JUDGMENT OF THE COURT

19 February 2002 *

In Case C-35/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretore di Pinerolo (Italy) for a preliminary ruling in the criminal proceedings before that court against

Manuele Arduino,

third parties:

Diego Dessi,

Giovanni Bertolotto,

and

Compagnia Assicuratrice RAS SpA,

on the interpretation of Article 85 of the EC Treaty (now Article 81 EC),

* Language of the case: Italian.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Italian Government, by U. Leanza, acting as Agent, assisted by L. Daniele, expert in the Legal Department of the Ministry of Foreign Affairs,

— the French Government, by K. Rispal-Bellanger and D. Colas, acting as Agents,

— the Finnish Government, by H. Rotkirch and T. Pynnä, acting as Agents,

— the Commission of the European Communities, by L. Pignataro, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Dessi, represented by G. Scassellati Sforzolini, avvocato, of the Italian Government, represented by M. Fiorilli, avvocato dello Stato, of the German Government, represented by A. Dittrich, acting as Agent, of the French Government, represented by D. Colas, and of the Commission, represented by L. Pignataro, at the hearing on 12 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2001,

gives the following

Judgment

1 By order of 13 January 1999, received at the Court on 9 February 1999, the Pretore di Pinerolo (Magistrate, Pinerolo) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 85 of the EC Treaty (now Article 81 EC).

2 Those questions have been raised in connection with the settlement of the costs relating to criminal proceedings against Mr Arduino.

The relevant national provisions

3 The basic text governing the profession of avvocati and procuratori in Italy is Royal Decree-Law No 1578 of 27 November 1933 (GURI No 281 of 5 December 1933) which was converted into Law No 36 of 22 January 1934 (GURI No 24 of 30 January 1934), as subsequently amended ('the Royal Decree-Law').

4 Avvocati and procuratori ('members of the Bar') are self-employed professionals who provide legal representation and advice in civil, criminal and administrative proceedings. In Italy, that activity is reserved to members of the Bar whose intervention is, as a general rule, mandatory (Article 82 of the Italian Code of Civil Procedure).

5 The Consiglio nazionale forense (National Council of the Bar, 'the CNF') is governed by Articles 52 to 55 of the Royal Decree-Law. It is composed of members of the Bar elected by their fellow members, with one representative for each appeal court district, and is established under the auspices of the Minister for Justice ('the Minister').

6 Article 57 of the Royal Decree-Law provides that the criteria for determining fees and emoluments payable to members of the Bar in respect of civil and criminal proceedings and out-of-court work are to be set every two years by decision of the CNF. When the CNF has decided upon the tariff, it must be approved by the Minister after he has obtained the opinion of the Comitato interministeriale dei prezzi (Interministerial Committee on Prices, 'the CIP') under Article 14.20 of Law No 887 of 22 December 1984 (GURI, Ordinary Supplement, No 356 of 29 December 1984) and consulted the Consiglio di Stato (Council of State) under Article 17(3) of Law No 400 of 23 August 1988 (GURI, Ordinary Supplement, No 214 of 12 September 1988).

7 Article 58 of the Royal Decree-Law specifies that the criteria referred to in Article 57 are to be based on the monetary value of disputes, the level of the court seised and, in criminal matters, the duration of the proceedings. For each procedural step, or series of steps, maximum and minimum limits must be set.

8 Under Article 60 of the Royal Decree-Law, fees are settled by the court on the basis of the criteria referred to in Article 57 of that decree-law, having regard to the seriousness and number of the issues dealt with.

9 That settlement must remain within the maximum and minimum limits mentioned in Article 58 of the Royal Decree-Law. However, in cases of exceptional importance, taking account of the special nature of the disputes and where the inherent value of the service justifies it, the court may exceed the maximum limit. Conversely, where the case is easy to deal with, the court may fix fees below the minimum limit. In both cases, the court must give reasons for its decision.

10 The tariff of fees for members of the Bar at issue in the main proceedings was adopted by decision of the CNF of 12 June 1993, amended on 29 September 1994 ('the CNF decision'), and was approved by Ministerial Decree No 585 of 5 October 1994 (GURI No 247 of 21 October 1994). Article 2 of that decree provides that 'the increases set out in the fee scales in the annex shall apply with effect from 1 October 1994 as to 50%, and as to the remaining 50% with effect from 1 April 1995'. That staggered increase originated in the comments made by the CIP which had taken particular account of the rise in inflation. Before approving the tariff, the Minister had consulted the CNF a second time, which, at its meeting of 29 September 1994, had accepted the proposal to postpone the application of the tariff.

11 Article 4(1) of the CNF decision prohibits derogation from the minimum limits for the fees of 'avvocati' and the fees and disbursements of 'procuratori'. However, in cases where, because of the particular circumstances of the case, there is a clear disproportion between the services of the 'avvocato' or 'procuratore' and the fees prescribed in the tariff, Article 4(2) of that decision permits fees in excess of the maximum limits (even to the extent of more than doubling the maximum envisaged in Article 5(2) of the CNF decision) or below the minimum limits, provided that the party who has an interest in the matter produces an opinion from the Council of the competent Bar.

12 Article 5 of the CNF decision lays down the general rules on settlement. Article 5(1) provides that fixing of the fees payable by the unsuccessful party must take account of the nature and monetary value of the dispute, the importance and number of the issues dealt with and the level of the court seised. Particular attention must be given to the services performed by the lawyer before the court. Article 5(2) states that in cases which are of particular importance because of the legal issues dealt with, fixing of the fees payable by the unsuccessful party may reach double the maximum limits. Article 5(3) adds that, in addition to the rules set out in the preceding paragraphs, fixing of the fees payable by the client may take account of the outcome of the proceedings and the advantage derived, including non-pecuniary advantage, as well as the urgency of any steps taken. In cases of extraordinary importance, fees may be fixed at up to four times the maximum limits.

The main proceedings

13 Proceedings were brought against Mr Arduino before the Pretore di Pinerolo for having, in breach of the road traffic legislation, negligently, carelessly or through lack of judgment overtaken on a stretch of road where that manœuvre was not

permitted and collided with Mr Dessi's vehicle. Mr Dessi claimed damages. When the Pretore made the order fixing the costs incurred by Mr Dessi and payable by Mr Arduino, he did not apply the tariff approved by Ministerial Decree No 585/94.

14 On appeal, the Corte suprema di cassazione (Supreme Court of Cassation) held that it was unlawful not to apply that tariff. By judgment 1363 of 29 April/6 July 1998, it set aside the judgment of the Pretore di Pinerolo in respect of the costs and referred the case back to that court on this point.

15 The Pretore di Pinerolo states that, in Italian law, there are two conflicting lines of case-law as to whether the tariff for fees payable to members of the Bar, approved by Ministerial Decree No 585/94, constitutes an agreement restricting competition under Article 85 of the Treaty.

16 According to the first line of case-law, that national legislation is comparable to the legislation on the tariff for customs agents which was the subject of the judgment in Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851. The CNF is an association of undertakings within the meaning of Article 85(1) of the Treaty and no statutory provision requires that public-interest criteria be taken into account in the determination of the tariff for fees payable to members of the Bar. Consequently, the national court must disapply that tariff.

17 According to the second line of case-law, the tariff is not the result of a discretionary decision of the professional organisation in question. The State plays a decisive role both in drawing up and approving the tariff, so that there is no delegation to private economic operators of the power to fix the tariff for themselves, in breach of Article 85 of the Treaty.

18 In those circumstances, the Pretore di Pinerolo decided to stay proceedings and to refer to the Court for a preliminary ruling the following questions:

'(1) Does the decision of the CNF, approved by Ministerial Decree No 585/94, fixing binding tariffs for the professional activity of members of the Bar, come within the scope of the prohibition in Article 85(1) of the EC Treaty?

(2) If the answer to (1) is in the affirmative:

Does the case none the less correspond to one of the situations envisaged in Article 85(3) of the Treaty to which that prohibition does not apply?'

Admissibility

19 The Italian Government expresses doubts as to the admissibility of the present reference for a preliminary ruling.

20 First, it questions the genuineness of the dispute in the main proceedings.

21 It explains that, following the judgment of the Corte suprema di cassazione, Mr Arduino's insurance company paid the costs incurred by Mr Dessi. In the light of this payment, Mr Dessi withdrew from the remainder of the proceedings and Mr Arduino's lawyer requested the Pretore di Pinerolo to order that the case should not proceed to judgment. As the proceedings now stand, the main dispute is therefore devoid of purpose.

22 In those circumstances, the Italian Government fails to understand the referring court's insistence on determining the compatibility of the tariff at issue in the main proceedings with Community law. In its submission, the Pretore di Pinerolo has seized the opportunity to settle an issue which is controversial in Italy.

23 Second, the Italian Government considers that the order for reference inadequately sets out the legal and factual context in which the questions have arisen. The Pretore di Pinerolo has not stated the reasons for which he did not apply the tariff at issue in the main proceedings.

24 It is settled case-law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38).

25 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, *Bosman*, paragraph 61; and *PreussenElektra*, paragraph 39).

26 That is not true of the dispute in the main proceedings.

27 On the basis of the documents in the case file, it is clear that the case is still pending before the national court. The Italian Government has not produced evidence of an agreement between the parties on the question of costs such as to bring the case to a close.

28 The observations submitted by the governments of the Member States and the Commission, pursuant to Article 20 of the EC Statute of the Court of Justice, show that the information supplied in the order for reference enabled them effectively to state their views on the questions referred to the Court.

29 Furthermore, the information in the order for reference was supplemented by the written observations lodged before the Court. All that information, which was included in the Report for the Hearing, was brought to the notice of the governments of the Member States and the other interested parties for the purposes of the hearing, at which they had an opportunity, if necessary, to

amplify their observations (see, to that effect, Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 43; and Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 42).

30 Finally, the information provided by the national court, supplemented where necessary by the abovementioned material, gives the Court sufficient knowledge of the factual and legislative background to the dispute in the main proceedings to enable it to interpret the relevant rules of the Treaty.

31 It follows from the foregoing that the questions referred by the Pretore di Pinerolo are admissible.

The questions

32 By its questions, which it is appropriate to examine together, the national court seeks essentially to ascertain whether Article 5 of the EC Treaty (now Article 10 EC) and Article 85 of the Treaty preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in the Italian legislation.

33 As a preliminary point, the Court observes that, since that State measure extends to the whole of the territory of a Member State, it may affect trade between Member States within the meaning of Article 85(1) of the Treaty (see, to that effect, *Commission* v *Italy*, cited above, paragraph 48).

34 Although Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 5 of the Treaty, none the less requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20; and *Commission* v *Italy*, cited above, paragraph 53; as to Article 86 of the EC Treaty (now Article 82 EC), see also Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31).

35 The Court has held that Articles 5 and 85 of the Treaty are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (*Van Eycke*, paragraph 16; *Reiff*, paragraph 14; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; *Centro Servizi Spediporto*, paragraph 21; and *Commission* v *Italy*, paragraph 54).

36 In that regard, the fact that a Member State requires a professional organisation to produce a draft tariff for services does not automatically divest the tariff finally adopted of the character of legislation.

37 That would be the case where the members of the professional organisation can be characterised as experts who are independent of the economic operators concerned and they are required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question (see, to that effect, *Reiff*, paragraphs 17 to 19 and 24; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraphs 16 to 18 and 23; Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257, paragraphs 18 and 19; and *Commission* v *Italy*, paragraph 44).

38 In the main proceedings, it is clear from the description of the national legislation that the Italian State obliges the CNF, composed exclusively of members of the Bar elected by their fellow members, to present every two years a draft tariff for fees payable to members of the Bar including minimum and maximum limits. Although, under Article 58 of the Royal Decree-Law, fees and emoluments must be fixed on the basis of the monetary value of disputes, the level of the court seised and, in criminal matters, the duration of the proceedings, the Royal Decree-Law does not lay down public-interest criteria, properly so-called, which the CNF must take into account.

39 In those circumstances, the national legislation at issue in the main proceedings does not contain either procedural arrangements or substantive requirements capable of ensuring, with reasonable probability, that, when producing the draft tariff, the CNF conducts itself like an arm of the State working in the public interest.

40 That said, it does not appear that the Italian State has waived its power to make decisions of last resort or to review implementation of the tariff. This is confirmed by the circumstances mentioned in paragraph 10 above.

41 First, the CNF is responsible only for producing a draft tariff which, as such, is not compulsory. Without the Minister's approval, the draft tariff does not enter into force and the earlier approved tariff remains applicable. Accordingly, the Minister has the power to have the draft amended by the CNF. Furthermore, the Minister is assisted by two public bodies, the Consiglio di Stato and the CIP whose opinions he must obtain before the tariff can be approved.

42 Second, Article 60 of the Royal Decree-Law provides that fees are to be settled by the courts on the basis of the criteria referred to in Article 57 of that decree-law, having regard to the seriousness and number of the issues dealt with. Moreover,

in certain exceptional circumstances and by duly reasoned decision, the court may depart from the maximum and minimum limits fixed pursuant to Article 58 of the Royal Decree-Law.

43 In those circumstances, the Italian State cannot be said to have delegated to private economic operators responsibility for taking decisions affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation. Nor, for the reasons set out in paragraphs 41 and 42 above, is the Italian State open to the criticism that it requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 85 of the Treaty or reinforces their effects.

44 The answer to the questions referred for a preliminary ruling must therefore be that Articles 5 and 85 of the Treaty do not preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in the Italian legislation.

Costs

45 The costs incurred by the Italian, German, French and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Pretore di Pinerolo by order of 13 January 1999, hereby rules:

Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in Royal Decree-Law No 1578 of 27 November 1933, as amended.

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	Gulmann
Edward	La Pergola	Puissochet
Wathelet	Schintgen	Skouris
	Cunha Rodrigues	

Delivered in open court in Luxembourg on 19 February 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President