



29.6.2016

NOTICE TO MEMBERS

Subject: Petition No 0671/2015 by A. J. N. C. (Spanish) on fees charged by Spanish lawyers

1. Summary of petition

The petitioner is unhappy that the Spanish bar association sets the fees for Spanish lawyers, and is of the opinion that this constitutes a breach of free competition.

2. Admissibility

Declared admissible on 18 February 2016. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 29 June 2016

The petitioner takes the view that mandatory fees for lawyers' activities (jura de cuentas), which are set by Spanish bar Associations, are not acceptable. According to the petitioner, such mandatory fees require a client to pay the lawyer fixed fees regardless of the quality of the lawyers' services provided. He takes issue with the fact that lawyers' fees for the same case will vary depending on the quantum of the claim. He is of the opinion that setting compulsory fees is a breach of free competition.

The Commission's observations

The underlying facts

According to the information available to the Commission, Spain abolished fixed tariffs and the ability for bar associations to set fixed and recommended tariffs already at the time of

ransposing the Services Directive, as foreseen in Article 14 of the Omnibus Law¹, which modified the Professional Associations Act. In the case of lawyers, bar associations were requested to change their deontological rules to ensure that no fixed prices exist, and that fees are subject to private contractual freedom in the relationship between lawyers and clients. Therefore, lawyers' fees are to be agreed between the lawyer and the client at the beginning of a contractual relationship. Bar associations however, may establish guidelines for the sole purpose of the oath of accounts (*jura de cuentas*) and the taxation of costs, to allow national courts to determine the cost that the winning party may claim from the losing party (see the Fourth Additional Provision of the Professional Associations Act).

Compatibility of fixed fees with Arts. 15 and 16 of Directive 2006/123 on services of the internal market (Services Directive)

The Commission agrees with the petitioner that measures imposed by legislation or professional rules aiming at setting compulsory fixed minimum or maximum tariffs, in particular for professional services like legal services, constitute a serious obstacle to the Internal Market freedoms. They deprive service providers of the possibility of competing on price or on quality, which is an essential tool of any economic activity. It may render the establishment in a Member State less attractive². However, as explained above in section 1, this does not seem to be the case in Spain.

Already at the time of the implementation of Directive 2006/123 on services of the internal market ("Service Directive"), in view of Article 15 of the Services Directive and in particular of Article 15 (2) (g), which refers to fixed minimum and/or maximum tariffs, Member States have been invited to thoroughly review and abolish fixed minimum or maximum tariffs if considered non-justified and disproportionate. According to Article 15 (3) of the Services Directive, a measure imposing a set of minimum tariffs, and the prohibition to deviate from those, that applies to all persons and undertakings operating in the territory of the host Member State, may be justified only where it serves overriding reasons of general interest, insofar as it is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary to achieve it. In carrying out the review, Member States need to take the Court of Justice of the European Union (CJEU) case-law into account. Member States should also consider that this provision under the Services Directive is not limited to cross-border situations but also covers internal situations where a Spanish lawyer intends carrying out remunerated activities towards customers in Spain. Such a regime needs also to be assessed in respect of Article 16 of the Services Directive, which only allows for maintaining restrictions to the cross-border provision of services if justified and proportionate on grounds of public security, public order, public health or protection of environment – overriding reasons which are not necessarily relevant when considering minimum fees for lawyers.

¹ Law 25/2009, of 22 December, modifying several laws to adapt them to the Law on the free access and exercise to services activities. Article 14 of the Professional Associations Act explicitly prohibits the establishment of indicative scales of professional fees, only allowing the existence of guidance for the sole purpose of taxation of costs criteria and the oath of accounts.

² Handbook on the implementation of the Services Directive, http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

The European Court of Justice has not yet delivered a ruling on that question on the interpretation of Article 15 of the Services Directive¹. In the past, it only examined such case under the right of establishment, one of the fundamental Internal Market freedoms under the Treaty (Article 49 TFEU). In that respect, when looking at the Italian scheme which set compulsory fees for lawyers (Cipolla case C-94/04²), the Court found that derogating from minimum fees set in a mandatory pay scale, is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in that Member State. The Court also found that such scheme constitute a restriction on freedom to provide services laid down in Article 56 TFEU. However, the Court left it open, whether this legislation achieves its purposes and whether the restrictions imposed are disproportionate.

The Court also pointed out that compulsory tariffs are not necessary in a number of cases since rules relating to organisation, qualifications, professional ethics, supervision and liability may suffice in themselves to attain the objectives of the protection of consumers and the proper administration of justice³. In this line, in light of the outcome of the peer review on legal form, shareholding and tariff requirements⁴, the Commission services have already underlined that fixed tariffs in general, and compulsory minimum tariffs, in particular, are serious restrictions to the establishment of service providers. They also negatively influence consumers' choice and reduce competition on a market. It is therefore highly questionable to what extent imposing minimum tariffs ensures a high quality of services. Member States should normally find more appropriate means to protect the general interest objectives at stake, such as consumer protection⁵. Consumer protection or the administration of justice does not constitute overriding reasons justifying restrictions to the cross-border provision of services under Article 16 of the Services Directive.

Compatibility of fixed fees with EU competition law

Obligations on undertakings under EU competition rules

Article 101(1) TFEU prohibits "all agreements between undertakings, decisions by associations of undertakings [...] which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". In particular, in accordance with the case-law of the European Courts, agreements between undertakings and decisions by associations of undertakings "*that directly or indirectly fix purchase or selling prices or any other trading conditions*" (see Article 101(1) (a) TFEU) harm competition and are therefore prohibited by Article 101(1) TFEU.

It is settled case-law that lawyers can be involved in economic activity and can therefore be

¹ However, a preliminary ruling is pending ((reference C-532/15 ET C-538/15) whereby the CJEU is asked by two Spanish national Courts to assess the compatibility with EU law of the existing tariff scheme for procuradores in Spain and in particular in view of Article 15 (3) of the Services Directive.

² Judgment of 5 December 2006, Cipolla, Joined Cases C-94/04 and C-202/04.

³ Judgment of 5 December 2006, Cipolla, Joined Cases C-94/04 and C-202/04.

⁴ Commission Staff Working Document SWD(2013) 402 final on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive, of 2.10.2013

⁵ In June 2015, the Commission launched infringement procedures against Spain as regards minimum compulsory tariffs for procuradores in Spain,. http://europa.eu/rapid/press-release_IP-15-5199_en.htm

considered to be undertakings¹ and that members of a professional association may be considered an association² of undertakings for the purpose of Article 101 TFEU.

Therefore, an agreement between undertakings (e.g. lawyers) or a decision by an association of undertakings (e.g. bar association) setting compulsory fixed minimum or maximum legal tariffs may breach Article 101 TFEU where such a conduct may affect trade between Member States.³

As explained in section 1 above, the Spanish relevant law now provides that lawyers can set their prices freely and the Commission has no information, including from the petition, suggesting that lawyers or bar associations have engaged or are still engaging in price fixing. Should the petitioner have information suggesting that lawyers or bar associations have agreed to fix prices or set minimum or maximum prices, such behaviour would infringe Article 101(1) TFEU or, if the agreement does not have effect on trade between Member States (within the meaning of the case-law), the equivalent provisions of the Spanish competition law.

For example, in its resolution of 23 July 2015, the Spanish National Market and Competition Commission found that the local Bar association of Las Palmas had infringed the national competition law, Article 1 of Law 15/2007 ("*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*") by making collective price recommendations to its member lawyers⁴. This shows that the national competition authority is well placed to address the petitioner's competition concerns, if any.

Article 102 TFEU prohibits "*any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.*"

According to point (a) of Article 102 TFEU such abuse may, in particular, consist in "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.*" In this context charging a price, which is excessive because it has no reasonable relation to the economic value of the product supplied may breach Article 102 TFEU.⁵

In order to determine that there may be a breach of Article 102 TFEU it should be established that one or more undertakings hold a dominant position on the relevant market. Based on the information at Commission's disposal, including information in the petition, it is not clear that such market dominance exist.

Furthermore, market dominance as such is not prohibited by EU law, but only abuse of such market position.⁶ The Commission has no information, including from the petition suggesting

¹ C-309/99 *Wouters v. Algemene Raad van de Nederlandse Ordre van Advocaten* ECLI:EU:C:2002:98, paragraphs 46 - 49.

² Commission Decision of 24 June 2004 in case COMP/38.549 *Belgian Architects Association*, OJ [2005] L 379/1.

³ *Idem*.

⁴ CNMC Resolution of 23 July 2015 (expte. SACAN/31/2013 HONORARIOS PROFESIONALES COLEGIO ABOGADOS LAS PALMAS)

⁵ C-52/07 *Kanal 5 Ltd v STIM upa*, ECLI:EU:C:2008:703, paragraph 28.

⁶ C-52/09 *Telia Sonera*, ECLI:EU:C:2011:83, paragraph 24.

that either lawyers or bar association, assuming that they would be market dominant, would have engaged in excessive pricing.

In the context of the application of EU competition rules to undertakings it is also worth recalling that the Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN) when applying EU competition law. Therefore a complaint about possible breach of EU competition rules by undertakings could be brought either to the Commission or to the competent national competition authority.

Obligations on Member States under EU competition rules

It is also settled case-law that Member States are under an obligation pursuant to Article 4(3) TEU and Article 101 TFEU not to "*render ineffective the competition rules applicable to undertakings*". Such would be the case if "*a Member State were to require or favour the adoption of agreements, decisions, or concerted practices contrary to Article 101 TFEU or to reinforce their effects, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere*".¹

However, as mentioned in section 1 above, there is nothing to suggest that Spain would have either (i) obliged or encouraged lawyers to adopt any type of agreement or decision contrary to the "*useful effect*" doctrine laid down in Article 4(3) TEU in conjunction with Article 101 TFEU or (ii) divested its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

Finally, Member States are according to Article 106 TFEU also obliged not to "*in the case of public undertakings and undertakings to which they grant special or exclusive rights, enact or maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*"

Yet, as mentioned in section 1, there is nothing to suggest that Kingdom of Spain would have enacted any measure, which would require lawyers or bar association to set compulsory fixed minimum or maximum legal tariffs.

Conclusion

Therefore, the Commission considers that as far as legislation in Spain does not subject lawyers' fees to compulsory fixed minimum or maximum tariffs scheme, there is no breach by the Kingdom of Spain of Articles 15 and 16 of the Services Directive.

Furthermore, for the reasons set out in section 3 above, there is nothing to suggest that (i) the Kingdom of Spain would infringe Article 4(3) TEU in conjunction with Article 101 TFEU or Article 106 TFEU in conjunction with Article 102 TFEU or (ii) that lawyers or bar associations are infringing Article 101 and/or Article 102 TFEU.

¹ Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API*, ECLI:EU:C:2014:2147, paragraph 29.

There is therefore no need for the Commission to further investigate these aspects.