

Unresolved Questions Regarding Lawyers' Fees and the Restriction of Competition*

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ABSTRACT: This paper explores the most salient aspects of the case-law of the Court of Justice of the European Union on legal services in order to highlight a lack of clarity in defining the terms of compatibility between European Union law and national rules on lawyers' fees. This is a complex issue and one that has not yet been finally resolved, especially in a difficult context such as that of the Italian market, which is characterised by an extremely large number of lawyers, which in itself entails the risk of deterioration in the quality of services provided, with services being offered at a discount. In Italy, following the *Cipolla* judgment of the ECJ and the resulting abolition of the system of fixed remuneration (minimum and maximum fees), new measures were introduced by the State and professional organisations to protect members of the legal profession (particularly to safeguard lawyers in a weaker position in dealings with powerful clients such as banks and insurance companies) and to ensure fair remuneration. In accordance with the *Wouters* exemption and the increasing role of economic analysis in competition rules, these measures require a reflective analytical approach in order to evaluate their compatibility with European Union law.

KEYWORDS: lawyers' fees, fair remuneration, professional organisation, *Wouters* exemption, Italian market.

1. Introduction

As is widely known, the European Commission is intending to remove or modify intrusive and restrictive regulation of the liberal professions

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in order to foster competition among professionals and to increase alternatives for consumers in terms of price and quality. General reform of restrictive rules in the professional services sector was initiated in 2003 with the publication of a study commissioned by the Director-General for Competition into the economic impact of the regulation of the professions in the various Member States.¹

This economic study was based on an in-depth comparison of the legislation, regulations and codes of conduct governing access to the professions and the provision of professional services in the European Union. The conclusion reached in the study was that, in those Member States in which such professional services are regulated restrictively and excessively, the outcome from the point of view of the overall economy is less than optimal.

Following on from the considerations set out in the economic study, the European Commission invited regulatory authorities in the Member States and professional bodies to review existing rules, considering whether those rules were necessary in the public interest, whether they were proportionate and whether they were justified.²

In this context, the Commission has undertaken many initiatives in the field of legal services with the aim of promoting competition and, in particular, protecting the freedom of lawyers to determine independently the fees they charge for their professional services. In the opinion of the Commission, the elimination of fee scales, whatever their nature (fixed or recommended, adopted by Member States or by professional bodies), not only increases price competition and client choice, but may also lead

¹ Iain Paterson, Marcel Fink, Anthony Ogus, *et al.*, *Economic impact of regulation in the field of liberal professions in different Member States*, Study for the European Commission, DG Competition, Institute for Advanced Studies, Vienna, January 2003, <http://europa.eu.int/comm/competition/publications/publications/#liberal>.

² Communication from the Commission – *Report on Competition in Professional Services*, 9 February 2004, COM/2004/0083 final; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Professional Services – Scope for More Reform – Follow-Up to the Report on Competition in Professional Services*, 5 September 2005, COM/2005/0405 final; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *On Reform Recommendations for Regulation in Professional Services*, 10 January 2017, COM/2016/820 final. See Mario Siragusa, “Critical remarks on the Commission’s legal analysis in its Report on Competition in Professional Services”, in *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford, 2006), 583.

to improvements in dynamic efficiency and innovation in the markets for legal services. Nevertheless, lawyers' associations and professionals have been very critical of the abolition of mandatory fee systems, arguing that the safeguarding of freedom of competition conflicts with the values of quality and independence in the legal profession.³ The tension between these two standpoints is reflected in the case-law of the Court of Justice of the European Union dealing with the question of whether the fixing of lawyers' fees is consistent with the rules of competition law and the freedom to provide services.⁴

In principle, a regulatory instrument fixing legal fees is by nature likely to have a detrimental effect on competition. In practice, however, it is a complex issue and one that has not yet been finally resolved. That is especially true in the difficult context of the Italian market, which is characterised by an extremely large number of lawyers, which in itself entails a risk of deterioration in the quality of the services provided, with services being offered at a discount.

The case-law of the Court of Justice reveals a lack of clarity in defining the terms of compatibility between European Union law and national rules on lawyers' fees. This article analyses in detail this case-law and then assesses the solutions adopted in the Italian legal system and their compatibility with European Union law.

³ In that context, as pointed out by Advocate General Léger in his Opinion in *Wouters and Others* (delivered on 10 July 2001, C-309/99, EU:C:2001:390, paragraph 174), "lawyers occupy a central position in the administration of justice as intermediaries between the public and the courts".

⁴ See, *inter alia*, Claus-Dieter Ehlermann, "Concurrence et profession libérales: antagonisme ou compatibilité?", *Revue Marché Commun*, 1993, 139; Bruno Nascimbene, "Tariffe professionali e norme sulla concorrenza fra giudice comunitario e giudice nazionale", *Contratto impresa/europa*, 1997, 482; Harold Nyssens, "Concurrence et ordre professionnels; les trompettes de Jéricho sonnent-elles?", *Revue de Droit Commercial Belge*, 1999, 475; Stefano Bastianon, "Due pronunce, tanti problemi, nessuna soluzione: ovvero gli avvocati e l'antitrust secondo la Corte di giustizia", *Il Foro. It.*, 2002, IV, 188; Giuseppe Scassellati Sforzolini and Cesare Rizza, "La tensione fra regole di concorrenza comunitarie e regole professionali e deontologiche nazionali", *Giurisprudenza commerciale*, 2003, 8; Fabio Ferraro, *L'Avvocato Comunitario*, Naples, 2005, 143; Edith Loozen, "Professional ethics and restraints of competition", *European Law Review*, 2006, 28; Ida E. Wendt, *EU Competition Law and Liberal Professions: An Uneasy Relationship?*, Leiden: Martinus Nijhoff Publishers, 2012.

2. Competition rules and minimum fees

The professions do not escape the application of the rules of competition law,⁵ the activities pursued in the professions being assimilated to the European Union law concept of “undertakings”⁶ and the governing bodies of the various professions being likened to “associations of undertakings”.⁷

In particular, a lawyers’ activity consists in offering legal services on a given market against remuneration, and that is enough to qualify that activity as an economic activity and, therefore, as an undertaking.⁸ The fact that the benefit is of an intellectual, technical or specialised nature and is provided on a personal and direct basis does not alter the nature of the economic activity of the profession.

This means that antitrust rules apply to professionals, as well as to professional bodies,⁹ and these include the prohibition of restriction of competition, the prohibition of abuse of a dominant position and the various other competition rules laid down in the FEU Treaty.¹⁰ Even mere recommendations issued by professional governing bodies may be contrary to

⁵ See the judgment of 18 June 1998, *Commission v. Italian Republic*, C-35/96, EU:C:1998:303; the judgment of 30 March 2000, *Consiglio Nazionale degli Spedizionieri Doganali v. Commission*, T-513/93, EU:T:2000:91; the judgment of 28 March 2001, *Institute of Professional Representatives before the European Patent Office v. Commission*, T-144/99, EU:T:2001:105.

⁶ In accordance with settled case-law, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, inter alia, judgment of 23 April 1991, *K. Hofner and F. Elser v. Macroton GmbH*, C-41/90, EU:C:1991:161, paragraph 21). It is a notion distinct from national concepts and only functional to the application of competition rules. Therefore, the professional is not subject to the national rules for business and enterprise and may not become insolvent or bankrupt.

⁷ Judgment of 19 February 2002, *Wouters*, C-309/99, EU:C:2002:98, paragraph 64.

⁸ Judgment of 19 February 2002, *Wouters*, C-309/99, EU:C:2002:98, paragraphs 47-49.

⁹ It is irrelevant whether the professional body enjoys public-law status as long as it regulates the economic behaviour of its members and does not carry out typical governmental prerogatives or social tasks based on the principle of solidarity. See the judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489, paragraph 44.

¹⁰ The issue of the applicability to the legal profession of antitrust law was first, and most amply discussed in the United States, in the well-known *Goldfarb* judgment (*Goldfarb v. Virginia State Bar* 421 U.S. 773, 1975). This is the leading case on the question of the applicability of the *Sherman Act*, the federal antitrust law, to the legal profession. The Supreme Court confirmed for the first time the principle that the liberal professions should be likened to a “trade or commerce” and found to be incompatible with the *Sherman Act* the bar’s practice of fixing mandatory minimum rates for professional services, precluding the applicability of the State action defence.

Article 101 TFEU, in so far as they tend to standardise the conduct of professionals on the market.¹¹

In accordance with the case-law of the Court of Justice, the TFEU Treaty rules on competition do not apply to any activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority.¹² It should be noted that generally speaking – and in any event in all of the cases examined by the Court of Justice – rules on lawyers' fees cannot be regarded as not belonging to the sphere of economic activity. Furthermore, when assessing the effects of a decision of an association of undertakings in the light of Article 101 TFEU it is necessary to take into consideration the actual context in which it is situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.¹³

In addition, Articles 101 TFEU and 102 TFEU, read in conjunction with Article 4(3) TEU, require Member States not to introduce or maintain in force measures, even those of a legislative or regulatory nature, which may render ineffective the competition rules that apply to undertakings.¹⁴

However, the Commission acknowledges that some regulation in this sector is justified. That is for three reasons: the *asymmetry of information* as between consumer and service provider,¹⁵ the concept of *externality*¹⁶

¹¹ European Commission, Decision COMP/A.38549 of 24 June 2004, *Belgian Architects' Association*, OJ 2005 L 48, p. 10. The European Commission found that the fee scale was neither necessary nor proportionate in order to guarantee the proper practice of the profession, discouraging architects from working in a cost-efficient manner. See, in this regard, Edith Loozen, "Professional ethics and restraints of competition", 33.

¹² Judgment of 30 January 1985, *BNIC v. Clair*, 123/83, EU:C:1985:33, paragraph 17.

¹³ See, inter alia, the judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 70.

¹⁴ In particular, as is well-known, Article 101 TFEU, read in conjunction with Article 4(3) TEU, is infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (judgment of 21 September 2016, *Établissements Fr. Colruyt*, C-221/15, EU:C:2016:704, paragraph 44 and the case-law cited).

¹⁵ An essential feature of professional services is that operators must have a high level of technical knowledge. Consumers, who may not have such knowledge, therefore have difficulty in judging the quality of the services they purchase.

¹⁶ In some markets, the provision of a service may have an impact on third parties as well as on the buyer of the service.

and the concept of *public goods*.¹⁷ In particular, the application of antitrust rules to the professions should be integrated with the so-called “*Wouters* exception” (from the ECJ case of the same name), whereby certain restrictions of competition are necessary for the proper exercise of the profession, in accordance with the organisational arrangements of the Member State concerned.¹⁸ This exception introduces into the analysis of the applicability to the professions of the rules of competition law public interest considerations relating to the need to lay down rules on organisation, qualification, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are protected by the necessary guarantees in relation to integrity and experience.¹⁹

It is worth pointing out that, to date, the Court of Justice has not ruled on the issue of whether lawyers and/or associations of lawyers may be regarded as undertakings entrusted with the operation of a service of general economic interest, within the meaning of Article 106(2) TFEU, as suggested by Advocate General Léger.²⁰

Having said that, it is interesting to examine the judgments in *Arduino*,²¹ *Cipolla and Others*,²² *CHEZ Elektro Bulgaria*,²³ *National Association of*

¹⁷ Some professional services are intended to produce public goods that have a value for society in general. In the absence of regulation, there is a risk that some professional services markets supply insufficient or inadequate public goods.

¹⁸ In judgment of 19 February 2002, *Wouters*, C-309/99, EU:C:2002:98, paragraph 107, the Court of Justice acknowledged that “the 1993 Regulation could (...) reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned”.

¹⁹ See Adrian J. Vossestein, “Case C-35/99, *Arduino*, Judgment of 19 February 2000, Full Court; Case C-309/99, *Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, Judgment of 19 February 2002, Full Court”; *Common Market Law Review*, 2002, 841; Rosemary O’Loughlin, “EC competition rules and free movement rules: An examination of the parallels and their furtherance by the ECJ *Wouters* decision”, *European Competition Law Review*, 2003, 62; Pietro Manzini, “I parafernali del giudizio antitrust: Regola della ragionevolezza, restrizioni accessorie, divieto ‘per se’”, *Giurisprudenza Commerciale*, 2003, II, 285; Hans Gilliams, “Competition law and public interest: Do we need to change the law for the (liberal) professions?”, in *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions*, ed. Claus-Dieter Ehlermann and Isabela Atanasiu (Oxford: Hart, 2006), 295.

²⁰ Opinion of 10 July 2001, C-309/99, *Wouters*, EU:C:2001:390, paragraph 172.

²¹ Judgment of 19 February 2002, *Arduino*, C-35/99, EU:C:2002:97.

²² Judgment of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758.

²³ Judgment of 23 November 2017, *CHEZ Elektro Bulgaria AD*, C-427/16 and C-428/16, EU:C:2017:890.

*Geologists*²⁴ and *Eurosaneamientos*,²⁵ in which the Court considered the compliance of mandatory fee rates with competition law and with the freedom to provide services, without taking into account the issue of contingency fee agreements.²⁶ The solutions which the Court arrived at are not entirely convincing and reflect a more cautious attitude than the Commission's deregulatory stance.

The first of these cases concerned the consistency with Articles 10 EC and 81 EC (Articles 4(3) TEU and 101 TFEU) of an Italian regulation on the Italian mandatory fee scheme. The Court was asked to rule on whether the abovementioned provisions precluded the adoption by a Member State of a regulation that approved, on the basis of a draft drawn up by a professional body such as a national professional association of lawyers, a minimum fixed fee for lawyers. It was necessary for the Court to assess whether Articles 10 EC and 81 EC had been infringed by reference to the case-law according to which such an infringement occurs where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.²⁷

In his Opinion in this case, Advocate General Léger arrived at a different, interesting and innovative solution for assessing the measures adopted by the Italian State in the light of Article 81 EC, read together with Article 10 EC.²⁸

In short, the Advocate General recognised that such a restrictive measure did indeed infringe Articles 10 EC and 81 EC, except if (1) the public authorities of the Member State exercised effective control over the content of the agreement, decision or concerted practice; (2) the State measure pursued a legitimate aim in the public interest, and (3) the State measure was proportional to the aim pursued.

²⁴ Judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489.

²⁵ Judgment of 8 December 2016, *Eurosaneamientos and Others*, C-532/15 and C-538/15, EU:C:2016:932.

²⁶ See the Opinion of 1 February 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:76, paragraph 94.

²⁷ Order of the Court of Justice of 17 February 2005, C-250/03, *Mauri*, EU:C:2005:96, paragraph 30; see also the judgment of 21 September 2016, *Établissements Fr. Colruyt*, C-221/15, EU:C:2016:704, paragraph 44 and the case-law cited.

²⁸ Opinion of 10 July 2001, *Arduino*, C35/99, EU:C:2001:389.

In its judgment, the Court did not follow that reading of “State measures”, which has since emerged progressively in the subsequent case-law of the Court of Justice, and instead concluded that the Italian State had not waived its powers by delegating to private economic operators responsibility for taking decisions affecting the economic sphere; nor had it “encourage[d] the adoption [by the Italian bar] of agreements, decisions or concerted practices contrary to Article [81 EC] or reinforce[d] their effects”.²⁹

The Court in Luxembourg arrived at this conclusion on the basis of the following considerations: (1) the Consiglio Nazionale Forense (National Bar Council) was responsible only for producing a draft fee scale which was not binding as such, inasmuch as, without the Minister of Justice’s approval, the draft scale would not enter into force and the earlier approved scale would remain applicable; (2) the Minister was assisted by two public bodies, the Consiglio di Stato (Council of State) and the CIP (Inter-ministerial Committee on Prices), whose opinions he must obtain before the scale could be approved; and (3) the national courts had a wide discretion in the application of the fees.

In effect, what the ECJ found most worthy of attention in this case was the fact that the ministerial act that approved the fees did not, in real terms, constitute a mere ratification of the autonomous decision of the National Bar Council.

The judgment in *Cipolla and Others* offers little guidance on the issue of consistency with EU competition law, since it merely repeats the principle expressed in *Arduino* concerning the validity of mandatory fee systems, which will be valid if they are subject to real State control.³⁰

²⁹ Judgment of the Court of Justice of 19 February 2002, C-35/99, *Arduino*, EU:C:2002:97, paragraph 43. See Mario Monti, “Competition in professional services: New lights and new challenges”, http://ec.europa.eu/competition/speeches/text/sp2003_070_en.pdf.

³⁰ See, *inter alia*, Marco Amorese, “Cases C-94/04, Cipola & Macrino: the emergence of a political approach to the regulation of professionals in Europe?”, *The Columbia Journal of European Law*, 2007, 733; Martin Illmer, “Lawyers’ fees and access to justice – the Cipolla and Macrino judgment of the ECJ (Joined Cases C-94/04 and C-202/04)”, *Civil Justice Quarterly*, 2007, 301; Michael J. Frese, Herman J. van Harten, “How extravagant the fees of counsellors at law sometimes appear, competition law and internal market constraints to fixed remuneration schemes”, *Legal Issues of Economic Integration*, 2007, 393; Juliana Rodríguez Rodrigo, “Aplicación del derecho de la competencia a los baremos de honorarios de abogados: Arduino y Cipolla”, in *La Unión Europea ante el Derecho de la Globalización*, coord. Alfonso Luis Calvo Caravaca, Esperanza Castellanos Ruiz (COLEX, 2008), 433.

2.1. *The CHEZ Elektro Bulgaria judgment*

As far as competition law is concerned, in its recent judgment in *CHEZ Elektro Bulgaria*, the Court reached a different conclusion from those of its previous judgments on minimum fee rates.

Before considering those conclusions, however, it is useful to recall that the Court of Justice first addressed certain questions relating to the relationship between the State and professional organisations for the purposes of the application of the rules of competition law, emphasising principles already set out in its earlier case-law and providing further clarification.

In particular, the ECJ emphasised that a Member State does not undermine the rules of competition law applicable to undertakings, in accordance with Article 101 TFEU and Article 4(3) TEU, where “tariffs are fixed with due regard for the public-interest criteria defined by law and the public authorities do not delegate their rights and powers to private economic operators even if representatives of the economic operators are not in the minority on the committee proposing those tariffs”.³¹ The Court of Justice pointed out that the criteria for the general public interest “must be defined in law sufficiently precisely, there must be actual review and the State must have the power to adopt decisions in the last resort”.³²

Nevertheless, the Court found that those conditions were not met in this case, “having regard to the lack of provisions capable of ensuring that the Supreme Council of the Legal Profession [conducted] itself as an arm of the State working in the public interest subject to actual review and the power to adopt decisions in the last resort by the State”.³³

³¹ Judgment of 23 November 2017, *CHEZ Elektro Bulgaria AD*, C-427/16 and C-428/16, EU:C:2017:890, paragraph 43.

³² Judgment of 23 November 2017, *CHEZ Elektro Bulgaria AD*, C-427/16 and C-428/16, EU:C:2017:890, paragraph 46.

³³ It should also be noted that the Court of Justice has confirmed that a tariff established by a professional organisation may “have the character of legislation, inter alia, where the members of that organisation are experts who are independent of the economic operators concerned and they are required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question” (judgment of 4 September 2014, *API and Others*, C-184/13 to C-187/13, C-194/13, C-195/13 and C208/13, EU:C:2014:2147, paragraph 34; judgment of 17 November 1993, *Reiff*, C-185/91, EU:C:1993:886, paragraphs 17 to 19 and 24; judgment of 9 June 1994, *Delta Schiffahrts- und Speditionsgesellschaft*, C-153/93, EU:C:1994:240, paragraphs 16 to 18 and 23; judgment of 17 October 1995 *DIP and Others*, C-140/94 to C-142/94, EU:C:1995:330, paragraphs 18 and 19).

Proceeding on from its preliminary assessments, the Court of Justice criticised, with reference to Article 101 TFEU, read together with Article 4(3) TEU, the Bulgarian legislation “which, first, [did] not allow a lawyer and his client to agree remuneration in an amount less than the minimum amount laid down in a regulation issued by a professional organisation of lawyers, such as the Supreme Council of the Legal Profession, without that lawyer being subject to a disciplinary procedure, and, secondly, [did] not authorise the courts to order reimbursement of fees in an amount below that minimum amount”.³⁴ The Court stated that the national legislation at issue seemed to contain no specific criterion ensuring that the minimum amounts of lawyers’ remuneration, as determined by the Supreme Council of the Legal Profession, were fair and justified in accordance with the general interest. The Court nevertheless left the question somewhat open-ended, stating that it was for the national court to decide whether the *Wouters* exception should be applied, that is to say, to assess “whether such legislation, in the light of the specific detailed rules for the application thereof, actually meets with legitimate objectives and whether the restrictions thus imposed are limited to what is necessary to ensure that those legitimate objectives are given effect”.³⁵

Ultimately, from the antitrust viewpoint, this judgment is more complete and exhaustive in its assessment of possible justifications for the introduction of minimum fee rates, albeit that the Court’s findings were essentially negative regarding the national rules laid down by the lawyers’ association and rendered mandatory by the State, which did not even allow the courts to order reimbursement of fees in an amount below the minimum amount.³⁶

³⁴ Judgment of 23 November 2017, *CHEZ Elektro Bulgaria*, C-427/16 and C-428/16, EU:C:2017:890, paragraph 40.

³⁵ Judgment of 23 November 2017, *CHEZ Elektro Bulgaria*, C-427/16 and C-428/16, EU:C:2017:890, paragraph 58. See also the judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489, paragraph 53.

³⁶ The Court of Justice also ruled that “Article 101(1) TFEU, read in conjunction with Article 4(3) TEU and Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, must be interpreted as not precluding national legislation (...) by virtue of which individuals and sole traders obtain reimbursement of lawyers’ remuneration, ordered by a national court, if they have been defended by a legal adviser (judgment of 23 November 2017, *CHEZ Elektro Bulgaria AD*, C-427/16 and C428/16, EU:C:2017:890, paragraphs 59-63). In this connection, the Court of Justice pointed out that “since Directive 77/249 does not contain any provision governing the reimbursement, ordered by a court, of the remuneration of

2.2. *The National Association of Geologists judgment*

Before the *CHEZ Elektro Bulgaria* judgment, the Court of Justice had, in fact, on several occasions addressed the issue of the complex relationship between competition law and fixed remuneration, but with reference to other professions than the legal profession.³⁷ In particular, it is worth briefly noting the *National Association of Geologists* judgment³⁸ in order to compare the solutions adopted by the Court of Justice with regard to lawyers with those it adopted with regard to a different profession, namely the profession of geologists.

In this judgment we find general principles analogous to those set out by the Court of Justice in the *CHEZ Elektro Bulgaria* judgment, with reference to both the definition of the professional bodies and the decisions they adopt, and the need to take the attainment of legitimate aims into consideration.

In this regard, the rules of professional conduct approved by the National Association of Geologists, which establish the dignity of the profession as well as the quality and scale of the work to be performed as criteria for determining professional remuneration, constitute a decision by an association of undertakings within the meaning of Article 101(1) TFEU which may have the effect of restricting competition within the internal market.

Despite the establishment of general principles, it is clear that, from an antitrust viewpoint, it is necessary to assess the national rules applicable to each profession on a case-by-case basis, referring to their objective, context and purpose. For this reason, the Court of Justice has deemed that rules of professional conduct relating to fees and professional dignity do not necessarily breach the antitrust rules, in so far as it must be ascertained whether legitimate aims justifying the restriction of competition exist.

Hence, the Court was able to conclude that “it is for the referring court to assess, in the light of the overall context in which the Code of Conduct produces its effects, including the national legal framework in its entirety and the manner in which that code is applied in practice by the National

providers of legal services, it must be held that that national legislation does not fall within the scope of Directive 77/249” (paragraph 62 of the judgment).

³⁷ See, for example, judgment of 18 June 1998, *Commission v. Italian Republic*, C-35/96, EU:C:1998:303.

³⁸ Judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489. See Giuliano Scarselli, “Il compenso professionale tra decoro e libera professione”, *Foro Italiano*, 2012, 374, which compares the rules on the professional conduct of geologists with those applicable to lawyers.

Association of Geologists, whether that effect [of restricting competition] is produced in the present case”. Furthermore, the Court of Justice left it to the referring national court to “verify whether, in the light of all the relevant material before it, the rules of that code, in particular, in so far as they apply the criterion based on the dignity of the profession, may be regarded as necessary for the implementation of the legitimate objective of providing guarantees to consumers of geologists’ services”.³⁹

In fact, in the *CHEZ Elektro Bulgaria* and *National Association of Geologists* judgments there is no clear rejection of rules of professional conduct which concern criteria for fixing fees, but what emerges is the need to coordinate free competition with professional dignity. However, in the Member States where compliance with these values is not required by the professional code of conduct or other rules, the parties will be free to determine the fees and/or it will be left to the national court to consider the aforementioned values.

Ultimately, the *CHEZ Elektro Bulgaria* and *National Association of Geologists* judgments appear to be in line with the latest ECJ case-law, which is moving towards raising the economic and social analysis in the evaluation of the real and potential impact of undertakings’ conduct on competition variables.⁴⁰

3. Freedom to provide service and minimum fees

The real issue is not only to ascertain the correct procedure as regards the practices of the professional governing bodies and the role of the State in this area, but also to establish whether competition restrictions should exist and, if so, in relation to which specific activities. The *CHEZ Elektro Bulgaria* and *National Association of Geologists* judgments address the need to review the overall context in which the decision on minimum fee rates was adopted and, most importantly, whether the objectives pursued are fair and justified, with regard to the public interest.

In line with such substantive assessments is the second part of the judgment in *Cipolla* in which the compatibility of the fee system with EU law on the free movement of service providers pursuant to Article 56 TFEU (formerly Article 49 TEC) is assessed.

³⁹ Judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489, paragraph 57.

⁴⁰ Judgment of 11 September 2014, C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission*, EU:C:2014:2204; judgment of 6 September 2017, C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632.

It is of course debatable whether a mandatory fee system should be assessed by reference to the freedom to provide services. For one reason, fees are among the main levers of competition and they should therefore be assessed by reference to the relevant provisions of EU law. In actual fact, the Court of Justice has based assessments on a previous solution, one that concerns in particular the free movement of goods⁴¹, and has also been applied in connection with the free movement of service providers⁴² and freedom of establishment.⁴³

As regards the freedom to provide services, the *Cipolla* judgment contains contradictory arguments, some in favour of abolishing the system of fixed remuneration, others in favour of maintaining minimum fees.

The Court of Justice pointed out that the prohibition of derogation from the minimum fees made access to the Italian legal services market more difficult for lawyers established in other Member States and, therefore, was likely to restrict the exercise of their activities providing services in that

⁴¹ Judgment of the Court of Justice of 5 April 1984, *Van de Haar*, C-177/82, EU:C:1984:144. The Court started from the premises that “it is important to bear in mind the context in which those two provisions of the Treaty are situated. Article 85 of the Treaty belongs to the rules on competition which are addressed to undertakings and which are intended to maintain effective competition in the common market. As the Court has held in previous judgments, that provision only comes into consideration with regard to agreements, decisions or practices restricting competition which appreciably affect intra-Community trade. Article 30, on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement” (paragraphs 11 and 12). It then concluded that “Article 30 of the Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article 85, which seeks to maintain effective competition between undertakings” (paragraph 14).

⁴² As far as, for example, the activity of transport consultant is concerned, it may be recalled that Advocate General Alber clearly stated (in his Opinion of 8 March 2001, *Commission v. Italy*, C-263/99, EU:C:2001:141, paragraph 48) that “the provision relating to the setting of minimum fees (...) restricts the freedom to provide services. This is because it does not allow service providers to offer their services at a price which might make their services more attractive to the customer than those of another firm on the basis of cost”. However, the Court of Justice did not follow the Advocate General’s approach because “the Commission [had] not made clear how and to what extent a service provider, even if he is required to comply with minimum and maximum fees within the Member State in which he is established, is subject to restrictions [on] the freedom to provide services within the meaning of Article 59 of the Treaty by reason of the fact that, in another Member State, in which he pursues his activity temporarily or occasionally, he is likewise required to comply with similar fees” (judgment of the Court of Justice of 29 May 2001, *Commission v. Italy*, C-263/99, EU:C:2001:293, paragraph 26).

⁴³ Judgment of 5 October 2004, *Caixa Bank France*, C442/02, EU:C:2004:586, paragraph 13.

Member State.⁴⁴ Such a prohibition deprived foreign lawyers “of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore had greater opportunities for winning clients than lawyers established abroad”.⁴⁵

A further point which militates in favour of the view that mandatory fee systems conflict with the freedom of service providers is the fact that a fixed fee system may not in itself prevent members of the legal profession from offering services of an inferior nature.

That view is countered by the Court’s observation exceptionally justifying a rigid system of fixed remuneration, stating that “it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided”.⁴⁶ In effect, in the complex Italian context it is not easy to balance diverse interests, since the free determination of fees may facilitate access to the market for younger lawyers and greater competition, but it may impede them and “weaker” professionals from obtaining a fair and dignified fee, if they have less contractual power *vis-à-vis* clients.

However, more generally, the protection of consumers, in particular the recipients of legal services provided by persons concerned with the administration of justice, and the safeguarding of the proper administration of justice are objectives among those which may be regarded as overriding reasons relating to the public interest capable of justifying a restriction of the freedom to provide services, on condition, first, that the national measure at issue is appropriate for attaining the objective pursued and, secondly, that it does not go beyond what is necessary in order to attain that objective.⁴⁷ The national court should determine whether education

⁴⁴ Judgment of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 58.

⁴⁵ Judgment of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 59.

⁴⁶ Judgment of the Court of Justice of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 67.

⁴⁷ See, in this regard, the judgment of 12 December 1996, *Reisebüro Broede*, C-3/95, EU:C:1996:487, paragraph 31 and the case-law cited, and the judgment of 21 September 1999, *Läärä and Others*, C-124/97, EU:C:1999:435, paragraph 33.

requirements, rules of professional ethics and liability suffice in themselves to attain the objectives of consumer protection and the proper administration of justice.

Overall, the reasoning of the Court of Justice in favour of abolishing systems of fixed remuneration seems to prevail over its reasoning in favour of their maintenance.

Nevertheless, the Court of Justice did adopt a different solution in *Eurosaneamientos*,⁴⁸ probably influenced by the Commission's approach, which was that the restrictions were basically national restrictions and it would primarily be for the Member States, the national competition authorities and the professional bodies to bring them to an end.⁴⁹

More specifically, the Court of Justice held that it did not have jurisdiction to answer the questions concerning the compatibility of the rules on lawyers' fees with the provisions of the FEU Treaty on freedom to provide services in a situation which was confined in all respects within a single Member State. In other words, the case in point was a matter of an internal, domestic nature. It should be noted that the situation was no different from that at issue in *Cipolla*, in which the Court instead considered the minimum fees essentially to be inconsistent with the freedom to provide services.

Incidentally, it may be noted that a provision which obliges lawyers to observe maximum fee rates does not constitute a restriction of the freedom to provide services or of the right of establishment within the meaning of the EC Treaty (now, the FEU Treaty): the Italian fee system here at issue was characterised by a flexibility which appeared to allow proper remuneration for all types of services provided by lawyers.⁵⁰ It follows that, according to the Court of Justice, rules on lawyers' maximum fee rates are not designed in such a way as to hinder access to the Italian market for legal services under normal, effective conditions of competition. It is

⁴⁸ See Georges Decocq, "La législation espagnole relative aux honoraires des avoués n'est pas contraire à la prohibition des ententes", *Revue de Jurisprudence Commerciale*, 2017, 49.

⁴⁹ In this regard, Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) empowered the competition authorities and courts of the Member States to apply EU competition rules in full, including in the area of the professions. However, the European Commission considers that the fixed prices are probably the regulatory instrument likely to have the most detrimental effects on competition (Communication from the Commission – *Report on Competition in Professional Services*, 9 February 2004, COM/2004/0083 final).

⁵⁰ Judgment of 29 March 2011, *Commission v. Italy*, C-565/08, EU:C:2011:188, paragraph 53.

debatable whether such assertions of principle in relation to maximum rates, and in particular the Court's favourable assessment of their flexibility, might also be applied to minimum rates. However, it must be borne in mind that maximum rates and minimum rates cannot be placed on the same footing, inasmuch as the primary purpose of the former is to protect clients from paying excessive fees, while the main objective of the latter is to safeguard the activities carried out by lawyers.⁵¹

4. The follow-up in Italy

In Italy, the system of fixed remuneration (minimum and maximum rates) was abolished and new measures were introduced by the State and the professional governing body to protect professionals (in particular, lawyers in a weaker position in dealings with powerful clients such as banks and insurance companies, as well as public authorities) and to ensure fair remuneration.⁵²

When it abolished fixed rates, the Italian State (the Ministry of Justice for the legal profession) replaced them with ministerial "parameters", which nevertheless apply only where professional fees are liquidated by a judicial body.⁵³ This means that courts may refer to the ministerial parameters, but that professionals may not use them in their agreements with clients, and if they do so the terms of remuneration agreed upon will be null and void.

These parameters therefore leave unresolved the issue of fair remuneration, inasmuch as they are incapable of preventing unjust prevarication in dealings with younger, less powerful professionals.

Suffice it to recall, by way of example, the recognition by the Consiglio di Stato (Council of State) of the lawfulness of a call for tenders launched by the municipality of Catanzaro for the drafting of a structural plan and town-planning regulation, notwithstanding the stipulation of a contract

⁵¹ The European Commission acknowledges that in some cases maximum fees might protect consumers from excessive charges, but considers that a less restrictive mechanism (such as improved information on the services provided) could be put in place. See the Communication from the Commission – *Report on Competition in Professional Services*, 9 February 2004, COM/2004/0083 final.

⁵² Decree-Law No. 223 of 4 July 2006 ("the Bersani Decree", *Official Journal of the Italian Republic*, no. 153 of 4 July 2006), converted by Law No. 248 of 4 August 2006 (*Official Journal of the Italian Republic*, no. 186 of 11 August 2006), abolished statutorily fixed and minimum attorneys' fees.

⁵³ See Article 9 of Decree Law No. 1 of 24 January 2012 (*Official Journal of the Italian Republic*, no. 19 of 24 January 2012), converted by Law No. 27 of 24 March 2012 (*Official Journal of the Italian Republic*, no. 71 of 24 March 2012).

value of one euro.⁵⁴ The Council of State found that a public contracting authority was different from a private contracting authority and could offer its suppliers alternative forms of remuneration, not necessarily of an economic nature, because a financial profit was not regarded as an essential element under the current law of public contracts. A tenderer could, according to the decision, derive a benefit inasmuch as “the financial profit is displaced by legitimate non-material factors inherent in becoming, and being seen to be the contractor”.

It is difficult to sympathise with this part of the decision, since a lack of remuneration is inconsistent with Article 31 of the Charter of Fundamental Rights of the European Union, which is headed “Fair and just working conditions” and stipulates that every worker – without distinction between employed and self-employed workers – is entitled to dignified working conditions.

For those reasons, the legislature and the National Bar Council have sought solutions in order to avoid such damaging situations for professionals. In accordance with the *Wouters* exemption and the increasing role of economic analysis in the rules of competition law, the new measures also require a reflective analysis so that their consistency with European Union law may be assessed.

As far as the profession’s governing body is concerned, the Italian Competition Authority has sanctioned the National Bar Council on account of two agreements restricting competition, without considering in detail the *Wouters* exemption.⁵⁵ The agreements consisted in:

1. the publication of ministerial tariffs – which had been abrogated – on the Council’s institutional website accompanied by a circular issued in 2006 stating that lawyers who charge rates below the minimum rate may be sanctioned on the basis of the profession’s code of conduct;
2. Opinion No. 48/2012 of the Council stating that the use of websites, on behalf of lawyers, which offer consumer discounts on professional services was inconsistent with the rule in Article 19 of the professional code of conduct concerning the securing of clients.

⁵⁴ Judgment No. 4614 of the Council of State of 3 October 2017; <https://www.giustizia-amministrativa.it>.

⁵⁵ The Italian Competition Authority, I748 – *Condotte restrittive del CNF*, Decision No. 25154 of 22 December 2014, <http://www.agcm.it>.

There therefore seems little scope for the National Bar Council to protect lawyers' fee rates, since it is now a given that a regulation on rates adopted by a professional governing body is to be regarded as a decision adopted by an association of undertakings within the meaning of Article 101 TFEU. The Italian Competition Authority has not examined in depth whether effects restrictive of competition are inherent in the pursuit of public interest objectives, as is required by the rulings in *Wouters*, *Cipolla* and *CHEZ Elektro Bulgaria*.

As for the measures introduced by the Italian State, Law No. 81 of 22 May 2017⁵⁶ (known as the "Jobs Act for Self-Employed Workers") extended to professionals the prohibition of abuse of economic dependence (Article 9 of Law No. 192 of 18 June 1998), providing that abusive clauses are null and void, and also providing for preventive and reparative protection.⁵⁷ This will apply, for example, to clauses which allow the purchaser of services the right to unilaterally alter the terms of the contract or to withdraw from the contract without giving reasonable notice, or which set payment terms over 60 days. But the rules are also significant as regards the delicate question of determining what payment is due, inasmuch as self-employed persons who are economically dependent on a purchaser of services must nevertheless be ensured "fair remuneration", to be fixed by the courts, which will refer, first of all, to any existing professional rates and then to custom and ultimately equity.

Falling within this area of protection would undoubtedly be situations in which a self-employed person has just a single client, as may also be situations in which there is a limited number of purchasers of the services offered, especially if there is reorganisation of work arrangements or adjustment of specialisations, to adapt to the specific requirements of that clientele.

This brings us on to the type of contractual relationship between members of some categories of intellectual professions, such as lawyers, and "powerful clients", such as banks, insurance companies, and large businesses, which is a relationship that represents for the self-employed professional the sole, or the principle source of income.

⁵⁶ *Official Journal of the Italian Republic*, no. 135 of 13 June 2017.

⁵⁷ See Pietro Paolo Ferraro, "Il divieto di abuso di dipendenza economica del professionista", *Gazzetta Forense*, no. 5 (2017), 928.

However, these protective rules have limits and apply only where the lawyer, or another professional, finds himself in a situation of economic dependency on his client.

Furthermore, Law No. 172 of 4 November 2017,⁵⁸ converting Decree-Law No. 148 of 16 October 2017, and Law No. 205 of 27 December 2017⁵⁹ guarantee fair remuneration for professionals in dealings with a broader spectrum of persons which fall within the scope of the rules on abuse of economic dependency, including agreements drafted unilaterally not only by banks and insurance companies, but also by undertakings not falling within the categories of micro-enterprises or SMEs, as defined by Commission Recommendation 2003/361/EC of 6 May 2003.

It may be added that fair remuneration is that which is proportional to the amount and quality of the work done, as well as to the content and characteristics of the legal supply, account being taken of the parameters laid down in the Decree of the Minister of Justice adopted in accordance with Article 13(6) of Law No. 247 of 31 December 2012. That innovation, which introduced a new Article 13a into Law No. 247 of 31 December 2012, essentially extends to professionals the protective rules on unfair contract terms, irrespective of economic dependency, and applies to public authorities.

In substance, the rules in question introduce a general principle according to which contractual terms between professional and client which fix remuneration at a level below the values set in the parameters identified in the ministerial decrees would be unfair and thus null and void. That relative nullity may be argued by the professional and is not subject to any limitation period.⁶⁰ It is also a partial nullity, inasmuch as the remaining clauses of the agreement with the “powerful client”, other than the *contra legem* clause, will remain valid. Where a court declares the clause null and void, it will determine the remuneration of the professional on the basis of the parameters set out in the ministerial regulations. This is one of the problematic areas of the new rules, but the reasoning behind it was the need to provide courts with a point of reference for fixing fair remuneration, even if a less rigid, more flexible system would have been preferable.

⁵⁸ *Official Journal of the Italian Republic*, no. 284 of 5 December 2017.

⁵⁹ *Official Journal of the Italian Republic*, no. 302 of 29 December 2017.

⁶⁰ Law No. 172/2017 provided that the “nullity must be put forward within 24 months of the signing of the agreement”, but that provision was subsequently repealed by Law No. 205/2017.

5. Conclusion

In conclusion, there are some grey areas in the new rules introduced into the Italian legal system, even though their aim is the protection of fair remuneration for professionals and the prevention of abusive conduct.

The most worrying aspects in competition terms are connected with the rules on payments, because the new Article 13a of Law No. 247/2012 could re-introduce *de facto* minimum fees.

The report explaining the new rules states that the rules were necessary in order to provide a better balance in contractual relationships between professionals and economically powerful entities, as well as to ensure that potentially distorted competition resulting from abusive conduct on the part of such powerful entities and the extremely large number of lawyers practising in Italy does not lead to the offering of discounted professional services, with the attendant risk of deteriorating quality.⁶¹

However, in the opinion of the Italian Competition Authority, in so far as they link the fairness of remuneration to the fee parameters contained in the ministerial decrees, the new rules actually reintroduce minimum rates, and thus impede price competition between professionals in their commercial dealings with this type of client.⁶² In particular, the Authority has pointed out to the legislature that, with the entry into force of the rules on fair remuneration, it is highly unlikely that clients will agree to the fixing of remuneration below the levels stipulated and thus assume the risk of being accused, immediately or subsequently, of not having observed the principle of equity. The Authority has also stated that its negative stance on the rules on fair remuneration is not called into question by the judgment in *Eurosanamientos*, since, in that judgment, the Court did not rule on

⁶¹ See the website of the Italian Parliament: <http://www.parlamento.it/home>.

⁶² Italian Competition Authority, ASI452 of 24 November 2017, *Misure contenute nel testo di conversione del Decreto legge 148/2017* ("Decreto Fiscale"). The Italian Competition Authority has always taken a negative stance on mandatory lawyers' fees, stating that such fees are not necessary for attaining public interest objectives, are not appropriate to ensuring quality of service and may result in a competitive disadvantage for lawyers by comparison with operators who have greater freedom to adjust the characteristics, including price characteristics, of their supply to those of the demand for their services (Italian Competition Authority, *L'indagine conoscitiva su Ordini e Collegi professionali*, 9 October 1997, <http://www.agcm.it>). The Authority's investigation predates the various initiatives taken by the European Commission in the area of professional services. See Sergio Maria Carbone and Francesco Munari, "L'indagine conoscitiva dell'Autorità Garante della concorrenza e del mercato sugli ordini e collegi professionali ed il suo possibile impatto sull'avvocatura", *Concorrenza e Mercato*, 1995, Milan, 411.

the question whether the national rules were justified by a public interest objective, nor did it apply the test of proportionality to the rules.

In practice, the criticism of new Article 13a of Law No. 247/2012 is the same as the criticism that was made by the Competition Authority against the decisions adopted previously by the National Bar Council, not to mention the fact that this is a legislative act adopted by the Italian State (rather than a professional governing body) or that it applies only to certain categories of clients ("powerful clients" and public authorities).

Notification is one of the so-called weak powers of the Competition Authority.⁶³ It has no binding effect on the legislature, which will not have to remove the rules introduced for the protection of fair remuneration. Nevertheless, we cannot say that the question of fair remuneration has been resolved, since the new provisions on fair remuneration could still be called into question from the point of view of their consistency with the freedom to provide services, in accordance with the Court of Justice's ruling in *Cipolla* (but not in *Eurosaneamientos*).

Although Member States are free to lay down the conditions for practising the legal profession, their scope for manoeuvre is, however, circumscribed by European Union law. Indeed, EU law requires verification of the general context in which rules have been adopted and in which they produce effects, as well as verification of whether any restrictions introduced are necessary and proportionate to the attainment of a legitimate public interest objective. At the same time, it will be necessary to consider whether the legal profession should be distinguished from other professions, given that the rules on fair remuneration have been extended to all professions, including those which require registration with bars and associations and those which are not regulated. Therefore, the fate of fair remuneration hangs in the balance.⁶⁴

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⁶³ See Article 21 of Law No. 287 of 10 October 1990, entitled "Powers to notify Parliament and the Government" (*Official Journal of the Italian Republic*, no. 240 of 13 October 1990).

⁶⁴ In accordance with Article 15(7) of Directive 2006/123/EC on services in the internal market, Law No. 172/2017 should be notified to the European Commission, which as we know is pressing for deregulation of professional fee rates far more keenly than is the Court of Justice.

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