

MAURI

ORDER OF THE COURT (Second Chamber)

17 February 2005 \*

In Case C-250/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by order of 13 November 2002, received at the Court on 11 June 2003, in the proceedings

**Giorgio Emanuele Mauri**

v

**Ministero della Giustizia,**

**Commissione per gli esami di avvocato presso la Corte d'appello di Milano,**

\* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber,  
C. Gulmann, R. Schintgen, J. Makarczyk and J. Klučka, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision  
by reasoned order in accordance with Article 104(3) of its Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having  
been invited to submit their observations in that regard,

after hearing the Advocate General,

makes the following

**Order**

- 1 The reference for a preliminary ruling concerns the interpretation of the provisions of the EC Treaty enshrining the protection of the Community principles of freedom of competition and non-discrimination.

- 2 The reference was made in the course of proceedings between Mr Mauri, on the one hand, and the Ministero della Giustizia (Ministry of Justice) and the Commissione per gli esami di avvocato presso la Corte d'appello di Milano (Committee for Advocates' Examinations of the Milan Court of Appeal), on the other, concerning the refusal to admit Mr Mauri to the oral stage of the State examination for authorisation to practise as an advocate ('the State examination').

### **National legislation**

- 3 It is clear from the order for reference that in Italy access to practice as an advocate is subject to a State examination.
  
- 4 Pursuant to Article 22 of Royal Decree-Law No 1578 of 27 November 1933 (GURI No 281 of 5 December 1933, p. 5521; 'Decree-Law No 1578/33'), in the version applicable at the time of the facts in the main proceedings, State examination committees are appointed by the Ministry of Justice and are composed of five members, namely two advocates who have been enrolled for at least eight years with a bar of the Court of Appeal district where the examination is held, two judges of the same district of at least the standing of a counsellor of the Court of Appeal and one full or associate professor of law at a university or an institute of higher education.
  
- 5 The Consiglio nazionale forense (National Bar Council, 'the CNF') nominates, on a joint proposal by the bar councils of the district concerned, the two advocates who are to sit on the committee in question and the Minister for Justice appoints one of them as president and the other as vice-president of the committee.

**The dispute in the main proceedings and the question referred for a preliminary ruling**

- 6 In December 2001 Mr Mauri took the written tests for the State examination in the Milan Court of Appeal district. After those tests had been marked by the committee the number of points he obtained was insufficient for him to be admitted to the oral stage of the tests, from which he was therefore excluded.
  
- 7 Mr Mauri brought an action before the national court seeking the annulment of the decision taken against him. He claimed, *inter alia*, that the composition of the committee, as provided for by Article 22 of Decree-Law No 1578/33, did not allow an impartial assessment or ensure a mechanism for proper competition in respect of access to the profession of advocate, in breach of the provisions of Articles 3(g) EC, 28 EC, 49 EC *et seq.*, 81 EC and 82 EC.
  
- 8 According to the national court, the complaint made by Mr Mauri does not appear to be entirely without foundation as regards the powers of the bar councils, the governing bodies of the bars to which advocates practising in the districts in question compulsorily belong, to nominate the most influential members of the committee and thus to affect more or less directly the committee's assessments.
  
- 9 The CNF nominates two of the five members of the committee who moreover fulfil the role of president and vice-president and it is possible and even usual for the third member, a teacher of law, also to be an advocate and therefore enrolled at the same bar.

- 10 According to the national court that circumstance appears, at least in theory, to enable the Bar to limit access to the profession in one way or another in order to protect the interests of those already in practice, by operating not only a qualitative but also a quantitative selection linked to market imperatives.
- 11 Taking the view that the resolution of the dispute before it required the interpretation of Community law, the Tribunale amministrativo regionale per la Lombardia decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must the provisions of the Treaty enshrining, as interpreted by the Court of Justice, the protection of the Community principles of competition and non-discrimination be interpreted as meaning that Italian national legislation, in particular Article 22 of Royal Decree-Law No 1578 of 27 November 1933, which makes access to pursuit of the professional economic activity of advocate subject to success in a prior State examination inasmuch as, for the purposes of assessment of aptitude and professional ability, it confers far-reaching powers on the local management entities of the professional body to which the practitioners already operating in the specific geographical territory belong, is contrary to [the Treaty] and therefore illegal?’

### **On the question referred for a preliminary ruling**

- 12 Taking the view that the answer to the question referred may be clearly deduced from existing case-law the Court, in accordance with Article 104(3) of its Rules of Procedure, informed the national court that it proposed to give its decision by reasoned order, and invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations on the matter.

- 13 The Italian and Irish Governments and the Commission of the European Communities responded to that invitation. The two governments have, in substance, expressed their preference for the Court to give its decision by judgment, having regard to the importance of the case in their view. By contrast, the Commission has stated that it has no objection to the Court giving its decision by reasoned order.

### *Admissibility*

#### Observations submitted to the Court

- 14 The Italian Government asserts that the question referred for a preliminary ruling is inadmissible in that it is not necessary in order to be able to give a ruling on the action brought by the candidate excluded from the State examination and, in any event, insofar as it is not possible to infer such a need from the order for reference.
- 15 Furthermore, in so far as that question concerns the Community principle of non-discrimination — more specifically, according to the Italian Government, the principle of national treatment in the sphere of freedom of establishment or freedom to provide services — it should also be regarded as inadmissible on the ground that the Treaty provisions on freedom of movement, including freedom of establishment and freedom to provide services, do not apply to activities which are confined in all respects within a single Member State.
- 16 The Irish Government also takes the view that the question referred for a preliminary ruling is inadmissible.

- 17 The dispute in the main proceedings concerns the Italian education system, when the organisation of education systems falls within the competence of the Member States and not Community competence. Furthermore, that question is hypothetical, since the order for reference states that the composition of the examination committee might constitute, 'at least in theory', an obstacle to access to the profession. Finally, the reference for a preliminary ruling does not provide sufficient detailed information on the functioning of the system at issue in the main proceedings to enable the Court to give a ruling.

### Findings of the Court

- 18 It should be borne in mind that 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. 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, or assessment of the validity of, a provision of Community law that is sought by the court making the reference 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, in particular, the judgment in Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 72 and case-law cited).
- 19 That is not the case in these proceedings.

- 20 Since the national court is required to resolve a dispute in which the applicant relies on a plea alleging the infringement of a number of Community law principles on account of the composition of an examination committee which decided not to admit him to the oral stage of the State examination, it cannot reasonably be accepted that the question referred by that court bears no relation to the actual facts of the main action or its purpose, or that the problem is hypothetical.
- 21 Furthermore, as regards the Italian Government's objection that the Treaty provisions concerning freedom of movement are not applicable on the ground that the activities in question in the main proceedings are confined in all respects within a single Member State, it should be pointed out that a reply might none the less be useful to the national court if its national law were to require, in proceedings such as those in this case, that an Italian candidate for the State examination must be allowed to enjoy the same rights as those which a candidate of another Member State would derive from Community law in the same situation (see, to that effect, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 26).
- 22 Finally, the Court considers that it is sufficiently informed by the particulars in the order for reference and the observations which have been submitted to it to be able to answer effectively the question referred.
- 23 It is therefore appropriate to answer the question referred for a preliminary ruling.

### *Substance*

- 24 First of all it should be noted that the question consists of two parts.



- 25 The national court refers, first of all, to the Community principles of 'competition' and thereby asks a question about the interpretation of Articles 81 EC and 82 EC.
- 26 Next, referring to the Community principles of 'non-discrimination', that court essentially asks the Court to interpret Article 43 EC, which imposes a duty of non-discrimination on Member States (Case 2/74 *Reyners* [1974] ECR 631, paragraphs 15 and 16).
- 27 By contrast, there is no need to examine the question referred in the light of Article 49 EC even though it also imposes a duty of non-discrimination (Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 27). As the Irish Government rightly observes there is no evidence to show that an advocate from another Member State who provided a service in Italy would be subject to the State examination.

#### Articles 81 EC and 82 EC

- 28 By the first part of its question the national court asks, essentially, whether Articles 81 EC and 82 EC preclude a rule, such as that laid down in Article 22 of Decree-Law No 1578/33, providing that, in connection with the State examination, the examination committee is to consist of five members appointed by the Minister for Justice, namely two judges, a professor of law and two advocates, the latter being nominated by the CNF on a joint proposal by the bar councils of the district concerned.

- 29 According to settled case-law, although it is true that Articles 81 EC and 82 EC are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC, which lays down a duty to cooperate, none the less require 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 (see, in particular, Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 34, and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 45 and case-law cited).
- 30 The Court has held, in particular, that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC 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 (*Arduino*, paragraph 35, and *CIF*, paragraph 46 and case-law cited).
- 31 Even assuming that advocates may, as members of the State examination committee, be treated as 'undertakings' within the meaning of Articles 81 EC and 82 EC, it does not appear that, in the circumstances of the main proceedings, the State has divested its own rules on access to the profession of advocate of the character of legislation by delegating to advocates responsibility for taking decisions concerning access to their profession.
- 32 It must be observed, first of all, that the State occupies a significant position on the examination committee itself by the presence, out of five members, of two judges who, even if they are not hierarchically subordinate to the Minister for Justice, must none the less be regarded as an emanation of that State.

- 33 Second, as is apparent from the case-file, the Ministry of Justice has substantial powers enabling it to supervise each stage of the examination committee's proceedings and even to intervene in those proceedings if necessary.
- 34 Thus, that Ministry appoints the members of the examination committee, chooses the examination subjects, may annul the examination in the case of irregularities and may intervene by appointing its own representative to implement the instructions received in order to ensure that the examinations are conducted in a disciplined and orderly fashion.
- 35 Third, a negative decision by the examination committee may be subject to proceedings before the administrative court which will re-examine the case.
- 36 The supervision carried out by the State at each stage of the examination at issue in the main proceedings leads to the conclusion that it has not given up the exercise of its powers in favour of private economic operators.
- 37 For the same reasons nor can that State be criticised for requiring or encouraging the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforcing their effects (see also, to that effect, *Arduino*, paragraph 43), or for requiring or encouraging abuses of a dominant position contrary to Article 82 EC or reinforcing the effects of such abuses.
- 38 It must therefore be concluded that Articles 81 EC and 82 EC do not preclude a rule such as that laid down in Article 22 of Decree-Law No 1578/33.

Article 43 EC

- 39 By the second part of its question the national court asks, essentially, whether Article 43 EC precludes a rule such as that laid down by Article 22 of Decree-Law No 1578/33.
- 40 It must be borne in mind that Article 43 EC requires the elimination of restrictions on the freedom of establishment and that all measures which prohibit, impede or render less attractive the exercise of such freedom must be regarded as constituting such restrictions (see, in particular, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26 and case-law cited).
- 41 Furthermore, it is clear from settled case-law that where measures constituting a restriction apply to any person or undertaking carrying on an activity in the territory of the host Member State, they may be justified where they serve overriding requirements relating to the public interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see, in particular, *Payroll and Others*, paragraph 28 and case-law cited).
- 42 In that connection, although an examination for access to the profession of advocate may indeed constitute an obstacle to the freedom of establishment (see, to that effect, Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 15), in the dispute in the main proceedings it is only the rule relating to the composition of the examination committee which is contested and not the fact that such an examination is organised.

- 43 There is no evidence to suggest that such a rule constitutes a restriction on freedom of establishment, irrespective of the restriction which might result from the examination itself.
- 44 In any event, even assuming that the participation of advocates in the State examination committee constitutes in itself a restriction on freedom of establishment, that participation may, in this case, as the Italian and Irish Governments and the Commission rightly point out, be regarded as justified.
- 45 That participation corresponds to an overriding requirement in the public interest, namely the need to assess as well as possible the aptitude and ability of persons called to practise as advocates. It is suitable for securing the attainment of that objective in that advocates have professional experience which makes them particularly qualified to assess candidates in the light of the specific requirements of their profession. Finally, the limits set out in paragraphs 32 to 35 of this order also ensure that the measure does not go beyond what is necessary in order to attain that objective.
- 46 It must therefore be concluded that Article 43 EC does not preclude a rule such as that laid down in Article 22 of Decree-Law No 1578/33.
- 47 The answer to the question referred for a preliminary ruling must therefore be that Articles 81 EC, 82 EC and 43 EC do not preclude a rule, such as that laid down by Article 22 of Decree-Law No 1578/33, which provides that, in connection with the examination regulating access to the profession of advocate, the examination committee is to be composed of five members appointed by the Minister for Justice,

namely two judges, a professor of law and two advocates, the latter being nominated by the CNF on a joint proposal by the bar councils of the district concerned.

## **Costs**

- 48 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

**Articles 81 EC, 82 EC and 43 EC do not preclude a rule, such as that laid down by Article 22 of Royal Decree-Law No 1578 of 27 November 1933, in the version applicable at the time of the facts in the main proceedings, which provides that, in connection with the examination regulating access to the profession of advocate, the examination committee is to be composed of five members appointed by the Minister for Justice, namely two judges, a professor of law and two advocates, the latter being nominated by the Consiglio nazionale forense (National Bar Council) on a joint proposal by the bar councils of the district concerned.**

[Signatures]