minister appoints four members to represent the interests of the general public. Whilst at least three cannot be doctors, the qualification of any such person is not in my view crucial. These individuals have a specific constituency to represent and that they must do. Otherwise they would act in violation of their mandate and in such circumstances they could be removed from office by the Minister. Therefore I do not believe, that the representation of the general good on the Council, is in anyway detrimentally affected by the possibility of one member of this four being a doctor.

55. The next matter which must be considered is the composition of the Council and the consequences for that Council of the fact that a majority of its members are undertakings in their own right. On the information supplied by the defendant (see para 16 above) it seems, that at least 15 members of the Council, with perhaps also another three, are individual undertakings for the purposes of competition law. It is accepted by all that the four lay people on the Council do not fall into this category. That leaves three doctors who work exclusively in public service. In respect of these doctors it has been submitted that they too should be treated as separate undertakings. Reliance in this regard was placed on the freedom which such persons enjoy, under the common contract, when carrying out their professional obligations. In further support of this proposition the observations of Advocate General Jacob, in Pavlov at para.112 have been referred to. The Advocate General said at 112 - "The classification of employed medical specialists is more difficult. In principle employees who offer labour against remuneration fall outside the scope of Article 85(1). Employed professionals are however not typical 'workers'. Sometimes they are 'pay is directly linked to the profits and losses of their employer and they do not really work under the direction of that employer'. They therefore constitute one of the borderline categories envisaged in my opinion in Albany. In the present cases it is however not necessary to take a final position (on these) issues because at the time of the decision under scrutiny all the LSV's members were self employed medical specialists".

56. In my view this submission, which was made on behalf of the plaintiff, is one which respectfully I cannot agree with. In the first instance such persons to be undertakings must be carrying on an economic activity. To do so, if judged in accordance with the most obvious criteria, would mean that these employees were free to offer their medical services on the market in return for a fee or charge from their patients, and also at the end of an accounting period would have to individually suffer any deficit or enjoy any surplus from such services. None of these circumstances apply to a P.A.Y.E. worker even one operating under the common contract. Moreover the example given by the Advocate General is certainly not applicable to publicly employed doctors, at least insofar as I am aware, as the salary of such professionals is not linked to the profit and losses of their employers. I therefore believe that the independence by which such persons carry on their duties, can better be explained as being one necessarily inherent in the provision of their specialised services rather than as being an indicator of economic activity.

57. There is no doubt but that the status of individual members of any body or entity is a relevant factor to the issue under consideration, as is the mix of members between those appointed by public bodies, or those who otherwise represent the public interests on the one hand, and those briefed solely to further the interests of a particular group or employment sector on the other. See *Pavlov* and *Wouters* where reliance was placed on the fact that all members of the relevant bodies were undertakings in their own right. See also the *Road Transport Tariff* case (para 32 above) where the fact that a majority on the Council's committee (17 out of 29) had been appointed by public authorities, was a highly influential factor in the court's decision. The importance of this point was again endorsed by the court at para. 87 of its judgment in Pavlov (para. 31 above). Hence the existence of a debate on the consequences of individual status and also on membership mix in the context of having to decide whether a body is an undertaking or an association of undertakings.

58. On these points I agree with the general submission made by counsel for the plaintiff when he says that it seems scarcely credible that this question could substantially turn on the numbers game, particularly where in the mix of members, some but not all are undertakings in their own right. In such cases what is the rationale for a percentage threshold whatever that might be? If a single majority would suffice then any entity, even one with a substantial body of public representation, would always be treated as an undertaking or an association of undertakings. On the other hand if unanimity was required then a token representation would disapply the competition rules. Moreover the unsatisfactory nature of such a situation would be compounded, where the designation may depend on the results of periodic elections or nominations. In my opinion this cannot be the situation as such an approach is both unsound and unreliable for resolving this issue.

59. In this regard I think it is important to keep in mind the distinction between a body acting as an association of undertakings and such a body, acting in its own right as an undertaking simpliciter. When the latter is the situation the normal rules apply. Where, however, the former is in issue, it appears to me that an entity could not possibly be said to be an association of undertakings, if none of its constituent parts are undertakings in their own right. One cannot have an association of undertakings, if in the first place there are no individual undertakings. The difficulty of course arises when some, but not all, of a body's members are separate undertakings and where this criteria or approach is used for a purpose which is unsuitable and not intended. It seems to me that this type of analysis may be very useful in order to exempt a body from being an association of undertakings, but it could never by itself determine an affirmative designation for such a body. This because 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. Therefore in my view the resolution of this question may not be as decisive as sometimes thought.

Even however when status cannot determine the question, this matter will remain relevant to the public nature of a body and will be

duly weighted in accordance with the circumstances.

Finally in this context I think that appointments by public bodies and the influence of public interest criteria, as well as the public nature of the body in question, are all separate matters from the pure issue of status and should be so viewed and looked upon.

60. Subject to *Pavlov* and *Wouters*, it appears to me 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. To do otherwise would be to act ultra vires. Given the aims, nature and statutory provisions under which it was established and must operate, including its composition as well as the other factors set out above, in particular those at paras. 46 to 54 inclusive, it seems to me that 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. In addition the approach adopted by the court in *Eurocontrol* may be justified in this case and therefore one might say that the issue of the Guide under s. 69(2) of the Act is so intrinsically bound up with the Council's other responsibilities, that the entire should be looked at as a whole for competition purposes. However considerable caution must be used in assimilating different functions as in principle each separate activity must be individually considered. It will only therefore be on the rarest of occasions that to a composite view will be appropriate. In any event, without placing any reliance on this point, I do not believe, for the reasons given above, that the Council is an undertaking or an association of undertakings within Articles 81 or 82 of the EC Treaty.

61. The question then arises as to whether this conclusion can stand in view of the ECJ's decisions in both *Pavlov* and *Wouters*. The findings made in both of these cases (see para. 30, 39 – 41 above) were heavily relied upon by the court in order to establish the foundation for its decisions; but such findings or findings of an equivalent type could not be made by this court in respect of the Medical Council. In fact in a number of key ways findings to the opposite effect are appropriate and have frequently been made. As set out earlier in this judgment, the Medical Council does not in my view act for or behalf of or otherwise represent the interest of individual doctors, (unlike *Pavlov* and *Wouters*). It has no role whatsoever in that regard. Secondly the principles by which it must perform its functions are driven by public interest criteria and accordingly the performance of such functions is carried out in the public interest and for the general good (unlike these cases). Thirdly it is not composed exclusively of members of the medical profession nor are all of its members undertakings in their own rights (again unlike those cases). Despite the forceful attempts which have been made to neutralise these differences, the undoubted fact remains that such findings formed the core basis upon which the European Court of Justice came to its conclusion in both *Pavlov* and *Wouters*. It must therefore follow in my view that these cases are clearly distinguishable from the present case and accordingly do not constitute an authority which would command a reversal of the decision as previously made.

62. There were further points mentioned in *Wouters* which I should comment upon. The first was a reference by the European Court of Justice to the fact that the Bar of the Netherlands was the regulator of a profession, the practice of which constituted an economic activity. It is unclear as to what precisely the court had in mind when making this connection or what consequences it wished to draw there from. In my view however it could never have intended to lay down a principle that a regulatory body of a profession, the practice of which constituted an economic activity, was by reason of that fact alone, an undertaking or an association of undertakings. Otherwise it would mean that every such body, irrespective of its composition, of its purpose and function, and of the underlying principles by which it had to operate, would simply be, by reference to the profession which it regulated, an undertaking or an association of undertakings. That in my opinion render the *Hofner* definition largely ineffective and would certainly would render many of the other decision making tools irrelevant. I therefore do not think that this observation can be treated as in any way being decisive. The second point which the court noted was the effect which the prohibition on inter disciplinary practice would have on how the members of the Bar performed their services on the legal market. This in my view was most probably a reference to the economic consequences rather than strictly to economic activity. As a result I do not believe that either *Pavlov* or *Wouters* are authorities which govern this case.

63. The decision above arrived at, is I think fully supported by the judgment of Gilligan J. of *Kenny v. The Dental Council*: see para 17.6 above. In that case the learned trial judge came to the conclusion that the failure of the Dental Council to put in place a scheme to regulate the practice of denturism did not constitute an economic activity for Treaty purposes. Whilst some differences exist between both cases, it seems to me that the Medical Council, if anything, is even in a more favourable position when issuing the Guide than the Dental Council was in respect of its powers under s. 53 of the Dental Act 1985.

64. In conclusion therefore, for the reasons above stated, I hold that a 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.