

CONTE

JUDGMENT OF THE COURT (Fifth Chamber)

29 November 2001 *

In Case C-221/99,

REFERENCE to the Court under Article 234 EC by the Giudice di Pace di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Giuseppe Conte

and

Stefania Rossi,

on the interpretation of Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: S. von Bahr, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Conte, by B. Della Barile and S. Cavanna, avvocati,
- the Italian Government, by U. Leanza, acting as Agent, assisted by L. Daniele, avvocato,
- the Commission of the European Communities, by L. Pignataro, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Conte, represented by S. Cavanna, of the Italian Government, represented by G. Aiello, avvocato dello Stato, and of the Commission, represented by L. Pignataro, at the hearing on 11 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2001,

gives the following

Judgment

- 1 By order of 6 May 1999, received at the Court on 9 June 1999, the Giudice di Pace di Genova (Magistrate's Court, Genoa) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC).
- 2 Those questions have been raised in proceedings between Mr Conte and Ms Rossi, an architect, on the subject of the settlement of her fees.

The legal framework

- 3 Italian legislation provides for minimum tariffs in respect of the services provided by engineers and architects.
- 4 Initially, those tariffs were fixed directly by the legislature. Article 2 of the fee scale annexed to Law No 143 of 2 March 1949 approving the professional scale of fees for engineers and architects (GURI No 90 of 19 April 1949, p. 3; 'Law No 143/49') had provided for four types of fees which were fixed: (a) by percentage, that is on the basis of the value of the works; (b) by unit, that is on the

basis of the unit of measurement; (c) by time, that is on the basis of the time spent; and (d) by discretion, that is they are left entirely to the professional.

5 Article 5 of the fee scale annexed to Law No 143/49, which is of particular importance in the main proceedings, lists the services for which fees may be set at the discretion of the professional.

6 Subsequently, Law No 143 of 4 March 1958 (GURI No 65 of 15 March 1958, p. 1101) provided that the scales of fees and emoluments for engineers and architects and the criteria for reimbursement of expenses were to be laid down by decree of the Minister for Justice, by agreement with the Minister for Public Works, on a proposal from the National Councils of the associations of engineers and architects. However, the fee scales laid down according to that new procedure are not applicable to the services referred to in Article 5 of the scale annexed to Law No 143/49. Architects thus still enjoy discretion in setting their fees in respect of those services.

7 Under the single article of Law No 340 of 5 May 1976 prohibiting derogation from the minimum fees of the professional scale for architects and engineers (GURI No 144 of 3 June 1976, p. 4253), the minimum tariffs are to be mandatory; however that scale does not apply to fees at the professionals' discretion.

8 The fee scale annexed to Law No 143/49 was amended on several occasions by decree of the Minister for Justice, by agreement with the Minister for Public Works.

- 9 As regards the rules of the National Council of the Association of Architects, Article 5 of Law No 1395 of 24 June 1923 (GURI No 157 of 5 July 1923, p. 5193) provides that architects enrolled on the register are to elect their own Association Council. One of the functions of that council is to give, on request, an opinion on professional disputes and on the settlement of fees and expenses.
- 10 For the purposes of the main proceedings, it is also necessary to take into consideration the provisions of the Italian Code of Civil Procedure ('the Code'), in particular Article 633 et seq. thereof on the 'procedimento d'ingiunzione' (procedure for the recovery of debts). That summary procedure allows a creditor by *ex parte* application to obtain an enforceable court order against the debtor.
- 11 Under Article 641 of the Code, the creditor, with his supporting documentary evidence, is to apply to the court with jurisdiction for the issue of an order against the debtor for payment of the sum claimed or delivery of the goods within a fixed period which is, in principle, 40 days.
- 12 If the debt relates to fees, charges or reimbursable expenses owed to persons carrying on a profession, the application for the order must be accompanied by the applicant's fee invoice. Under Article 636 of the Code, that invoice must be signed by the applicant and endorsed by the opinion of the competent professional association. That opinion is not necessary if the amount of the expenses and fees is fixed on the basis of mandatory tariffs.
- 13 Article 636 of the Code and Article 5 of Law No 1395 do not specify either the criteria or the information which must be taken into account by the professional association concerned in giving its opinion.

- 14 It is clear from Article 636(3) of the Code that, unless the court dismisses the application on the ground that it is insufficiently substantiated, pursuant to Article 640 of the Code, it is bound to follow the opinion of the professional association as regards the sums claimed, the correction of clerical errors aside.
- 15 In accordance with Article 643(2) of the Code, copies of the order and the application are to be served on the defendant. Under Article 643(3), their joint service marks the start of the proceedings. As from that service, the defendant may apply to have the order set aside within the period prescribed, in accordance with Article 641 of the Code, for voluntary compliance. Under Article 645 of the Code, if the debtor applies to have the order set aside within that period, the ordinary civil procedure *inter partes* is to be followed. If he does not apply, the court is to declare the order enforceable on application by the creditor.

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

- 16 On 30 October 1998, an order against Mr Conte for payment of ITL 2 550 000 to Ms Rossi, an architect, was made by the Giudice di Pace di Genova. Ms Rossi had applied to that court on the ground that, although she had performed some professional services for Mr Conte and had set her fees in accordance with Article 5 of the scale annexed to Law No 143/49, those fees had not been paid by the debtor. She had attached to her application the fee invoice and a confirmatory opinion settling the fees, given by the Council of the Association of Architects of Genoa.
- 17 By memorandum of oral statement served on 18 December 1998, Mr Conte applied to have that payment order set aside, challenging the substance of Ms Rossi's application and contending, as a preliminary point, that the order was

null and void. In Mr Conte's submission, the opinion settling the fee, given by the Association Council and attached to the application for the payment order pursuant to Article 636 of the Code, constitutes a decision by an 'association of undertakings' contrary to Article 85 of the Treaty.

- 18 Since it took the view that the interpretation of Articles 5 and 85 of the Treaty was necessary in order for it to resolve the dispute, the Giudice di Pace di Genova decided to stay proceedings and to refer to the Court for a preliminary ruling the following questions:

'(1) Is the concept of an "undertaking" set out in the decisions of the Commission and the case-law of the Court of Justice applicable to those carrying on a professional activity as architects and, if so, are architects' professional associations to be regarded as "associations of undertakings" within the meaning of Article 85(1) of the Treaty?

(2) Are the combined provisions of Articles 5 and 85 of the EC Treaty compatible with a national rule which simply gives a fee scale drawn up and determined by the national associations of engineers and architects the force of law where:

(a) the final measure of the public authorities is essentially an act confirming the independently expressed will of the national councils of the associations concerned; or

(b) the final measures of the public authorities essentially delegate to the members of the associations concerned the power to set the fee scale at their own discretion, even after the professional services requested of them have been performed; or

(c) the final measures of the public authorities do not contain any indication of being in the public interest or any upper and lower limits with which the fee scale set at the practitioner's discretion must comply; or

(d) the final measures of the public authorities do not require professionals to communicate in advance and/or publicise in any other way the fee scales which they intend to apply for the services requested of them?

(3) Are the combined provisions of Articles 5 and 85 of the Treaty compatible with national legislation which, without requiring public interest considerations to be taken into account, confers on a fee committee set up by the association council and composed solely of association members the power to adopt a discretionary measure settling the fee, even where it confirms the fee set by the member at his own discretion, the force of which is such as to bind the court to make an order for payment in accordance with the measure adopted by the council itself settling the fee?

Preliminary observation

19 As a preliminary point, it should be noted that, according to the settled case-law of the Corte Suprema di Cassazione (Italian Court of Cassation), the opinion of the competent professional association binds the court seised of the dispute only

at the first, *ex parte* stage of the procedure for the recovery of debts. By contrast, that opinion ceases to be binding where the debtor initiates proceedings to have the order set aside in order to challenge the existence and amount of the debt in respect of fees claimed by the professional (see, *inter alia*, judgments of 8 April 1975, No 1276; of 12 July 1975, No 2775; of 24 August 1994, No 7504; of 30 October 1996, No 9514; and of 7 May 1997, No 3972).

The third question

- 20 The third question, which it is appropriate to answer first, must therefore be understood as relating to the question whether Articles 5 and 85 of the Treaty preclude national legislation which, in the context of a summary procedure for the recovery of debts relating to the fees of an architect, a member of a professional association, requires the court seised of the dispute to follow the opinion of that association in relation to the settlement of the fees in so far as that opinion ceases to be binding where the debtor initiates proceedings *inter partes*.
- 21 The debtor against whom the payment order is sought can challenge that opinion during the subsequent judicial proceedings, which are *inter partes* and which only he can institute (see, on Article 645 of the Code, Case C-474/93 *Hengst Import* [1995] ECR I-2113, paragraph 15, on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). That opinion cannot therefore constitute a decision by an association of undertakings which may in itself restrict or distort competition within the meaning of Article 85 of the Treaty.

- 22 The absence of effect on competition is also the consequence of the fact that the opinion of the professional association relates to individual services which have been evaluated at the discretion of a specific practitioner.
- 23 In the light of the foregoing, the answer to the third question must be that Articles 5 and 85 of the Treaty do not preclude national legislation which, in the context of a summary procedure for the recovery of debts relating to the fees of an architect, a member of a professional association, requires the court seised of the dispute to follow the opinion of that association in relation to the settlement of the amount of those fees in so far as that opinion ceases to be binding where the debtor initiates proceedings *inter partes*.

The first and second questions

- 24 By its first question, the national court seeks to ascertain in substance whether architects constitute undertakings and, if so, whether the professional associations to which they belong constitute ‘associations of undertakings’ within the meaning of Article 85(1) of the Treaty.
- 25 By part (a) of its second question, the national court asks whether, in respect of the determination of the mandatory fee scale for architects, the Italian authorities have delegated their powers to the competent professional association in breach of Articles 5 and 85 of the Treaty.

- 26 By parts (b) to (d) of its second question, the national court seeks to ascertain essentially whether Articles 5 and 85 of the Treaty preclude national legislation which provides that the members of a profession may set at their discretion the fees for certain services which they perform.
- 27 In that respect, it is sufficient to state that the services in respect of which the procedure for the recovery of debts has been implemented are not subject to an obligatory tariff and that, having regard to the freedom thereby left to each practitioner to set the relevant fee, national legislation such as that at issue in the main proceedings is not such as to promote the creation of anti-competitive agreements.
- 28 In the light of those considerations, it is not necessary to deal further with the first question or part (a) of the second question, and the answer to parts (b) to (d) of the second question must be that Articles 5 and 85 of the Treaty do not preclude national legislation which provides that the members of a profession may set at their discretion the fees for certain services which they perform.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Giudice di Pace di Genova by order of 6 May 1999, hereby rules:

1. **Articles 5 and 85 of the EC Treaty (now Articles 10 EC and 81 EC) do not preclude national legislation which, in the context of a summary procedure for the recovery of debts relating to the fees of an architect, a member of a professional association, requires the court seised of the dispute to follow the opinion of that association in relation to the settlement of those fees in so far as that opinion ceases to be binding where the debtor initiates proceedings *inter partes*.**
2. **Articles 5 and 85 of the Treaty do not preclude national legislation which provides that the members of a profession may set at their discretion the fees for certain services which they perform.**

von Bahr

Edward

La Pergola

Wathelet

Timmermans

Delivered in open court in Luxembourg on 29 November 2001.

R. Grass

P. Jann

Registrar

President of the Fifth Chamber