

Competition in Professional Services (II)

Whilst the European Parliament and the European Commission have taken concrete steps to set in motion a complete overhaul of the regulatory restrictions governing professionals, the European Court of Justice (ECJ) in two recent judgements has shown that it is catching up.

Both cases are connected due to the fact that they deal with Italian legislation concerning the fixing of lawyers' fees. Mr Cipolla and Mr Meloni, the two Italian lawyers involved, instituted proceedings in the Italian Courts after their clients refused to pay their bills for professional services they rendered to them. Mr Cipolla contested the scale of legal fees, adopted by the National Bar Council setting out minimum fees to be charged, insofar as it precluded lawyers from negotiating freely their fees with their clients. Similarly, Mr Meloni contested the application of compulsory minimum fees for extra-judicial activities in view of EU competition rules.

Scales of fees that fix maximum and minimum prices are tantamount to price-control systems. Control of prices is generally prohibited as it affects access to the market where such a system is implemented. Fixing maximum or minimum prices tends to restrict free movement of services, especially when prices are fixed at a level such that the sale of imported services becomes either impossible or more difficult than that of domestic services. For instance, lawyers established in one member state may have to incur additional costs as a result of providing services in a member state other than that in which they are established. Fixing maximum prices would impede lawyers from recouping travel costs to meet their clients living abroad.

In its combined judgement, the ECJ maintained that member states' laws and regulations must respect the EU competition rules and therefore member states must neither implement nor permit the implementation of rules that could harm competition. As things stand, the Court considered that the EU competition rules do not preclude a scale fixing a minimum fee chargeable by members of the legal profession, even if no derogation from the application of such a scale is permissible.

Yet, the Court acknowledged that such a scenario could nonetheless impinge on lawyers' freedom to provide services. In fact, it held that the absolute prohibition of derogation by agreement from the minimum fees set by a scale is in breach of the fundamental freedom to provide services since it deprives lawyers established in another member state from effectively competing with Italian lawyers by requesting fees lower than those set by the scale. Likewise, Italian recipients of legal services cannot resort to the services offered by foreign lawyers because the latter would not be able to offer their services at a lower rate than the minimum fees set by the Italian scale, even though those services are available in other member states for a lower fee. Hence, Italian clients are unable to benefit fully from the advantages of the common market. To that extent Italian law constitutes a restriction on the cross-border provision of legal services.

The Italian government tried to justify the fixing of minimum fees by arguing that a scale that fixes the level of fees safeguards the quality of service provided by the legal profession and is in the interest of consumers as well as the proper administration of

justice. The Commission on the other hand argued that there is no correlation between the fixing of fees and quality of service. The Court considered that any justifiable factor, such as the one at issue, has to be determined by the national court in the light of the particular national rules.

These two judgements illustrate the 'judicial activism' of the ECJ, which takes an active part in the creation of a free market by requiring the removal of restrictions to the fundamental freedoms in all spheres, including those in the liberal professions.

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