JUDGMENT OF THE COURT (Fifth Chamber)
11 December 2003 *

In Case C-289/02,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht München (Germany) for a preliminary ruling in the proceedings pending before that court between

AMOK Verlags GmbH

and

A & R Gastronomie GmbH,

on the interpretation of Articles 12 EC and 49 EC,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— A & R Gastronomie GmbH, by R. Hauff and A. Konradsheim, Rechtsanwälte,

— the German Government, by W.-D. Plessing and A. Dittrich, acting as Agents,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Commission of the European Communities, by M. Patakia and C. Schmidt, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of A & R Gastronomie GmbH and of the Commission at the hearing on 19 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2003,

gives the following

Judgment

1 By order of 25 July 2002, received at the Court on 9 August 2002, the Oberlandesgericht München (Higher Regional Court, Munich) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 12 EC and 49 EC.

2 That question has arisen in a dispute between AMOK Verlags GmbH, a company established under German law ('AMOK'), and A & R Gastronomie GmbH, a company established under Austrian law ('A & R'), concerning reimbursement of legal costs in the case where one party has been represented in legal proceedings by a lawyer established in another Member State.

The legal framework

Community law

3 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) ('the Directive'), which was adopted on the basis of Article 57 of the EC Treaty (now, after amendment, Article 47 EC) and Article 66 of the EC Treaty (now Article 55 EC), applies, within the terms of Article 1 thereof, to the activities of lawyers pursued by way of provision of services.

4 Article 4 of the Directive provides:

'1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

...'

5 Article 5 of the Directive provides:

'For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

...

— to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.'

National legislation

6 In Germany, Paragraph 91(1) of the Zivilprozessordnung (Code of Civil Procedure), in its version of 12 September 1950 (BGBl. 1950 I, p. 533) ('the ZPO'), provides that the successful party in a dispute is entitled to receive reimbursement from the unsuccessful party of its legal costs in so far as those costs were necessary for bringing or defending the case.

7 So far as the amount of legal costs is concerned, this is calculated in accordance with a scale laid down in the Bundesgebührenordnung für Rechtsanwälte (federal regulation on lawyers' fees) of 26 July 1957 (BGBl. 1957 I, p. 907) ('the BRAGO').

8 The Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland (Law on the activities of European lawyers in Germany) of 9 March 2000 (BGBl. 2000 I, p. 182) ('the EuRAG') transposed in German law several directives on the pursuit by lawyers of their professional activities. Paragraph 28 of the EuRAG provides:

'(1) In judicial proceedings and administrative proceedings resulting from criminal offences, summary offences, service-related faults or infringement of professional obligations, in which the client cannot represent himself in bringing the action or in conducting his own defence, a European lawyer providing services may act as the representative of or as defence counsel for a client only pursuant to an agreement with a lawyer (domestic lawyer).

(2) The domestic lawyer must be authorised to provide representation or defence services before the judicial or administrative authority in question. He shall ensure that the European lawyer providing services complies with the principles of the proper administration of justice when providing representation or defence services.

(3) In the absence of agreement between the parties concerned to the contrary, no contractual relationship is established between the domestic lawyer and the client.

...'

9 So far as concerns the fees of the domestic lawyer referred to in Paragraph 28 of the EuRAG, Paragraph 24a(1) of the BRAGO, in the version of 14 March 1990 (BGBl. 1990 I, p. 479), provides:

'(1) If the lawyer acts as a domestic lawyer, pursuant to Paragraph 28 of the Law on the activities of European lawyers in Germany, he shall receive remuneration equivalent to the fee for lodging the application (Prozessgebühr) or for assuming responsibility for the conduct of the case (Geschäftsgebühr) which he would receive had he been himself instructed by the client. This remuneration is to be charged to the corresponding fee received by the lawyer instructed by the client.

...'

The dispute in the main proceedings and the question submitted for preliminary ruling

10 In proceedings before the Landgericht (Regional Court) Traunstein (Germany) between AMOK and A & R, the latter had been represented by a lawyer who was established in Austria and worked in conjunction with a lawyer established in Germany, in accordance with Paragraph 28 of the EuRAG. As it was the successful party in the dispute, A & R sought reimbursement of its legal costs from AMOK.

11 In that connection, it first sought, with regard to the lawyer established in Austria, the associated costs calculated according to the Austrian scale, which were significantly higher than the costs resulting from application of the BRAGO. A & R thereafter requested reimbursement of the fees paid to the lawyer established in Germany pursuant to Paragraph 24a(1) of the BRAGO.

12 AMOK objected to A & R's request on the ground that a lawyer established in Austria was not necessary for the proceedings in this case nor, consequently, was his cooperation with the lawyer established in Germany. In any event, in a dispute before a German court, the reimbursement of costs by the unsuccessful party must be calculated by reference to the German scale, which is the only scale that is foreseeable.

13 The Oberlandesgericht München, before which the request for reimbursement of the legal costs was brought on appeal, states that it consistently applies the principle that a party which is established in another Member State and arranges to be represented by a lawyer established in that State may claim from the other party reimbursement of its legal costs only in the amount of those which would have resulted from the involvement of a lawyer established in Germany, and that it cannot in any event claim the costs of a lawyer established in Germany with whom the lawyer established in the other Member State has worked in conjunction.

14 Having none the less doubts as to whether this judicial practice is consistent with Community law, the Oberlandesgericht München decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Articles 49 EC and 12 EC to be interpreted as precluding a decision of a national court in accordance with which, in a Member State (domestic territory), the maximum amount of a claim for reimbursement of the costs of the services of a lawyer of a different Member State in domestic proceedings and of an *Einvernehmensanwalt* (domestic lawyer acting in conjunction with the foreign lawyer) is the sum of the costs including VAT which would have been incurred in the case of representation by a domestic lawyer?'

The first part of the question: the applicability of the Austrian scale

15 By the first part of its question, the Oberlandesgericht München is in substance asking whether Article 49 EC, Article 12 EC and the Directive are to be construed as precluding a rule laid down in the case-law of a Member State limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute

to the successful party, of the costs resulting from the services provided by a lawyer established in another Member State.

Observations submitted to the Court

16 A & R submits that limiting the fees of a lawyer from another Member State to the level of those which result from the national scale is contrary to Article 49 EC. The consequence of that rule is that a party established in another Member State will in general have recourse to a lawyer established in the place of the court seised of the dispute, with a resultant deterrent effect. This rule has the effect of restricting the freedom of lawyers from other Member States to provide services and adversely affects their competitiveness. Furthermore, parties to proceedings will have their right freely to choose a lawyer restricted inasmuch as they will be indirectly obliged to instruct a lawyer established in the place of the court before which the proceedings have been brought.

17 In the present case, it is therefore appropriate to apply the Austrian scale, *a fortiori* in view of the fact that, under the rules of private international law, the connecting factor in respect of a request for remuneration by a lawyer is the place in which that lawyer is established.

18 According to the German Government, it is, however, necessary to determine whether recourse to a lawyer established in another Member State is necessary, within the meaning of Paragraph 91(1) of the ZPO, on grounds of the particular nature of the dispute and specific circumstances, such as issues concerning the law of that other State which require to be appraised, or whether recourse to that lawyer is based solely on the free choice of the client. In the former case, the reimbursable expenses should be determined in line with the tariffs applicable at the place where the lawyer in question is established. If, by contrast, recourse to that lawyer depended solely on the free choice of the client, as in this case, reimbursement by the other party ought to be effected in accordance with the tariffs applicable in the place of the court seised of the dispute.

19 So far as concerns the compatibility of the rules in question with the free provision of services, the German Government proposes that these rules be treated in the same way as a sales detail such as defined by the Court, in regard to the free movement of goods, in its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. The rules in question relate only to one detail in the exercise of the profession of a lawyer, they are applicable in identical manner to the fees of any lawyer providing services in the Member State, and are thus applied in a non-discriminatory manner. They fall therefore in principle outside the scope of the free provision of services.

20 Even if one were to take the view that the rules in question do involve a restriction on the free provision of services, this would be justified on grounds of general interest. Those rules would then constitute a non-discriminatory measure for purposes of the proper administration of justice (see Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511). Organisation of procedure is a matter for the Member States, which may for that reason adopt appropriate rules on reimbursement of costs. Such reimbursement need not necessarily be in full, as demonstrated by the very different systems of the Member States.

21 The setting of a maximum ceiling for reimbursable costs is also proportionate and necessary for achieving the result of a proper administration of justice in so far as it protects the unsuccessful party to a dispute against exaggerated and unforeseeable claims for reimbursement.

22 The Austrian Government essentially supports this view. It also points to the need to draw a distinction between, on the one hand, the contractual relationship between the lawyer and his client and, on the other, the question of the reimbursement of costs by the unsuccessful party to a dispute to the successful party. With regard to this latter issue, objective legal provisions are indispensable,

and the adoption of such provisions, as they concern a procedural issue, is a matter for the law of the court seised.

23 There is no restriction on the freedom to provide services within the meaning of Article 49 EC, or discrimination for the purposes of Article 12 EC, inasmuch as a lawyer established in Austria can indeed exercise, so far as reimbursement of his fees is concerned, his activity in Germany under the same conditions as that State lays down for lawyers established within its territory.

24 The Commission also takes the view that Community law does not preclude the rules in question. In its opinion, the reply to this part of the question submitted follows clearly from the Directive without any need to rely on the provisions of the Treaty. Article 4(1) of the Directive states expressly that transfrontier activities of a lawyer in the representation of a client are pursued in each host Member State under the conditions laid down for lawyers established in that State. This also holds for rules such as those concerning reimbursement of legal costs.

Reply of the Court

25 With regard to the assessment by the Oberlandesgericht München of the rules in question in the light of Article 12 EC, it must be stated at the outset that, according to the settled case-law of the Court, that provision, which lays down

the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25).

26 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

27 Article 49 EC prohibits restrictions on the freedom to provide services within the Community. It cannot be ruled out that the imposition of an upper limit on the reimbursable fees of a lawyer established in a Member State which is fixed at the level of those applicable to lawyers established in another Member State may, in the case where the fees are higher than those resulting from the scale used by the latter State, be liable to render less attractive the provision by lawyers of their services across borders.

28 The third paragraph of Article 50 EC provides that the transfrontier service provider may pursue his activity in the State where the service is provided 'under the same conditions as are imposed by that State on its own nationals'.

29 As the Commission has pointed out, that provision is defined in greater detail, within the area in question, by the Directive. Article 4(1) of the Directive provides that the activity of representing a client in legal proceedings in another Member State must be pursued 'under the conditions laid down for lawyers established in that State', with the exception of 'any conditions requiring residence, or

registration with a professional organisation, in that State'. Article 4(2), furthermore, provides that the rules of professional conduct of the host Member State must be observed in the pursuit of those activities.

30 It follows, as the Advocate General has stated in point 42 of his Opinion, that the Community legislature formed the view that, apart from the exceptions expressly mentioned, all other conditions and rules in force in the host country may apply to the transfrontier provision of services by a lawyer. The reimbursement of the fees of a lawyer established in a Member State may therefore also be made subject to the rules applicable to lawyers established in another Member State. This solution is, moreover, the only one which complies with the principle of predictability, and thus of legal certainty, for a party which enters into proceedings and thus incurs the risk of having to bear the costs of the other party in the event of being unsuccessful.

31 The answer to the first part of the question must therefore be that Article 49 EC, Article 50 EC and the Directive are to be interpreted as not precluding a judicial rule of a Member State limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of costs in respect of the services provided by a lawyer established in another Member State.

The second part of the question: reimbursement of the additional fees of the lawyer practising before the court seised of the dispute

32 By the second part of the question submitted, the Oberlandesgericht München asks in substance whether Article 49 EC and the Directive must be construed as precluding a judicial rule of a Member State providing that the party which has

been successful in a dispute in which it was represented by a lawyer established in another Member State cannot recover, from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practising before the court seised of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

Observations submitted to the Court

33 The German Government submits that the fact that the appointment of a lawyer practising before the court seised involves additional expenses in a dispute is inherent in Article 5 of the Directive and does not constitute a restriction on the freedom to provide services. That freedom does not require that the party to a dispute should be able to benefit 'at no cost' from the assistance of two lawyers, *a fortiori* as there are also certain types of national proceedings in which no provision exists for reimbursement by the unsuccessful party. In so far as a lawyer practising before the court seised must always be paid by his client, no discrimination against the lawyer established in another Member State results from the fact that the unsuccessful party need not reimburse to the other party the fees of the first lawyer.

34 The German Government also refers, in regard to the second part of the question, to the arguments already set out in relation to the first part.

35 The Commission takes the opposite view. It argues that, if national law requires the appointment of a lawyer practising before the court seised, the party required

to bear the legal fees of the successful party will also have to reimburse the fees corresponding to that appointment. This solution derives indirectly from the Directive, with the result that there can scarcely be any need to invoke the provisions of the Treaty.

Reply of the Court

36 The fact that the party which has been successful in a dispute and which has been represented by a lawyer established in another Member State cannot also obtain reimbursement, from the unsuccessful party, of the fees of the lawyer practising before the court seised and to whom the successful party has had recourse, on the ground that such costs are not regarded as being necessary, is liable to make the transfrontier provision by a lawyer of his services less attractive. Such a solution may have a deterrent effect capable of affecting the competitiveness of lawyers in other Member States.

37 Admittedly, the Directive, albeit without providing details in regard to the resultant legal costs, states in Article 5 that Member States may require lawyers established in other Member States to work in conjunction with a lawyer practising before the judicial authority in question. The Federal Republic of Germany exercised that option when it introduced Article 28 of the EuRAG.

38 The appointment of a lawyer practising before the court seised is thus a mandatory requirement resulting from harmonisation measures and for that reason falls outwith the will of the parties, as is evident from Paragraph 28(3) of the EuRAG, which provides that, in the absence of any contrary agreement between the parties, no contractual relationship is created between the national lawyer and the client.

39 It cannot, however, be inferred from this mandatory requirement that the disadvantage resulting from the appointment of the lawyer practising before the court seised, that is to say, the additional associated costs, must be attributed, automatically and in every case, to the party which has had recourse to the lawyer established in another Member State, irrespective of whether that party has or has not been successful in the dispute. On the contrary, the obligation to have recourse to the services of a lawyer practising before the court seised means that the resulting costs will be necessary for the purposes of appropriate legal representation. The general exclusion of these costs from the amount to be reimbursed by the unsuccessful party would penalise the successful party, with the effect, as the Advocate General has stated in point 70 of his Opinion, that parties to legal proceedings would be strongly discouraged from having recourse to lawyers established in other Member States. The freedom of such lawyers to provide their services would thereby be obstructed and the harmonisation of the sector, as initiated by the Directive, adversely affected.

40 The rules in issue cannot be justified by the requirements of the proper administration of justice. The German Government submits in this regard that it is necessary to protect the unsuccessful party to a dispute against claims for reimbursement that are exaggerated and unforeseeable. It must be stated that, in the Member State in question, the fees of a lawyer practising before the court seised are perfectly foreseeable inasmuch as they are expressly mentioned in Paragraph 24a of the BRAGO. Likewise, in view of the relatively limited activity of that lawyer, the associated costs are significantly lower than those corresponding to the representation by the other lawyer.

41 It follows that the answer to the second part of the question submitted must be that Article 49 EC and the Directive are to be construed as precluding a judicial rule of a Member State which provides that the successful party to a dispute, in which that party has been represented by a lawyer established in another Member State, cannot recover from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practising before the court seised of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

Costs

42 The costs incurred by the German and Austrian 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 (Fifth Chamber),

in answer to the question referred to it by the Oberlandesgericht München by order of 25 July 2002, hereby rules:

1. **Article 49 EC, Article 50 EC and Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services must be interpreted as not precluding a judicial rule of a Member State limiting to the level of the fees which would have resulted from**

representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of costs in respect of the services provided by a lawyer established in another Member State.

2. Article 49 EC and Directive 77/249 must, however, be construed as precluding a judicial rule of a Member State which provides that the successful party to a dispute, in which that party has been represented by a lawyer established in another Member State, cannot recover from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practising before the court seised of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

Jann La Pergola von Bahr

Delivered in open court in Luxembourg on 11 December 2003.

R. Grass
Registrar

V. Skouris
President