OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 1 February 2006 [1]

1. In *Arduino* [2] the Court examined the Italian legislation concerning the fixing of lawyers' fees in the light of Articles 10 EC and 81 EC. Following on from that judgment, two Italian courts referred questions to the Court concerning whether that legislation complies with the competition rules and the principle of freedom to provide services.

I — Facts, relevant provisions and questions

2. In Case C-94/04, the Corte d'appello di Torino (Court of Appeal, Turin) (Italy), in the course of proceedings between Federico Cipolla, a lawyer, and Rosaria Portolese, a client of his, concerning the payment of the former's fees, referred questions to the Court on 4 February and 5 May 2004 concerning the compatibility with Articles 10 EC, 49 EC and 81 EC of the national legislation fixing lawyers' fees. In March 1991, Ms Portolese approached Mr Cipolla with a view to obtaining compensation for the emergency occupation of land belonging to her, carried out under a decision of the Municipality of Moncalieri. At a meeting, Mr Cipolla asked his client for an advance payment for his professional services of ITL 1 850 000, which was made to him. As instructed, Mr Cipolla brought legal proceedings against the Municipality before the Tribunale di Torino (District Court, Turin). Subsequently a settlement was agreed between the Municipality and the property owners without the involvement of the lawyer. Ms Portolese therefore transferred her land to the Municipality by a notarially attested contract dated 27 October 1993.

3. In an invoice for fees dated 18 May 1995 Mr Cipolla asked his client to pay a total of ITL 4 125 400 (EUR 2 130.38); the advance she had already paid had been deducted. Ms Portolese challenged that amount before the Tribunale di Torino, which, by judgment of 12-20 June 2003, acknowledged payment of the sum of ITL 1 850 000 but rejected any further demand from Mr Cipolla. The latter appealed against that judgment before the Corte d'appello di Torino, claiming that the scale of legal fees to be applied was that adopted by the Consiglio nazionale forense (National Council of the Bar, 'CNF') by a

1 — Original language: Portuguese.

2 — Case C-35/99 [2002] ECR I-1529.

resolution of 30 March 1990 and approved by Ministerial Decree No 392 of 24 November 1990 (hereinafter, 'the Ministerial Decree of 1990'). According to Mr Cipolla, a lawyer and his client are not at liberty to agree on remuneration that departs from that scale, which is binding.

4. The legal profession in Italy is governed by Royal Decree-Law No 1578 of 27 November 1933, [3] which became Law No 36 of 22 January 1934, [4] as subsequently amended (hereinafter, 'the Decree-Law'). Article 57 of the 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 the CNF. That scale of lawyers' fees must then be approved by the Minister for Justice after he has consulted the Comitato interministeriale dei prezzi (Interministerial Committee on Prices) and the Consiglio di Stato (Council of State). [5] Article 58 of the Decree-Law provides that the criteria referred to in Article 57 are to be set on the basis of 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, a maximum and a minimum fee must be set.

5. Article 24 of Law No 794 of 13 June 1942, which governs the legal profession in Italy, provides that 'no derogation from the minimum ... fees laid down for the services of lawyers shall be permitted. Any agreement to the contrary shall be null and void.' This principle has been interpreted particularly broadly in case-law. The court making the reference questions whether that prohibition on derogation from the fees laid down by the scale of lawyers' fees, as interpreted by case-law, is in compliance with Community law. In its view, the Court in *Arduino* ruled only on the manner in which the scale was drawn up and did not consider that specific aspect.

6. The Corte d'appello di Torino therefore referred the following questions to the Court for a preliminary ruling:

'(1) Does the principle of competition under Community law, as set out in Articles 10 EC, 81 EC and 82 EC, also apply to the provision of legal services?

(2) Does that principle permit a lawyer's remuneration to be agreed between the parties, with binding effect?

(3) Does that principle preclude an absolute prohibition of derogation from lawyers' fees?

3 — GURI No 281 of 5 December 1933.

4 — GURI No 24 of 30 January 1934.

5 — *Arduino*, paragraph 6.

(4) Does the principle of free movement of services, as laid down in Articles 10 EC and 49 EC, also apply to the provision of legal services?

(5) If so, is that principle compatible with the absolute prohibition of derogation from lawyers' fees?'

7. At the same time, in Case C-202/04, the Tribunale di Roma (District Court, Rome) (Italy) also referred a question to the Court of Justice concerning the compatibility with Articles 10 EC and 81 EC of another aspect of the same national legislation. The facts of the main proceedings are as follows. Mr Macrino and Ms Capodarte are in dispute with Mr Meloni, their lawyer, who is claiming from them payment of fees of an amount which they challenge. Mr Meloni obtained a payment order against them in respect of out-of-court services relating to copyright. The amount of the fees was fixed in accordance with the statutory scale applicable to that type of service. According to the clients, the services provided by their lawyer were limited to sending a standard letter of objection and a brief correspondence with the other party's lawyer, so the fees claimed are disproportionate in relation to the services provided.

8. The rates of charges for those services were fixed by a resolution of the CNF of 12 June 1993, as amended on 29 September 1994 and approved by Ministerial Decree No 585 of 5 October 1994 (hereinafter, 'the Ministerial Decree of 1994'). [6] The scale of lawyers' fees covers three categories of services: fees for court-related services in civil and administrative matters, fees for court-related services in criminal matters and fees for out-of-court services. According to the referring court, only court-related services were dealt with in *Arduino* and the Court did not decide on whether the Italian legislature could set fees for out-of-court services.

9. The Tribunale di Roma therefore referred the following question to the Court of Justice:

'Do Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) 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 in respect of services rendered in connection with activities (so-called "non-court work") that are not reserved to members of the Bar but may be performed by anyone?'

6 — GURI No 247 of 21 October 1994, p. 5.

10. A hearing took place on 25 October 2005 at which Mr Meloni, the Italian and German Governments and the Commission of the European Communities were represented.

11. Before considering the questions referred by the national courts in detail it is necessary to examine their admissibility, which is challenged by Mr Cipolla and the German Government in Case C-94/04, and by Mr Meloni and the Italian Government in Case C-202/04.

II — Admissibility of the questions referred for a preliminary ruling

12. In Mr Cipolla's submission, the questions referred by the Corte d'appello di Torino are inadmissible, first, on the grounds that they are irrelevant for the purposes of resolving the case in the main proceedings and, second, on the grounds that they are hypothetical.

13. In his first objection, Mr Cipolla contends, contrary to what is stated in the decision making the reference, that the relevant national law does not require the national court to assess whether an agreement between a lawyer and his client exists and is lawful. In his submission, the absence of agreement between the lawyer and his client and the classification of the sum paid as an advance on account of the services to be paid for have the force of *res judicata*, since they were not challenged before the court of appeal.

14. It is clear from settled case-law that the relevance of the question referred must first be established by the national court. [7] The Court may declare a question inadmissible on such grounds only if it is manifestly irrelevant or if there is no connection between the question referred and the subject-matter of the case.

15. In the main proceedings, however, the question whether the initial sum paid by the client to her lawyer constitutes full payment for the services provided to her has an impact on the outcome of the dispute because the answer to that question determines whether an agreement between a lawyer and his client regarding the fees due to him can override the scale of lawyers' fees.

16. Secondly, Mr Cipolla argues that the question referred is hypothetical. In his view the validity of the agreement between the lawyer and his client need be assessed only if

7 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 33 and 34; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 24; and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 43.

it is shown that such an agreement exists, which is not the case. That is why, in his view, the questions referred by the Corte d'appello di Torino are similar to an application for an advisory opinion.

17. It is correct that the Court's role does not include delivering advisory opinions on general or hypothetical questions. [8] The purpose of the present case is, however, to determine whether fees may be fixed by an agreement between the parties or only according to the scale of lawyers' fees. As the question raised by the referring court relates to this point, it cannot be classed as hypothetical.

18. Since it has been established that the question raised by that national court was not hypothetical, it is not for the Court to rule on the national procedural rules applying in the case.

19. One final objection has been raised by the Commission and the German Government, which point out in their written observations in *Cipolla* that the facts at issue in the main proceedings have no cross-border implications. The same applies as regards *Macrino and Capodarte*. One may question all the more then, in a purely internal situation, the applicability of Article 49 EC, which is intended to prevent restrictions on freedom to provide services from one Member State to another, and hence the admissibility of the question referred by the national court. However, in answer to a question relating to the free movement of goods, the Court held, in paragraph 23 of the judgment in *Guimont*, [9] that it cannot be considered that the national court does not need the interpretation of Community law requested, even if the factual situation at issue is purely internal, since 'such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation'. That case-law was followed in *Anomar and Others*, [10] in which the questions referred by the national court also related to freedom to provide services. Although the questions raised by the Corte d'appello di Torino were referred in a case that had no cross-border element, the national court held, quite rightly, that an answer would be useful if Italian law required it to extend to Italian citizens the advantages that Community law confers on the citizens of the other Member States. [11] Moreover, the scope of competition law, on which the national court relies, is particularly broad, since it can apply to any restriction on competition affecting trade between Member States. The scale of lawyers' fees to which the question relates should also be considered in the light of Article 49 EC, even though the factual situation described by the

8 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22.

9 — Case C-448/98 [2000] ECR I-10663.

10 — Case C-6/01 [2003] ECR I-8621, paragraph 41.

11 — This is clear from Article 3 of the Italian Constitution concerning the principle of equality, as interpreted by the Corte costituzionale (Constitutional Court) in its judgments No 249 of 16 June 1995 (GURI, Constitutional Court Special Series, No 26 of 21 June 1995) and No 443 of 30 December 1997 (GURI, Constitutional Court Special Series, No 1 of 7 January 1998).

national court is a purely internal one, since it may have effects on freedom to provide services by giving advantage to national providers of legal services. [12]

20. At the present stage of case-law, it does not therefore appear that the objections raised would affect the admissibility of the questions referred by the Corte d'appello di Torino.

21. In *Macrino and Capodarte*, Mr Meloni and the Italian Government also contend that the question referred by the Tribunale di Roma is inadmissible.

22. They argue, first of all, that the question referred by the national court is inadmissible because it is not needed in order to resolve the main proceedings. In the absence of an agreement between the parties on the amount of the lawyers' fees, that court should, under Article 2233 of the Codice civile (Italian Civil Code) fix the amount without being bound by the scale of lawyers' fees. [13] However, as stated in the order for reference, the dispute at issue concerns remuneration for services provided by Mr Meloni for which the latter obtained an order to pay based on the scale of lawyers' fees laid down in respect of out-of-court services, and the amount of that remuneration is disputed by his clients. It therefore appears that the question of legality, with regard to Community law, of the scale of lawyers' fees for out-of-court services does have a link with that dispute.

23. The Italian Government also challenges the relevance of the question referred by the national court since no anti-competitive practice was involved, either when the scale was drawn up, as was established in *Arduino*, or as a result of the conduct of the economic operators. In that regard, it should be pointed out that, in the context of the procedure of cooperation between the national court and the Community court established by an order for reference, the relevance of the question referred in the light of the factual and legal circumstances of the pending dispute is established by the national court, [14] so the objection of the Italian Government should be rejected.

12 — In respect of goods, the Court followed this line of reasoning in Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraphs 44 and 45, which it extended to services in Case C-398/95 *SETTG* [1997] ECR I-3091; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraphs 11 and 12; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraphs 37 and 38.

13 — Article 2233 of the Codice civile governs remuneration under a contract for the provision of services and provides that 'if the remuneration has not been agreed between the parties and cannot be determined by reference to scales of charges or custom and practice, it shall be determined by the court, after the opinion of the professional association to which the professional belongs has been heard' (p. 3 of the English translation of the decision making the reference in *Cipolla*).

14 — See *Dzodzi*, *Leur-Bloem* and *Inspire Art*, cited above.

24. Mr Meloni also contends that the national court did not state the precise reasons which led it to raise the question of the interpretation of Community law. That argument is unconvincing since, on the contrary, the order for reference makes it very clear in what circumstances an interpretation of Community law is useful for the resolution of the main proceedings.

25. In those circumstances, it appears that none of the arguments put forward either by Mr Meloni or by the Italian Government have shown that the question referred in *Macrino and Capodarte* is inadmissible.

III — Analysis

26. The first three questions in *Cipolla* and the question in *Macrino and Capodarte* all seek to clarify the scope of the judgment in *Arduino*. An interpretation of that judgment is required in order to answer the questions referred concerning any restrictions it may involve, first as regards the inclusion of out-of-court services and second as regards the prohibition on lawyers and their clients agreeing to derogate from the scale.

27. In that regard, the Commission expressly asks the Court in *Macrino and Capodarte* to reverse its well-established case-law regarding the application of Articles 10 EC, 81 EC and 82 EC, and, in particular, to reverse the judgment in *Arduino*.

28. The Court has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments. Without determining whether those judgments constituted legal precedents the Court has always shown deference to a line of well-established case-law. The force awarded by the Court to judgments it has delivered in the past may be considered to derive from the need to secure the values of cohesion, uniformity and legal certainty inherent in any system of law. Those values are all the more important within the context of a decentralised system of applying the law such as that of the Community legal system. The acknowledgement in *CILFIT* that there is no longer an obligation to make a reference for a preliminary ruling if the question raised has already been interpreted by the Court [15] and the option for the Court provided for in Article 104(3) of its Rules of Procedure to adopt an order if 'a question referred to the Court for a preliminary ruling

15 — Case 283/81 [1982] ECR 3415, paragraph 21.

is identical to a question on which [it] has already ruled' can only be understood in the light of the interpretative authority granted the Court for the future. [16] Even though the Court is not formally bound by its own judgments, by the deference it shows them it recognises the importance of the stability of its case-law for its interpretative authority and helps to protect uniformity, cohesion and legal certainty within the Community legal system.

29. It is true that stability is not and should not be an absolute value. The Court has also recognised the importance of adapting its case-law in order to take account of changes that have taken place in other areas of the legal system or in the social context in which the rules apply. It has also accepted that the appearance of new factors may justify adaptation or even review of its case-law. The Court has none the less agreed only cautiously to depart from its earlier judgments in as radical a way as is suggested by the Commission in the present case. [17]

30. Due to the judgment recently delivered in *Arduino* and the impact that the present case will have on the same regulations, namely the scale of lawyers' fees, and in the absence of any new legal argument put forward by the Commission, I do not consider that it would be appropriate for the Court to reverse its judgment in *Arduino*. Also, for reasons which I will set out below, I think that the reasoning followed by the Court in that judgment is compatible with an interpretation of the law which meets some of the concerns expressed in their Opinions by Advocates General Léger and Jacobs respectively in *Arduino* and *Pavlov and Others* [18] cited below.

16 — The underlying logic of the system is to ensure uniform application of Community law without obliging national courts to make a reference whenever an issue of Community law is raised whilst at the same time not preventing national courts from making a reference if the Court of Justice has already ruled. Otherwise, national courts would be unable to request the Court to reverse some of its interpretations of the law, which might in the long term lead to the absolute irreversibility of case-law in certain areas of the law (because the Court has very often no opportunity to review its case-law unless reference is made to it). Such a prohibition does not even exist in legal systems where the rule of precedent is applied with the greatest rigour. In that regard, Article 104(3) of the Rules of Procedure should not be considered to prevent national courts from expressly requesting the Court to review well-established case-law. It is of course permissible for the Court to take such an opportunity or to adopt an order under the said Article 104(3) upholding its case-law on a specific point of law.

17 — An exception to this view of the Court is to be found in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, where the Court took into consideration the consequences of its earlier case-law in the social context of the relevant rules and the legal systems responsible for applying them. The Court held in paragraph 14 of that judgment: 'In view of the increasing tendency of traders to invoke Article 30 of the [EC] Treaty [now, after amendment, Article 28 EC] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter'.

18 — Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451.

A — *Review of State measures from the point of view of Articles 10 EC and 81 EC*

31. Article 81 EC forms part of the competition rules applying to the conduct of undertakings. It is therefore only by way of exception that national measures are covered by that article, and only in the context of the obligation on Member States to cooperate in good faith in the application of Community law. The concern to preserve the neutrality of the EC Treaty in relation to the powers conferred on the Member States, [19] although it does not preclude it, none the less limits review of legislative measures in the light of Articles 10 EC and 81 EC. Both those rules were used together in *GB-Inno-BM* [20] which established a principle in remarkably broad terms: 'while it is true that Article 86 [of the EC Treaty (now Article 82 EC)] is directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness'. Thus set out, that principle would have made it possible to make any national measure having a restrictive effect on competition subject to competition law. However, the Court subsequently gave a more restrictive interpretation of the requirements under Articles 10 EC and 81 EC. According to case-law, those articles are regarded as having been infringed only in two cases: where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, [21] or where that State divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. [22]

32. There is a clear difference between the two cases. In the first case an agreement between undertakings is in existence before the State measure which validates or reinforces it. The State's liability arises from the fact that it aggravates by its action conduct that is already anti-competitive. In the second case, in which the State delegates its authority to private entities, undertakings adopt a decision which is then codified in a legislative measure. Application of Articles 10 EC and 81 EC is therefore designed to prevent a measure's form alone making it subject to competition law. In my view, that means that the concept of delegation must be interpreted in a substantive way by requiring an assessment of the decision-making process leading to the adoption of the State legislation. The following cases are covered by the concept of substantive delegation: first, delegation by the State to a private entity of the right to adopt a measure and, second, delegation of official authority to a private entity to review the decision-making process leading to the adoption of a legislative measure. A State may be regarded as having delegated its authority where its

19 — Triantafyllou, D., 'Les règles de la concurrence et l'activité étatique y compris les marchés publics' (The competition rules and State activity including public works contracts), *Revue Trimestrielle de Droit Européen*, 1996, No 1, p. 57, see p. 64 in particular.

20 — Case 13/77 [1977] ECR 2115, paragraph 31.

21 — Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 46.

22 — Case 136/86 *Aubert* [1987] ECR 4789, paragraph 23; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851; *Arduino*, paragraph 35, and Order of 17 February 2005 in Case C-250/03 *Mauri* [2005] ECR I-1267, paragraph 30.

intervention is limited to the formal adoption of a measure, even though public interest requires the way in which the decisions are adopted to be taken into account. To define the concept of 'delegation' as covering both those cases strengthens the requirement for consistency to which State action is subject. That principle of consistency ensures that whilst the State is acting in the public interest its intervention is subject to political and democratic review procedures, and if it delegates the pursuit of certain objectives to private operators it must make them subject to the competition rules which constitute the procedures for supervising power within the market. However, the State cannot delegate certain powers to private market operators whilst exempting them from application of the competition rules. This extended interpretation of delegation ensures that exclusion of the application of the rules of competition law is due to submission to the public interest and not to appropriation of public authority by private interests. [23]

33. This is why the case-law cited above must certainly be construed as meaning that it is necessary to be aware what aims the State is pursuing in order to determine when its action may be made subject to competition law. It is necessary to establish whether legislative action by the State is dominated by a concern to protect the public interest or, on the other hand, whether the degree to which private interests are being taken into account is likely to alter the overriding objective of the State measure, which is therefore to protect those interests. Involvement of private operators in the legislative process, at the stage at which a rule is proposed, or by their presence within a body responsible for drafting that rule, is likely to have a determining influence on the content of the rule. The danger is that a legislative provision might have the sole purpose of protecting certain private interests from the elements of competition, to the detriment of the public interest. [24]

34. There is no doubt that there is no justification for making every State measure subject to Articles 10 EC and 81 EC. The concerns expressed in their Opinions by Advocates General Jacobs and Léger in *Pavlov and Others* [25] and *Arduino*, [26] respectively, are not along those lines, but follow closely the case-law. They set out two criteria for determining whether State measures are in fact under the control of private operators. In their view, the measure in question does not constitute an infringement of Articles 10 EC and 81 EC, first, if its adoption is justified by pursuit of a legitimate public interest and,

23 — Opinion of Advocate General Léger in *Arduino*, point 91, and of Advocate General Jacobs in Case C-67/96 *Albany International* [1999] ECR I-5751, point 184.

24 — Point 91 of the Opinion in *Arduino*, cited above.

25 — Points 156 to 165.

26 — Points 86 to 91.

secondly, if Member States actively supervise the involvement of private operators in the decision-making process.[27] Those criteria are intended to establish to what extent the State is supervising delegation to private operators. Although the criteria set out are intended to be cumulative, it seems to me that the public interest criterion covers the other criterion too. It is even liable to lead the Court to assess all measures likely to reduce competition. This is perhaps the reason why the Court rejected the adoption of such a criterion.

35. However, in my view, the concerns underlying the Advocate Generals' suggestions are valid. It seems to me that current case-law allows them to be answered. One may even speculate whether the Court did not implicitly adopt the criterion of supervision by the State in order to verify the legislative nature of a State measure, since it refers to this in paragraph 10 of the judgment in *Arduino*. Doubts remain, however, as to the way in which this criterion is assessed by the Court, in particular as regards the effectiveness of the supervision exercised by the State, since formal control of the nature of the measure would appear to be inadequate.[28]

36. A comparison with US anti-trust law, which recognises the 'State action doctrine' and subjects State measures only to limited review with regard to competition law, shows the same. In US law, that 'State action doctrine' originated in the judgment of the Supreme Court in *Parker* v *Brown*,[29] which excluded application of the Sherman Act to measures taken by States under their sovereign powers. The decisions and practices of the competition authorities have evolved considerably since that judgment.[30] A legislative measure is therefore excluded from the scope of anti-trust law only if it meets two cumulative conditions. First, it is required that the contested measure causing a restriction on competition be clearly stated to be a State measure and, second, that its implementation be supervised by the State.

37. A further difficulty is encountered when similar fields are regulated differently depending on the Member States concerned. Whilst measures for self-regulation remain subject to competition law by reason of their origin, State measures elude it. In practice, the Court examined in *Wouters and Others*[31] the compatibility with Article 81 EC of a professional rule prohibiting the formation of multi-disciplinary groups, whilst it held in *Arduino* that a national measure fixing a scale of lawyers' fees was not subject to Article 10 EC in conjunction with Article 81 EC. The only way of ensuring, with regard to Community law,

27 — Points 161 to 163 in the Opinion in *Pavlov and Others*.

28 — Point 106 of the Opinion in *Arduino*.

29 — 317 U.S. 341 (1943).

30 — Delacourt, J., and Zywicki, T., 'The FTC and State Action: Evolving views on the proper role of government', *Antitrust Law Journal*, 2005, vol. 72, p. 1075.

31 — Case C-309/99 [2002] ECR I-1577.

consistent review of both those types of measures is to adopt a criterion requiring effective supervision of the State, including examination of the decision-making process leading to adoption of the rule in question.

38. However, it is clearly not appropriate in the present case to proceed to a relaxation of the case-law, since the Italian legislation in question in the main proceedings has already been considered in *Arduino*. The facts in the dispute which gave rise to the judgment in that case are similar to those which gave rise to *Cipolla*. Following an ordinary car accident caused by Mr Arduino, Mr Dessi claimed damages and reimbursement of his lawyer's fees before the Pretore di Pinerolo. The Italian court awarded the victim what he had claimed, but fixed the level at which the lawyer's fees were to be reimbursed below the minimum rate fixed by the Ministerial Decree of 1994. That judgment was set aside by the Italian Court of Cassation, which held that it was unlawful to disregard the scale of fees in that case and referred the case back to the trial court. That court then made a reference to the Court of Justice, which resulted in that judgment in *Arduino*.

39. In that judgment the Court considered whether or not Articles 10 EC and 81 EC precluded the adoption or maintaining in force of a national measure such as the Ministerial Decree of 1994. The Court held that the Italian Republic had not delegated to private economic operators responsibility for regulating an activity since in that case the CNF submitted only a draft scale to the Minister for Justice, who had the power to have the draft amended or defer its application. [32] In paragraph 10 of that judgment, the Court referred however to the State's effective exercise of its powers of supervision, as a result of which, for example, introduction of the scale approved by the Ministerial Decree of 1994 was deferred. [33] At the hearing the Italian Government pointed out that in 1973 the decree approving the scale of lawyers' fees had been adopted 11 months after the date of the CNF proposal. In 2004 also supervision of the decision-making process by the State was noticeable from the fact that, initially, the Consiglio di Stato refused to approve that proposal, considering that it did not have all the evidence it required in order to give its opinion on the draft scale which was submitted to it. It could be argued that the national court is in a better position than the Court of Justice to make that practical assessment. The Court of Justice considered, however, that it had adequate evidence to make that assessment itself. Since the fees agreed in both sets of main proceedings are governed by the Ministerial Decrees of 1990 and 1994 there is no need to consider the question again. However, if the Court were seised in the future by an Italian court with regard to a dispute concerning facts governed by a later decree, it would perhaps be appropriate to refer back to the national court examination of the effectiveness of the State's supervision of the

32 — Judgment in *Arduino*, paragraph 41.

33 — See also point 107 of the Opinion in *Arduino*.

decision-making process leading to the adoption of that decree.

40. Even though application of a scale of lawyers' fees greatly restricts competition between lawyers, there can no longer be any doubt as to the legality of that scale under Articles 10 EC and 81 EC since the Court held in *Arduino* that it had been laid down by the State and the State had not delegated the power to do so to a group of undertakings. However, it remains to be ascertained whether that result holds good irrespective of the scope of the scale. The questions referred by the national courts relate specifically to that point.

B — *Compatibility with Community competition law of including out-of-court services in the scale of lawyers' fees*

41. A distinction should be drawn between out-of-court services and services provided in the context of proceedings before a court. Article 4(1) of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [34] separates activities relating to the representation of a client in legal proceedings or before public authorities from all the other activities. It could be argued that the market in out-of-court legal services differs from the market in legal services provided in the context of proceedings before a court. In the former case there is less asymmetry of information between the lawyer and his clients because the recipients of the service refer to a lawyer more frequently, so they are in a better position to assess the quality of the service provided.

42. The scale of lawyers' fees as laid down by the Ministerial Decrees, whether of 1990 or 1994, also contains specific provisions relating to services provided in the context of a dispute referred to a court, be it civil, administrative or criminal, on the one hand, and services provided in a non-litigious context, on the other hand. Legal services provided in proceedings directly affect access by individuals to the court. In practice, moreover, legal aid is often restricted to this type of services. [35]

43. Although it makes no specific reference to the features of out-of-court services, the

34 — OJ 1977 L 78, p. 17.

35 — Article 10 of Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41) provides that legal aid is to be extended to extrajudicial procedures only 'if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them'.

Commission, in its written observations in *Macrino and Capodarte* and at the hearing, argues that it is necessary to revert to the conclusion reached in *Arduino* and find that a State measure restricting competition infringes Articles 10 EC and 81 EC unless it is justified by public interest objectives and is proportionate to those objectives. In so doing the Commission is following the line of argument put forward by Advocates General Léger and Jacobs, referred to in point 30 of this Opinion.

44. For the reasons set out above, it seems to me that the judgment in *Arduino* allows no interpretation other than that Article 81 EC in conjunction with Article 10 EC does not apply to this type of State measure, although it has an anti-competitive effect which is increased in relation to a scale which concerns only court-related services. The findings reached in that judgment are based on the State nature of the legislation in question, that is the scale of lawyers' fees, and not on the specific nature of those potential anti-competitive effects according to the different types of legal services concerned.

45. However, a national court has a duty when interpreting national law to select, where it has some discretion in the matter, the interpretation that conforms most closely to Community law, and is most likely to attain its objectives. [36] Article 60 of the Decree-Law states that a court is free to fix at its discretion fees for out-of-court services, within maximum and minimum limits, and without giving reasons; with adequate reasons a court may also disregard the minimum and maximum limits of the scale. [37] Consequently, in order not to increase the anti-competitive effect of the scale, the national court will be required, so far as possible, to use its discretion when it decides a dispute concerning the amount of fees laid down in that scale for out-of-court services.

46. Finally, I suggest that the Court should find that it is clear from the judgment in *Arduino* that Article 81 EC in conjunction with Article 10 EC does not preclude a national measure fixing a scale for lawyers' fees, even as regards out-of-court services, provided that the measure has been subjected to effective supervision by the State and where the power of the court to derogate from the amounts fixed by the scale is interpreted in accordance with Community law in a way that limits the anti-competitive effect of that measure.

36 — With regard to the obligation on the national court to interpret national law as far as possible in conformity with Community law, see Case 14/83 *Von Colson and Kamann* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [1990] ECR I-8835.

37 — Interpretation given in the observations of the Italian Government in *Macrino and Capodarte*.

C — *Compatibility with Community competition law of the prohibition on derogating from the scale of lawyers' fees*

47. The question raised in *Cipolla* concerns the prohibition on lawyers and their clients derogating from the scale of lawyers' fees contained in the Ministerial Decree of 1994. As pointed out in point 5 of this Opinion, Article 24 of Law No 794 provides that: 'No derogation from the minimum ... fees laid down for the services of a lawyer shall be permitted. Any agreement to the contrary shall be null and void.' It should be noted, however, that that prohibition is absolute only between a client and his lawyer, since it is however permissible for a court to depart from the scale. [38]

48. Article 60 of the Decree-Law cited in point 45 above states that a national court may at its discretion fix fees within maximum and minimum limits. Giving adequate reasons that court may also disregard the minimum and maximum limits of the scale. A court has the same power in the case of legal services provided in the context of a dispute that has been referred to the courts.

49. It is true that the question of the compatibility of the prohibition on derogating from the scale of lawyers' fees with Articles 81 EC and 10 EC is not specifically mentioned in *Arduino*. A restrictive interpretation of the possibility for a national court to derogate from that scale would increase its anti-competitive effects by limiting considerably price competition between lawyers. That is why, in order to ensure respect for the effectiveness of Community competition law, a national court is required to interpret national law in such a way that those anti-competitive effects are reduced as much as possible. [39]

50. I therefore suggest that the answer to the question referred in *Cipolla* should be that it is clear from *Arduino* that Article 81 EC in conjunction with Article 10 EC does not preclude a national measure preventing lawyers and their clients from derogating from the scale of lawyers' fees, on condition that the measure has been subject to effective supervision by the State and where the court's power to derogate from the amounts fixed by the scale is interpreted in accordance with Community law so as to limit that measure's anti-competitive effect.

D — *Compatibility of the scale of lawyers' fees with the principle of freedom to provide services*

51. Legal services provided by lawyers are services within the meaning of Article 50

38 — Article 60 of the Decree-Law and paragraph 42 of the judgment in *Arduino*.

39 — *CIF* and *Pfeiffer and Others*.

EC. [40] Article 49 EC prohibits restrictions on freedom to provide services in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. More generally, case-law has declared unlawful restrictions on freedom to provide services involving travel by the recipient of the service [41] or simply movement of the services. [42]

52. Article 52(1) EC empowers the Council of the European Union to adopt directives in order to achieve the liberalisation of a specific service. It is on that basis that Directive 77/249 was adopted. Article 4(1) thereof provides in particular that 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.

53. The Court has consistently held that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty' constitute a restriction. [43]

54. In order to establish whether Article 49 EC and Directive 77/249 preclude national legislation such as that in question in the main proceedings it is necessary first of all to ascertain whether that legislation includes a restriction on freedom to provide services, and then to see whether that restriction can be justified by the reasons set out in Article 46(1) EC in conjunction with Article 55 EC or by overriding reasons of public interest.

1. The existence of a restriction on freedom to provide services

55. As with the other freedoms, the purpose of the principle of freedom to provide services is to promote the opening up of national markets through the possibility offered to service providers and their clients to benefit fully from the Community's internal market. It is a matter both of allowing such providers to exercise their activity at a transnational level and of opening up access for consumers to services offered by providers established in other

40 — Case 33/74 *Van Binsbergen* [1974] ECR 1299.

41 — See to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

42 — Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007; Case C-76/90 *Säger* [1991] ECR I-4221; Case C-23/93 *TV10* [1994] ECR I-4795; and Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 21.

43 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33. See also Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraph 31.

Member States. Freedom to provide services therefore forms part of 'the fundamental status of nationals of the Member States'[44] constituted by European citizenship, of which it represents the transnational dimension.

56. In order to achieve that objective, Member States are required to take into account the effects that measures they adopt to regulate their national markets will have as regards the exercise by providers established in other Member States of their right to freedom to provide services. In that context, it is not only discrimination on grounds of nationality that is prohibited but also discrimination imposing, in respect of the exercise of a transnational activity, additional costs or hindering access to the national market for service providers established in other Member States.[45]

57. A similar framework exists for appraising all four freedoms. In respect of the free movement of goods, in *Deutscher Apothekerverband*[46] the Court censured a national measure on the grounds that it was more of an obstacle to pharmacies outside Germany than to those within it, thereby depriving the former of a significant way of gaining access to the German market. Reference to the criterion of market access was also made in *CaixaBank France*,[47] which concerned freedom of establishment. Similar reasoning was applied in the field of services in *Alpine Investments*.[48] It has also been held that national legislation treating revenue from capital of non-Finnish origin less favourably than dividends distributed by companies established in Finland constitutes a restriction on the free movement of capital.[49]

58. The common line adopted in those cases appears to be that any national policy that results in treating transnational situations less favourably than purely national situations constitutes a restriction on the freedoms of movement.[50] With that reservation, Member States remain free to regulate economic activity in their territories, as application of the freedoms of movement is not intended to bring about legislative harmonisation.[51]

44 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

45 — See points 37 to 40 of my Opinion in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837.

46 — Case C-322/01 [2003] ECR I-14887, paragraph 74.

47 — Case C-442/02 [2004] ECR I-8961, paragraph 12.

48 — It is stated in paragraph 38 of that judgment that the prohibition in question 'directly affects access to the market in services in the other Member States'. In point 59 of his Opinion in *Bacardi France*, Advocate General Tizzano notes that the restriction on freedom to provide services derives from the fact that the French rules in question 'directly impede access to the market'.

49 — Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 23.

50 — Opinion in *Marks & Spencer*.

51 — See point 28 of the Opinion of Advocate General Tesauro in Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, and point 60 of the Opinion of Advocate General Tizzano in *CaixaBank France*.

59. The less favourable treatment of transnational situations may take various forms. Often it manifests itself as an obstacle to access to the national market, either by protecting positions acquired on that market or by making it more difficult for cross-border service providers to participate in the market. It is appropriate to consider the Italian legislation at issue in the main proceedings in the light of that criterion.

60. In the present case, although the scale of lawyers' fees established by the legislation in question applies indiscriminately both to lawyers established in Italy and to those established in other Member States who wish to provide services in Italy, it gives rise to restrictions on freedom to provide services in a number of situations in which the latter are placed in a less favourable situation than their Italian counterparts.

61. First, it is clear that the scale is drawn up taking solely into account the situation of Italian lawyers and fails to contemplate transnational situations.[52] It is therefore appropriate to consider whether the criteria adopted in fixing the fees are specific to lawyers established in Italy or whether they are applicable to lawyers established in other Member States. Some provisions of the scale are likely to create restrictions on freedom of movement. This is so first of all as regards the minimum and maximum fees fixed by that scale. Other provisions of the scale will be mentioned in so far as they might also be problematical with regard to the principle of the freedom to provide services. In order to establish whether they restrict freedom to provide services, I will examine in turn the effects on cross-border situations of each of those provisions.

(a) The minimum fees fixed in the scale

62. Do the minimum fees fixed in the scale constitute a restriction on freedom for lawyers established outside Italy to provide services?

63. It is clear from well-established case-law of the Court that State price-control systems including a prohibition on selling below a minimum price 'do not in themselves constitute measures having an effect equivalent to a quantitative restriction but may have such an effect when prices are fixed at a level such that imported products are placed at a disadvantage compared to identical national products, either because they cannot profitably be marketed on the conditions laid

52 — Case 231/83 *Cullet* [1985] ECR 305 and Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 10.

down or because the competitive advantage conferred by lower cost prices is cancelled out'. [53]

64. This reasoning was transposed by the Court from the area of free movement of goods to the area of right of establishment in *CaixaBank* v *France*. The Court held that the French legislation prohibiting the remuneration of sight accounts constituted 'a serious obstacle to the pursuit of their activities ... affecting their access to the market' since it deprived foreign companies of the possibility of 'competing more effectively ... with the credit institutions traditionally established in the Member State of establishment'. [54] Similarly, in respect of freedom to provide services, it is necessary to ensure that the competitive advantage of lawyers established outside Italy is not cancelled out by the legislation of that Member State. The comparison should be made between the situation of lawyers established in other Member States and that of their counterparts already established in Italy.

65. The minimum fees fixed in the scale prevent lawyers established in a Member State other than the Italian Republic from providing legal services in that State for fees below those minimum levels, even if they had the opportunity to do so due, for example, to their specialising in a particular field. [55] The discriminatory effect of the minimum fees is strengthened by the fact that their level is fixed by the scale drawn up by the CNF, which is made up only of lawyers who are members of the Italian Bar, and, as the Italian Government acknowledged at the hearing, only takes into account costs incurred by national lawyers. [56] The minimum fees therefore constitute a restriction on freedom to provides services in so far as they cancel out the competitive advantage of lawyers established outside Italy. Contrary to what the German Government contends, that finding is not altered by the fact that competition between lawyers does not only have an effect on prices but also on the quality of the services provided. Consequently, Italian citizens wishing to call on the services of a lawyer established in another Member State are unable to benefit fully from the advantages of the common market, because access to legal services at a cost below that fixed by the Italian scale is denied them, even though those services are available in another Member State.

(b) The maximum fees fixed in the scale

66. The scale at issue also contains maximum fees, which lawyers practising in Italy

53 — Joined Cases 80/85 and 159/85 *Edah* [1986] ECR 3359, paragraph 11. See also Case 65/75 *Tasca* [1976] ECR 291; Case 82/77 *Van Tiggele* [1978] ECR 25; *Cullet*, paragraph 23; and Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, paragraph 17.

54 — *CaixaBank France*, paragraphs 12 and 13. It should be noted that even if *Keck and Mithouard*, were relevant as regards the right of establishment, the result achieved would be the same, as there would in any case be de facto discrimination that would make the concept of 'selling arrangements' irrelevant (paragraph 16 of that judgment).

55 — See point 48 of the Opinion of Advocate General Alber in Case C-263/99 *Commision* v *Italy* [2001] ECR I-4195.

56 — No account is taken, for example, of the fact that foreign lawyers might have lower fixed costs.

cannot exceed regardless of where they are established.

67. The Court has already considered pricing systems containing maximum prices. It is clear from case-law that where the effect of the maximum price is to reduce the gross profit margin of importers, who must deduct from that price their import costs, that price conflicts with the free movement of goods. [57] The censure of maximum prices is expressed in general terms: a restriction on free movement is found to exist 'when the prices are fixed at a level such that the sale of imported products becomes either impossible or more difficult than that of domestic products'. [58]

68. The judgment in *AMOK*, [59] cited by the German Government at the hearing in order to dispute the fact that the scale brought about a restriction on freedom to provide services, is not relevant in the present case. In *AMOK* the Court considered a German procedural rule which limited the recoverable costs to the rates applying to lawyers established in Germany. Unlike the legislation at issue here, however, the German scale does not preclude foreign lawyers and their clients from fixing the level of fees freely. [60]

69. Additional costs may be incurred by lawyers as a result of providing services in Italy whilst being established in another Member State, if only in terms of travel costs to meet their clients or to appear before an Italian court. [61] However, the maximum fees are fixed only by reference to the situation of lawyers established in Italy. Such fees therefore reduce the profit margin of lawyers established outside Italy in relation to that of lawyers established in Italy. To that extent at least the fixing of maximum fees by the scale constitutes a restriction on the cross-border provision of legal services.

70. Furthermore, the upper level of the scale at issue might also constitute an obstacle to freedom to provide services by preventing the quality of the services provided by lawyers established in Member States other

57 — Case 116/84 *Roelstraete* [1985] ECR 1705, paragraph 21, and Case C-249/88 *Commission* v *Belgium*, paragraph 7.

58 — Case C-249/88 *Commission* v *Belgium*, paragraph 15. In Case 181/82 *Roussel Laboratoria and Others* [1983] ECR 3849, paragraphs 21 and 23, the Court considered a pricing system which applied different arrangements to imported goods from those applied to locally produced goods, which indexed the prices of imported goods to rates whose significance varied from one Member State of manufacture to another as a result of the legal provisions and economic conditions which govern the formation of the reference price. The Court held that the sale of imported products is placed at a disadvantage or made more difficult whenever the level of prices to which, as regards products from other Member States, the legislation of the Member State of importation refers, is lower than that applicable to products from that State.

59 — Case C-289/02 [2003] ECR I-15059.

60 — Point 46 of the Opinion of Advocate General Mischo in *AMOK*.

61 — See point 44 of the Opinion in *Commission* v *Italy*.

than Italy from being correctly remunerated, so that some lawyers charging high fees would be dissuaded from providing services in Italy.

(c) Other potential restrictions on freedom to provide services arising from the prohibition on derogating from the scale

71. Under the Ministerial Decree, whether that of 1990 or that of 1994, lawyers practising in Italy are required to invoice for their services on the base of a closed list of legal services set out in the scale. They are therefore in principle prevented from fixing the amount of their fees by any other method, for example, on the basis of the time spent on preparing the case by each lawyer according to his level of expertise. However, these two systems give the client the opportunity to understand the amount of fees he will have to pay and also help to reduce the asymmetry of information that exists between a lawyer and his client. In any event, to require lawyers established outside Italy who are exercising their freedom to provide services there to submit invoices for their fees based on the categories of services established by the scale results in additional costs for them. If they normally use another system of invoicing they will be forced to abandon it, at least for services provided in Italy. Consequently, the requirement imposed on lawyers established in other Member States who provide services in Italy to submit invoices for their work based on categories of services set out in the scale, in so far as it results in additional costs for them, may constitute a restriction on their freedom to provide services.

72. Article 15 of the Ministerial Decree of 1994 relating to disputes before a commercial, civil or administrative court, [62] which provides that lawyers may invoice their costs at a standard rate of 10% of the sum of their fees and the court fees, does not take into account the different factual situations. [63] That article does not contemplate cross-border situations for which the costs incurred may exceed that standard rate. Thus it is likely to be unfavourable to lawyers exercising their freedom to provide services in Italy.

73. Fixing success fees is also covered by the Ministerial Decree of 1990 applying to disputes before a commercial, civil or administrative court, since Article 5(3) thereof provides that such fees must be less than twice the maximum rates set. [64] Foreign lawyers providing their services in Italy are prevented by that measure from freely fixing

62 — The relevant articles are Article 11 for extrajudicial disputes and Article 8 for cases before a criminal court.

63 — This standard amount was raised to 15% by the Ministerial Decree of 2004.

64 — This threshold was raised to four times the maximum fees in 1994, and prior approval of the CNF has been required since 2004.

the fees to be paid by their clients. Thus, lawyers established in other Member States are deprived of a particularly effective way of entering the Italian market. [65]

74. Generally, whilst lawyers established in Italy may arrange to share costs within their chambers on the basis of the fees fixed in the scale it is not possible for lawyers established in other Member States to operate according to the Italian scale since, by definition, they only do some of their work in Italy.

75. In all these situations the scale of lawyers' fees constitutes an obstacle to the freedom of lawyers established in other Member States to provide services on the Italian market. In conclusion, it appears that the Decree-Law constitutes a restriction on freedom to provide services within the meaning of Article 49 EC, and it is now necessary to ascertain whether that restriction is justified. As no argument concerning Article 46(1) EC in conjunction with Article 55 EC has been submitted, [66] I will only consider justification from the point of view of overriding reasons of public interest. As the interveners have focused their arguments on the question of minimum fees I will take that point first.

65 — *CaixaBank*.

66 — In Case 2/74 *Reyners* [1974] ECR 631 the Court rejected the argument that lawyers were involved in the exercise of official authority within the meaning of Article 45 EC.

2. Possible justification for the restriction on freedom to provide services resulting from the fixing of minimum fees

76. In their written observations and at the hearing Mr Meloni and the Italian and German Governments put forward arguments to justify the infringement of freedom to provide services constituted by the fixing of minimum fees under the Italian legislation in question in the main proceedings. Their justification covers two aspects.

(a) The principle of access to the courts

77. Mr Meloni and the German Government have referred to the principle of access to the courts and to respect for the right to a fair hearing as an overriding reason of public interest. Mr Meloni refers to Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and to Article 24 of the Italian Constitution.

78. A right of access to the courts has been recognised as a fundamental principle of Community law. [67] The Court has held that in criminal matters that right may also include the right to be defended by a lawyer. [68] The second and third paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union [69] also provide that 'everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

79. The German Government maintains that if the minimum fees were abolished fees would be calculated on the basis of the amount of time spent on the case, which would mean that the fees to be paid in respect of small claims for compensation would be comparatively high in relation to the value of the dispute. People on low incomes would be placed at a disadvantage by such a system. At the hearing, the German Government explained that the minimum fees for small cases could be fixed below cost, but that it would be possible to set them off against the minimum fees applying in other cases.

80. However, it is not clear how the fixing of minimum fees helps to ensure equal access to the courts for all citizens. On the contrary, as the Commission stated at the hearing, if that was the objective of the Italian legislation in question in the main proceedings, it would only be necessary to fix maximum fees in order to prevent the level of fees from exceeding a certain threshold. Moreover, I do not see in that legislation any clear link between fixing minimum fees and the possibility for lawyers of maintaining a reasonable level of remuneration by making up for their costs not covered in certain cases with fees obtained in other cases. The justification put forward by the German Government in this respect seems to me to be purely hypothetical. In those circumstances, it appears that the adoption of minimum fees for lawyers' services is not an appropriate way of attaining the legitimate objective of ensuring access to the courts for all. The question whether it promotes equal access to the courts is more delicate. That question is related to the second argument by way of justification, proper operation of the legal profession.

67 — Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17 to 19.

68 — Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 39. According to the case-law of the European Court of Human Rights, that right extends to civil cases. In *Golder* v *United Kingdom* (judgment of 21 February 1975, Series A no. 18), the Court declared that refusal to grant a prisoner wishing to bring a civil action access to a lawyer to be a violation of the right of access to a court guaranteed by Article 6 of the ECHR.

69 — Charter proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 20). See also the interpretation of paragraph 1 of Article 6 of the ECHR by the European Court of Human Rights. In *Airey* v *Ireland* (judgment of 9 October 1979, Series A no. 32, paragraph 26), that Court held that that article may sometimes require the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court.

b) Proper operation of the legal profession

81. At the same time, the Italian Government bases its arguments on the constraints of organising the legal profession, as mentioned in paragraphs 97 and 122 of the judgment in *Wouters and Others*. It is clear from this that the objective 'to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice' may justify a restriction on freedom to provide services. [70]

82. Although Member States are free to organise their own systems in respect of procedures and litigation [71] and to lay down the conditions for practising the legal profession, [72] their scope for manoeuvre is, however, circumscribed by Community law. That is why they must demonstrate how fixing minimum fees is appropriate for ensuring the proper operation of that profession.

83. The main argument put forward both by the Italian Government and the German Government at the hearing concerns the likelihood that fierce competition between lawyers would lead to price competition resulting in a reduction in the quality of the services provided, to the detriment of consumers. That likelihood would be all the greater since the market in legal services is characterised by asymmetry of information between lawyers and consumers, since the latter do not have the necessary criteria for assessing the quality of the services provided. [73]

84. The Italian Government adds that the existence of minimum prices alone would ensure separation of the interests of lawyers and their clients. Providing poor-quality services at a low price might be in the lawyer's interest, but would not be the interest of his client in the long run. The Italian Government also pleads the need to protect the dignity of the legal profession, which requires fixing a minimum level for their fees. With regard to the latter argument, the Italian Government does not explain how that measure is appropriate for protecting the dignity of the legal profession, nor why such a measure is necessary only for that profession and not for the other liberal professions.

70 — See also *Van Binsbergen*, Case 427/85 *Commission* v *Germany* [1988] ECR 1123 and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511.

71 — Joined Cases 51/71 to 54/71 *International Fruit Company* [1971] ECR 1107 and Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 49.

72 — Case 107/83 *Klopp* [1984] ECR 2971, paragraph 17; *Reisebüro Broede*, paragraph 37; *Wouters and Others*, paragraph 99, and Order in *Mauri*.

73 — With regard to the asymmetry of information which characterises the markets in professional services, see the Opinion in *Arduino*, point 112, and the Opinion in *Pavlov and Others*, point 85.

85. Although the Court did not consider this point in *Arduino*, Advocate General Léger raised in his Opinion the question whether it was possible to justify the adoption of minimum fees in order to ensure the quality of services provided by lawyers. In point 117 of his Opinion he expressed his doubts in the following terms: 'I fail to see how a system of mandatory prices would prevent members of the profession from offering inadequate services if, in any event, they lacked qualifications, competence or moral conscience.'

86. Advocate General Léger's doubts are shared by economic literature, which considers that it is by no means demonstrated that the abolition of the minimum fees would necessarily lead to a deterioration in the quality of legal services provided. [74] Although unable to adduce any evidence, the German Government has tried to plead a 'negative causal link', which it considers results from the fact that below a certain level of fees the quality of services is no longer guaranteed. This presupposes, however, that it would be guaranteed above a certain level. This, per se, is not moreover sufficient to justify fixing minimum fees. It is necessary to demonstrate that the abolition of minimum fees would automatically lead to a reduction in the quality of the legal services.

87. In order for the justification put forward by the Italian Government to offset the restriction on the freedom to provide services which the legislation in question in the main proceedings entails, it is essential to establish a direct link between that legislation and the proper operation of the legal profession. The discriminatory impact of that legislation due to the fact that the minimum fees are calculated on the basis of the substantive conditions under which Italian lawyers operate and taking into account the fact that the CNF is to be involved in drafting that measure, creates a greater obligation to provide justification. Although the objective of ensuring proper operation of that profession is legitimate, the Italian Government has not demonstrated how the fixing of minimum fees is appropriate for achieving it. Although there is already a large difference between the lowest and highest fees, it does not provide any incentive to provide poor-quality legal services at low prices. The Italian Republic has not demonstrated that there is a correlation between the level of fees and the quality of the services provided, and in particular that services provided for a low fee are of an inferior quality. Support is given for this conclusion when one takes into account the situation in those Member States which have no system of price controls. Lawyers' fees appear to be based on a number of factors: the level of specialisation, internal organisa-

74 — Kwoka, J., 'The Federal Trade Commission and the professions: a quarter century of accomplishments and some new challenges', *Antitrust Law Journal*, 2005, p. 997.

tion, economies of scale, and not only, or predominantly, according to the quality of the services provided.

88. In any event, the Italian Government has not studied whether there was an alternative that was less restrictive on the freedom to provide services than that measure. [75] First of all, it should be pointed out that quality may be controlled by other means, apart from fees fixed by the public authorities, in order to ensure the proper operation of the legal profession by reducing the asymmetry of information between a lawyer and his client. The Commission lists three of them. Controlling access to the legal profession by the use of strict selection criteria would be one way. Increasing the opportunity for lawyers' clients to challenge the amount of fees charged would be another way. Finally, strictly applying the disciplinary rules would also dissuade lawyers from behaving towards their clients in ways that did not comply with the professional code of ethics.

89. In that regard, it is correct that the determining factor is not that in most Member States and in many non-member States there are no minimum fees applying to legal services provided by lawyers. [76] The Italian and German Governments quite rightly countered that argument by stating that it would amount to abolishing their freedom to lay down the procedure for organising the legal profession under their national law. However, in the absence of clear evidence of the risk pleaded by the Italian Republic and the Federal Republic of Germany, the experience of the other Member States may serve to cast doubt to some extent on the existence of a causal link between fixing minimum fees and providing high-quality services.

90. The German Government also tries to present the rule of minimum fees as forming part of a broader system. In its view, fees paid to lawyers should be considered in connection with the payment of costs as allowing the consumer to foresee the cost of legal proceedings. It cites in that regard *AMOK*, a case concerning a German rule whereby the fees paid by an unsuccessful party following proceedings were not permitted to exceed the scale applying to lawyers in Germany. However, whilst the introduction of a maximum level, as under the German rule in question in *AMOK*, does make it possible to increase legal certainty, a similar conclusion cannot be drawn from a rule laying down minimum fees, since lawyers may, by defini-

75 — See Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraphs 87 to 89. In that case, in order to demonstrate that there were no measures less restrictive of freedom of movement of goods than a ban on the movement of heavy goods vehicles, the Republic of Austria should have tried to find alternatives before adopting that measure.

76 — Commission Communication — Report on Competition in Professional Services, of 9 February 2004 (COM(2004) 83 final, p. 12), lists the Republic of Austria, the Federal Republic of Germany and the Italian Republic as Member States still having price controls (minimum or maximum prices) with regard to lawyers' fees.

tion, fix their fees above that amount. In order to meet that requirement it would be less restrictive to require that consumers be informed in advance of the way the fees they will have to pay will be calculated. The asymmetry of information would thus be offset by means that were less restrictive of freedom to provide services than fixing minimum amounts.

91. The German Government adds, in its written observations, that the prohibition on derogating from the minimum fees ensures simple and effective application of the principle of reimbursing costs. Permitting lawyers to fix fees below a minimum threshold would be likely to mean that the unsuccessful party would in the end have to reimburse an amount that was greater than that which the successful party had paid and would complicate the taking of evidence in that field. It is sufficient in that regard to observe that the abolition of minimum fees would doubtless not lead to the consequence described by that government but rather to a reduction in the costs borne by the unsuccessful party, who cannot be required to reimburse amounts that the other party has not incurred.

92. Even if there was a link between the minimum rates and the quality of the legal services provided, those rates could not apply for all legal services. Since non-lawyers can, subject to certain conditions, provide non-court-related advice, without being subject to minimum fees, maintaining them does not seem justified for that type of services. The inconsistency shown by the coexistence on the same market of economic operators subject to minimum fees and other persons who are free of that obligation precludes considering that the restriction on freedom to provide services might be justified in the cause of the quality of the services provided to consumers of such services.

93. In the light of the above considerations, I suggest that the Court should find that the restriction on freedom to provide services constituted by the fixing of minimum fees cannot be justified by an overriding reason of public interest.

94. Lastly, it is necessary to consider two final points. As was stated above, the Italian legislation in question in the main proceedings raises questions because it lays down not only minimum fees, but also the maximum fees. However, the national court has not touched on that aspect. Also, an assessment of the possible justifications for maximum fees is more complex and delicate than that of minimum fees [77] and that point has not been discussed. It therefore seems to me

77 — In particular with regard to their consequences for equal access to the courts.

more appropriate not to consider that part of the Italian legislation, which is not moreover necessary in order to settle the dispute in the main proceedings. However, the prohibition on derogating from the minimum fees also raises indirectly the prohibition on success fees. In reality, these may be fees that are lower than minimum fees and are therefore prohibited. It is also true that the reasoning set out above appears to apply to them, since there is no link between lower quality of the services provided and authorisation of success fees. Also, as regards the justification based on access to the courts, the possibility of fixing success fees might, on the contrary, improve such access by enabling parties who have no financial resources to have access to the courts with the risk being borne by the lawyers. In some cases it is even the existence of success fees which makes it possible to bring a class action. In any case, consideration of this aspect is not essential in order to enable the national court to rule in this particular case, and even though it is inextricably linked to consideration of minimum fees I feel it is more prudent, for the reasons already stated in respect of maximum fees, not to give a ruling on this point.

IV — Conclusion

95. In the light of the above considerations, I suggest that the Court should declare:

In Case C-202/04:

As is clear from Case C-35/99 *Arduino* [2002] ECR I-1529, Article 81 EC, in conjunction with Article 10 EC, does not preclude a national measure fixing a scale of lawyers' fees, such as that at issue, even as regards out-of-court services, provided the measure has been subject to effective supervision by the State and where the power of the court to derogate from the amounts fixed by the scale is interpreted in accordance with Community law in a way that limits that measure's anti-competitive effect.

In Case C-94/04:

As is clear from *Arduino,* Article 81 EC, in conjunction with Article 10 EC, does not preclude a national measure preventing lawyers and their clients from derogating from the scale of lawyers' fees, such as that at issue, on condition that the measure has been subject to effective supervision by the State and where the court's power to derogate from the amounts fixed by the scale is interpreted in accordance with Community law so as to limit that measure's anti-competitive effect.

Article 49 EC precludes a national measure, such as that at issue, fixing minimum amounts of lawyers' fees by a scale.