

JUDGMENT OF THE COURT (Grand Chamber)

29 March 2011 *

In Case C-565/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 December 2008,

European Commission, represented by E. Traversa and L. Prete, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented initially by I. Bruni, and subsequently by G. Palmieri, acting as Agents, assisted by W. Ferrante, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of A. Tizzano, President of the First Chamber, acting for the President, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, President of Chambers, A. Rosas, M. Ilešič, J. Malenovský, U. Löhmus (Rapporteur), E. Levits, A. Ó Caoimh, L. Bay Larsen, P. Lindh and M. Berger, Judges,

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 March 2010,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2010,

gives the following

Judgment

- ¹ By its application, the Commission of the European Communities asks the Court to declare that, by maintaining provisions which oblige lawyers to comply with maximum tariffs, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

National legal context

- 2 The profession of lawyer is regulated in Italy by Regio decreto legge n. 1578 – ordinamento delle professioni di avvocato e procuratore legale (Royal Decree-Law No 1578 governing the professions of lawyer and ‘procuratore legale’) of 27 November 1933 (*GURI* No 281 of 5 December 1933, p. 5521), converted into law, after amendment, by Law No 36 of 22 January 1934 (*GURI* No 24 of 30 January 1934), as subsequently amended (‘the Royal Decree-Law’). Pursuant to Articles 52 to 55 of the Royal Decree-Law, the Consiglio nazionale forense (National Council of Lawyers; ‘the CNF’) is established under the auspices of the Minister for Justice and consists of lawyers elected by their fellow members, with one representative for each appeal court district.

- 3 Article 57 of the Royal Decree-Law provides that the criteria for determining fees and emoluments payable to lawyers and ‘procuratori’ in respect of both civil and criminal proceedings and out-of-court work are to be determined every two years by decision of the CNF. Those criteria must then be approved by the Minister for Justice after he has obtained the opinion of the Comitato interministeriale dei prezzi (Interministerial Committee on Prices) and consulted the Consiglio di Stato (Council of State).

- 4 Pursuant to Article 58 of the Royal Decree-Law, the criteria referred to in Article 57 thereof are to be based on the monetary value of disputes, the level of the court seised and, in criminal matters, on the duration of the proceedings. For each procedural step, or series of steps, a maximum and a minimum fee limit must be determined. In respect of out-of-court work, account is to be taken of the importance of the case.

- 5 Article 60 of the Royal Decree-Law provides that fees are to be determined by the court on the basis of those criteria and having regard to the seriousness and number of the issues dealt with. That determination must remain within the maximum and minimum limits previously set. However, in cases of exceptional importance, regard

being had to 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 proves to be straightforward, the court may fix fees below the minimum limit. In both cases, the court must give reasons for its decision.

- 6 According to Article 61(1) of the Royal Decree-Law, the fees charged by lawyers to their clients, in respect of court and out-of-court work, are to be determined, unless there is a special agreement, on the basis of the criteria set out in Article 57, regard being had to the seriousness and number of the issues dealt with. Pursuant to Article 61(2), those fees may be higher than the fees which have been calculated for the party ordered to pay the costs, if the special nature of the dispute or the value of the service so justify.
- 7 Article 24 of Legge n. 794 – onorari di avvocato per prestazioni giudiziali in materia civile (Law No 794 on lawyers' fees in respect of court services in civil matters) of 13 June 1942 (*GURI* No 172 of 23 July 1942) provides that there may be no derogation from the minimum fees set for lawyers' services and that any derogating agreement is void.
- 8 Article 13 of Legge n. 31 – libera prestazione di servizi da parte degli avvocati cittadini di altri Stati membri della Comunità europea (Law No 31 on freedom for lawyers who are nationals of other Member States of the European Community to provide services) of 9 February 1982 (*GURI* No 42 of 12 February 1982, p. 1030), which transposes 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), extends the obligation to comply with the professional tariffs in force to lawyers from other Member States who perform court and out-of-court activities in Italy.

- 9 Lawyers' charges and fees have been regulated successively by several ministerial decrees, the three most recent being Decrees No 392 of 24 November 1990, No 585 of 5 October 1994, and No 127 of 8 April 2004.
- 10 Pursuant to the CNF decision annexed to Ministerial Decree No 127 of 8 April 2004 (*GURI* No 115 of 18 May 2004) ('the CNF decision'), the tariffs applicable to lawyers' fees are divided into three chapters, namely Chapter I on court services in civil, administrative and tax matters, Chapter II on court services in criminal matters and Chapter III on out-of-court services.
- 11 For Chapter I, Article 4(1) of the CNF decision prohibits any derogation from the fees and charges fixed for lawyers' services.
- 12 With respect to Chapter II, Article 1(1) and (2) of the CNF decision provides that, for the determination of fees referred to in the table, account must be taken of the nature, complexity and gravity of the case, the allegations and charges, the number and importance of the questions dealt with and their financial impact, the duration of the procedure and the court proceedings, the value of the service provided, the number of lawyers who cooperated and shared responsibility for conducting the defence, and the outcome obtained, having regard also to the civil-law consequences and the financial situation of the client. For cases requiring particular involvement, by reason of the complexity of the facts or the legal issues dealt with, the fees may be increased by up to four times the maximum amounts established.
- 13 With regard to Chapter III, Article 1(3) of the CNF decision states that, in cases which are important, complex or particularly difficult, the maximum limit for fees may, on the advice of the competent national lawyer's council, be increased by up to twice

and, for cases which are exceptionally important, by up to four times. Article 9 of that decision states that, in cases where the service and the fees indicated in the table are manifestly disproportionate for reasons specific to the case, the maximum ceiling may, on the advice of the competent national lawyer's council, be increased beyond that which is provided for by Article 1(3) of the decision and the minimum levels may be reduced.

- ¹⁴ Decree-Law No 223 of 4 July 2006 (*GURI* No 153 of 4 July 2006), which became Law No 248 of 4 August 2006 (*GURI* No 186 of 11 August 2006) ('the Bersani Decree'), amended the provisions on lawyers' fees. Article 2 of that decree, entitled 'Urgent provisions for the protection of competition within the professional services sector', provides, in paragraphs 1 and 2, as follows:

'1. In accordance with the Community principles of free competition, freedom of movement of persons and freedom to provide services, and in order to guarantee consumers a meaningful choice when exercising their rights and the ability to compare services offered on the market, from the date of entry into force of the present decree the laws and regulations shall be repealed which impose, with regard to the liberal professions and those engaged in intellectual work:

- (a) compulsory fixed or minimum tariffs, and therefore the prohibition of establishing remuneration contractually on the basis of the attainment of the objectives pursued;

...

2. This shall be without prejudice to the provisions concerning ... any maximum tariffs established beforehand, in a general way, with the objective of protecting consumers. The court shall determine the costs and fees, in cases of winding-up by court order and legal aid, on the basis of the professional tariff ...'

- 15 According to Article 2233 of the Codice civile (Italian Civil Code), generally, remuneration under a contract for provision of services which has not been agreed between the parties and which cannot be determined by reference to the applicable tariffs or custom and practice is to be fixed by the court concerned after it has heard the opinion of the professional association to which the service provider belongs. In any event, the amount of remuneration must be commensurate with the scale of the work performed and the dignity of the profession. Any agreement concluded between lawyers or authorised assistants and their clients which sets legal fees is to be void unless drawn up in writing.

The pre-litigation procedure

- 16 By a letter of formal notice sent on 13 July 2005, the Commission drew the attention of the Italian authorities to a potential incompatibility of certain national provisions on out-of-court activities of lawyers with Article 49 EC. The Italian authorities replied by letter of 19 September 2005.
- 17 The Commission subsequently twice supplemented the analysis made in the formal letter of notice. In a first supplementary letter of formal notice, dated 23 December 2005, the Commission expressed the view that the Italian provisions imposing the obligation to comply with compulsory tariffs for lawyers' court and out-of-court services were incompatible with Articles 43 EC and 49 EC.

- 18 The Italian Republic replied by letters of 9 March, 10 July and 17 October 2006, informing the Commission of the new Italian legislation applicable to lawyers' fees, namely the Bersani Decree.
- 19 In a second supplementary letter of formal notice dated 23 March 2007, the Commission, bearing in mind that new legislation, once again amplified its comments. The Italian Republic sent a letter of reply dated 21 May 2007.
- 20 By letter of 3 August 2007, the Commission subsequently asked the Italian authorities to provide information on the arrangements for reimbursing costs incurred by lawyers. The Italian Republic replied by letter of 28 September 2007.
- 21 As it was not satisfied with that reply, the Commission addressed to the Italian Republic a reasoned opinion on 4 April 2008, in which it set out its view that the national provisions which imposed on lawyers the obligation to comply with maximum tariffs were incompatible with Articles 43 EC and 49 EC. That obligation resulted, in particular, from the provisions of Articles 57 and 58 of the Royal Decree Law, Article 24 of Law No 794 of 13 June 1942, Article 13 of Law No 31 of 9 February 1982, the relevant provisions of Ministerial Decrees No 392 of 24 November 1990, No 585 of 5 October 1994 and No 127 of 8 April 2004, as well as from the provisions of the Bersani Decree (hereinafter together referred to as 'the contested provisions'). It called on the Italian Republic to take the measures necessary to comply with that reasoned opinion within two months of its receipt. The Italian Republic replied by letter of 9 October 2008.
- 22 The Commission, taking the view that the Italian Republic had not remedied the infringement complained of, decided to bring the present action.

The action

Arguments of the parties

- 23 By its action, the Commission claims that the Italian Republic adopted, in breach of Articles 43 EC and 49 EC, provisions requiring lawyers to comply with maximum tariffs for the calculation of their fees.
- 24 In the Commission's view, that obligation results from the Bersani Decree, which, while repealing the fixed or minimum tariffs applicable to lawyers' fees, expressly maintained, in the interests of consumer protection, the obligation to comply with maximum tariffs. That interpretation is also confirmed by the CNE, by the Lawyers' Council of Turin, and by the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority) in their official documents.
- 25 The fact that the Bersani Decree abolished the prohibition of establishing remuneration by contract on condition that the objectives pursued are attained – so-called 'conditional fees' – cannot invalidate the finding that compliance with those maximum tariffs remains mandatory in all cases where there is no agreement on a conditional fee. Moreover, in the course of the pre-litigation procedure, the Italian authorities at no time denied that those maximum tariffs were binding.
- 26 Similarly, the Commission emphasises that the exceptions laid down to the maximum tariffs applicable to lawyers' fees do not exclude but, on the contrary, confirm that the maximum tariffs for fees apply as a general rule.

- 27 The Commission argues that the contested provisions have the effect of discouraging lawyers established in other Member States from establishing themselves in Italy or from temporarily providing their services there and, as a result, constitute restrictions on the freedom of establishment within the meaning of Article 43 EC and the freedom to provide services within the meaning of Article 49 EC.
- 28 The Commission is of the view that a mandatory maximum tariff, which applies irrespective of the quality of the service, the work necessary to perform the service and the costs incurred in performance of that service, may render the Italian market for legal services unattractive to professionals established in other Member States.
- 29 According to the Commission, those restrictions result, first, from the obligation imposed on lawyers to calculate their fees on the basis of an extremely complex scale which generates additional costs, in particular for lawyers established outside Italy. In the case where those lawyers hitherto used a different system for calculating their fees, they are obliged to abandon this in order to adapt to the Italian system.
- 30 Second, the Commission argues that the existence of maximum tariffs applicable to lawyers' fees prevents the services of lawyers established in Member States other than the Italian Republic from being properly remunerated and dissuades certain lawyers who claim fees higher than those fixed by the contested provisions from temporarily providing their services in Italy or establishing themselves in that Member State. The Commission takes the view that the maximum profit margin is determined independently of the quality of the service provided, the experience of the lawyer, his specialisation, the time he devotes to the case and the client's financial situation and, moreover, without regard for the possibility that the lawyer may be required to travel long distances.
- 31 Third, the Commission takes the view that the Italian tariff system runs counter to the contractual freedom of lawyers by preventing ad hoc offers in certain situations

and/or to individual clients. The contested provisions could therefore lead to a loss of competitiveness for lawyers established in other Member States because they deny to those lawyers effective methods of gaining access to the Italian legal market. The Commission is accordingly of the opinion that the contested provisions constitute an obstacle to access for lawyers established in other Member States to the Italian market for legal services.

- 32 As its main argument, the Italian Republic does not dispute the existence of maximum tariffs in the Italian legal order but does contest the assertion that they are binding, arguing that there are numerous derogations by which those limits may be exceeded, either by the free choice of lawyers and their clients or by judicial intervention.
- 33 According to that Member State, the main criterion for the determination of lawyers' fees lies, pursuant to Article 2233 of the Italian Civil Code, in the contract concluded between the lawyer and his client, whereas recourse to the tariffs applicable to lawyers' fees is merely a secondary criterion, to be used in those cases in which remuneration is not freely determined by the parties to the contract in the exercise of their contractual autonomy.
- 34 In addition, fees calculated on an hourly basis are expressly envisaged in paragraph 10 of Chapter III of the CNF decision as an alternative method by which to calculate fees in respect of out-of-court work.
- 35 Similarly, following the adoption of the Bersani Decree, the prohibition on a client and a lawyer concluding an agreement which provides for remuneration on the basis of the outcome of the proceedings has, it is argued, been definitively abolished in the Italian legal system.

- 36 As regards derogations from the maximum tariffs applicable to lawyers' fees, the Italian Republic notes that, in all cases which are important, complex or particularly difficult by reason of the legal issues dealt with, lawyers and their clients may agree, without it being necessary to obtain an opinion of the competent national lawyer's council, that the fees are to be increased by up to twice the maximum of those tariffs or even, in criminal matters, by up to four times those maximum limits.
- 37 Conversely, the prior opinion of the competent national lawyers' council is required, in civil and out-of-court matters in exceptionally important cases, in order to increase the fees by up to four times the maximum limits provided for, and where there is a clear lack of proportionality between the professional service and the fees prescribed by the tariffs applicable to those fees, in order also to increase those fees beyond those maximum amounts.
- 38 In the alternative, the Italian Republic submits that the contested provisions do not contain any measure restricting freedom of establishment or freedom to provide services and that the Commission's complaints are unfounded.
- 39 With regard to the additional costs, it continues, the existence of two sets of rules, namely that of the Member State of origin and that of the host Member State, cannot in itself constitute a ground on which to claim that the contested provisions are restrictive since the professional rules in force in the host Member State are applicable to lawyers from other Member States pursuant to Directive 77/249 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), irrespective of which rules are applicable in the Member State of origin.

40 As regards the alleged reduction in profit margins, the Italian Republic submits that the contested provisions provide in detail for full reimbursement of all travel costs, on condition that supporting documents are provided, and grant, in addition, a travel allowance for the loss of working time when travelling. Those expenses are added to the lawyers' charges, fees and general costs and are reimbursed, in application of the principle of non-discrimination, both to lawyers established in Italy who have to travel within the national territory and to lawyers established in other Member States who have to travel within Italy.

Findings of the Court

41 At the outset, it must be stated that it is evident from all of the contested provisions that the maximum tariffs applicable to lawyers' fees are legally binding rules in so far as they are prescribed by legislation.

42 Even if it were accepted that lawyers and their clients are in practice free to agree contractually on the lawyer's remuneration, on an hourly basis or on the basis of the outcome of the proceedings, as the Italian Republic contends, the fact remains that the maximum tariffs remain mandatory if there is no agreement between lawyers and their clients.

43 Furthermore, the Commission correctly took the view that the existence of derogations allowing the maximum limits on the amount of fees to be exceeded, under certain conditions, by up to twice or four times that amount, or even more, confirms that the maximum fee tariffs apply as a general rule.

- 44 Consequently, the Italian Republic's argument that, in its legal order, there is no obligation on lawyers to comply with the maximum tariffs for the calculation of their fees cannot be accepted.
- 45 Next, as regards the existence of restrictions on the freedom of establishment and on the freedom to provide services referred to in Articles 43 EC and 49 EC respectively, it is settled case-law that measures which prohibit, impede or render less attractive the exercise of such freedoms constitute such restrictions (see, to that effect, Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 22; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 31; and Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 19).
- 46 In particular, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for economic operators from other Member States (see, inter alia, *CaixaBank France*, paragraph 12, and Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraph 64).
- 47 In the present case, it is common ground that the contested provisions apply without distinction to all lawyers providing services on Italian territory.
- 48 However, the Commission takes the view that those provisions constitute a restriction within the meaning of the abovementioned articles in that they are liable to subject lawyers established in Member States other than the Italian Republic, who provide services in Italy, to additional costs resulting from the application of the Italian system of fees, as well as to a reduction in profit margins and therefore a loss of competitiveness.

- 49 In this regard, it must be borne in mind at the outset that rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory (see Case C-518/06 *Commission v Italy*, paragraph 63 and the case-law cited).
- 50 The existence of a restriction within the meaning of the Treaty cannot therefore be inferred from the mere fact that lawyers established in Member States other than the Italian Republic must become accustomed to the rules applicable in that latter Member State for the calculation of their fees for services provided in Italy.
- 51 By contrast, such a restriction exists, in particular, if those lawyers are deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition (see, to that effect, *CaixaBank France*, paragraphs 13 and 14; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 59; and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 45).
- 52 The Commission has not, however, demonstrated that the contested provisions have such an object or effect.
- 53 The Commission has not succeeded in demonstrating that the system at issue was established in a manner which adversely affects access to the Italian market for the services in question under conditions of normal and effective competition. It must be noted, in that regard, that the Italian system of fees is characterised by a flexibility which appears to allow proper remuneration for all types of services provided by lawyers. Thus, in cases which are particularly important, complex or difficult, the fees may be increased by up to twice the maximum tariffs applicable by default, and, for cases which are exceptionally important, by up to four times those limits or even more where there is a clear lack of proportionality, in view of the circumstances of the individual case, between the services of the lawyer and the maximum tariffs. It is also

open to lawyers, in numerous situations, to conclude a special agreement with their clients to fix the amount of the fees.

54 Since it has therefore not established that the contested provisions impede the access of lawyers from other Member States to the Italian market at issue, the Commission's argument that there is a restriction within the meaning of Articles 43 EC and 49 EC cannot be upheld.

55 The action must accordingly be dismissed.

Costs

56 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has not asked for the Commission to be ordered to pay the costs, each party must bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission and the Italian Republic to bear their own costs.

[Signatures]