



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

18 July 2013*

(Third paragraph of Article 267 TFEU — Scope of the obligation on courts of final instance to make a reference for a preliminary ruling — Article 101 TFEU — Code of conduct of a professional association prohibiting the application of fee scales which are not commensurate with the dignity of the profession)

In Case C-136/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 14 February 2012, received at the Court on 13 March 2012, in the proceedings

Consiglio nazionale dei geologi

v

Autorità garante della concorrenza e del mercato

and

Autorità garante della concorrenza e del mercato

v

Consiglio nazionale dei geologi,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Consiglio nazionale dei geologi, by A. Lagonegro, avvocatessa,
- the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

* Language of the case: Italian.

— the French Government, by G. de Bergues, E. Belliard and B. Beaupère-Manokha, acting as Agents,
— the Hungarian Government, by M. Fehér, K. Molnár and K. Szíjjártó, acting as Agents,
— the European Commission, by J.-P. Keppenne, L. Malferrari and G. Conte, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU and the third paragraph of Article 267 TFEU.
- 2 The request has been made in proceedings between the Consiglio nazionale dei geologi (National Council of Geologists, ‘the CNG’) and the Autorità garante della concorrenza e del mercato (national competition authority, ‘the Authority’) and between the Authority and the CNG concerning the finding, by the Authority, of a restrictive agreement implemented in the form of the code of conduct adopted by the CNG and concerning the determination of geologists’ fees.

Legal context

- 3 In accordance with Article 2 of Law No 112 on the protection of the qualification and profession of geologist (legge n. 112 – Disposizioni per la tutela del titolo e della professione di geologo), of 3 February 1963 (GURI No 57 of 28 February 1963, ‘Law No 112/1963’), the exercise of that profession in Italy is subject to entry in the register administered by the National Association of Geologists.
- 4 Article 8 of that law provides that all geologists entered in that register constitute the Association and elect the CNG.
- 5 Paragraph 9 of that law states as follows:

‘The [CNG] shall have the following responsibilities, in addition to those conferred on it by other provisions:

(a) it shall ensure compliance with professional regulations and all other provisions concerning the profession;

(b) it shall ensure that the register and special list are maintained and be responsible for registering members and removing members from the register;

(c) it shall ensure that the professional qualification is protected and take measures to prevent the unlawful exercise of the profession;

(d) it shall adopt disciplinary measures;

(e) it shall, if requested, determine fees;

(f) it shall administer the material assets of the National Association and draw up annually the provisional budget and the final balance sheet;

- (g) it shall establish, within the limits strictly necessary to cover the operating costs of the National Association, by resolution to be approved by the Ministry of Justice, the amount of the annual contribution to be paid by those entered in the register or the special list, as well as the amount of the registration fee for entry in the register or list, and the charge for issuing certificates and opinions on the determination of fees.'
- 6 Under the first paragraph of Article 14 of Law No 616, containing the implementing provisions of the Law No 112 of 3 February 1963 on the protection of the qualification and profession of geologist (legge n. 616 – Norme integrative per l'applicazione della L. 3 febbraio 1963, n. 112, contenente norme per la tutela del titolo e della professione di geologo), of 25 July 1966 (GURI No 201 of 13 August 1966):
- 'A person entered in the register or special list who fails to act in a manner consistent with the integrity or dignity of the profession may be subject, depending on the seriousness of the offence, to one of the following disciplinary measures:
- (1) reprimand;
 - (2) suspension from professional activity for a period of not more than one year;
 - (3) removal from the register.
- ...'
- 7 Article 2 of Decree-Law No 223 laying down urgent measures for economic and social revival, the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion (decreto-legge n. 223 – Disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale) of 4 July 2006 (GURI No 153 of 4 July 2006), converted into law, after amendment, by Law No 248 of 4 August 2006 ('Decree-Law No 223/2006'), provides:
- '1. In accordance with the Community principles of free competition, freedom of movement of persons and freedom to provide services, and in order to guarantee consumers a genuine choice when exercising their rights and the ability to compare services offered on the market, from the date of entry into force of the present decree-law, the laws and regulations which impose the following, with regard to the liberal professions and those engaged in intellectual work, shall be repealed:
- (a) compulsory fixed or minimum fee scales or the prohibition of fixing fees determined on the basis of the attainment of the objectives pursued;
- ...
3. Provisions relating to professional ethics and agreements, and self-regulation codes which include the measures referred to in paragraph 1, shall be amended, including by means of the adoption of measures designed to ensure the quality of professional services, by 1 January 2007. If these are not amended, rules which are contrary to the provisions of paragraph 1 shall, in any event, be null and void as from that date.'
- 8 Under Article 2233 of the Civil Code, which concerns the intellectual professions:
- 'If the fees have not been agreed by the parties and cannot be determined by reference to fee scales or custom and practice, they shall be determined by the court, after the opinion of the professional association to which the professional belongs has been obtained.

In any event, the amount of remuneration must be commensurate with the scale of the work performed and the dignity of the profession.

...’

- 9 Articles 17 to 19 of the Code of Conduct concerning the exercise of the profession of geologist in Italy, approved by the CNG on 19 December 2006 and most recently amended on 24 March 2010 (‘the Code of Conduct’), provides as follows:

‘Article 17 – Fee criteria

In determining professional remuneration, the geologist must comply with the provisions of Decree-law 223/2006, the principle that remuneration must be commensurate laid down in the second paragraph of Article 2233 of the Civil Code and, in any event, all the statutory provisions in force governing the subject-matter. The scale of professional fees approved by Ministerial Decree of 18 November 1971, as amended, and the fee scale in respect of public works approved by the Ministerial Decree of 4 April 2001, in so far as concerns geologists, shall constitute a legitimate and objective technical and professional reference criterion for the purpose of the consideration, determination and settlement of questions relating to fees as between the parties.

Article 18 – Commensurate nature of the fee

Under the legislation in force, in order to ensure that the services provided are of the requisite quality, a geologist engaging in professional activity in whatever form – as an individual, as a member of a company or a partnership – must always ensure that the fee charged is commensurate with the scale and difficulty of the task to be performed, the dignity of the profession, technical knowledge and the commitment required.

Having regard to the principles of competition in the profession, the National Association shall monitor compliance with these requirements.

Article 19 – Public tendering procedures

In public tendering procedures, where the public authority legitimately refrains from applying the scale of professional fees as the criterion for remuneration, the geologist shall, in any event, ensure that his or her bid is commensurate with the scale and difficulty of the task to be performed, the dignity of the profession and the technical knowledge and commitment required.’

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

- 10 By decision of 23 June 2010, adopted on the basis of the results of an investigation (‘the decision of the Authority’), the Authority found that the National Association of Geologists had infringed Article 101 TFEU in that it encouraged its members to adopt a standard commercial approach by applying the scale of professional fees. In particular, the Authority found that the Code of Conduct constituted a decision by an association of undertakings having a restrictive effect on competition in breach of Article 101 TFEU.
- 11 According to the Authority, the classification, under Article 17 of that Code, of the scale of professional fees as a legitimate reference criterion for the determination of remuneration encouraged geologists to set their fees in accordance with that scale. The formal reference, in Article 17, to Decree-Law 223/2006 repealing fixed and minimum tariffs was not liable to suggest to geologists that it is possible to set professional fees by agreement between the parties.

- 12 Furthermore, the obligation laid down in Articles 18 and 19 of the Code of Conduct to determine fees in accordance with general standards, such as the integrity and dignity of the profession, in the absence of criteria that characterise those standards by specific reference to the determination of fee scales for professional services might also lead to the assumption that the professional scale is to be regarded as compulsory, thus preventing independent behaviour in the market. Moreover, the fact that Article 17 of that Code refers to Article 2233 of the Civil Code, which makes reference to the dignity of the profession, supports that view.
- 13 The CNG challenged the Authority's decision before the Tribunale amministrativo regionale per il Lazio.
- 14 By judgment of 25 February 2011, that court dismissed CNG's action. In particular, it agreed with the Authority's view that the allusion to the scale of professional fees as a legitimate reference criterion when determining fees induced geologists to apply that scale, which resulted in a restriction of competition. At the same time, that court held that the Authority had not submitted sufficient evidence in support of the argument that the reference to the dignity of the profession as one of the criteria to be taken into account when determining the remuneration of geologists implied that the scale of professional fees was binding in nature. Nevertheless, it took the view that that error was not sufficient to invalidate the Authority's decision.
- 15 The CNG brought an appeal against the judgment of the Tribunale amministrativo regionale per il Lazio before the Consiglio di Stato. The Authority also brought an appeal against that judgment, in so far as it stated that the grounds of the Authority's decision were partially incorrect.
- 16 In the proceedings before the referring court, the CNG proposed that several questions concerning the compliance of national provisions, both legislative and regulatory and those contained in the Code of Conduct, with European Union competition law be referred to the Court of Justice for a preliminary ruling.
- 17 Whereas the referring court considers that the majority of the questions proposed by the CNG are, in principle, relevant to the resolution of the dispute in the main proceedings, it notes that they are nevertheless expressed in vague terms. Furthermore, that court considers that some of those questions are manifestly without relevance for the purpose of the main proceedings, in particular those that refer to Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1).
- 18 Accordingly, the referring court has put to the Court questions concerning the scope of the third paragraph of Article 267 TFEU, in so far as concerns its power to choose and reformulate the questions proposed by one of the parties in the main proceedings and any duty it may be under to make such a choice and reformulate the questions.
- 19 With regard to the questions concerning European Union legislation on competition, the referring court has reformulated the proposals submitted by the CNG.
- 20 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - I. (1) Does the third paragraph of Article 267 TFEU, in so far it provides that a court of final instance is under an obligation to refer to the Court of Justice for a preliminary ruling a question of interpretation of Community law raised by a party to the proceedings, preclude national procedural rules which provide for a system of procedural bars, such as time-limits for bringing proceedings, the requirement that the grounds relied on be specific, a bar on amending the claim in the course of the proceedings and a bar on the court amending the claim as formulated by the applicant?

- (2) Does the third paragraph of Article 267 TFEU, in so far as it provides that a court of final instance is under an obligation to refer to the Court of Justice for a preliminary ruling a question of interpretation of Community law raised by a party to the proceedings, preclude any power on the part of the national court to ‘filter’ as regards the relevance of the question and its assessment of the degree of clarity of Community law?
 - (3) If it is construed as imposing on the national court of final instance an unconditional obligation to refer to the Court of Justice for a preliminary ruling a question of interpretation of Community law raised by a party to the proceedings, is the third paragraph of Article 267 TFEU consistent with the principle that proceedings must be concluded within a reasonable time, which is also enshrined in Community law?
 - (4) In what factual and legal circumstances does a failure on the part of the national court to comply with the third paragraph of Article 267 TFEU constitute a “clear breach of Community law”, and can that concept differ in its scope and application with regard to special proceedings against the State, under Law No 117 of 13 April 1988 on compensation for damage caused in the exercise of judicial functions ...?
- II. In the event that the Court should ... accept the argument of the “large-mesh filter” ... precluding the application of the national procedural rules concerning the specific nature of the grounds relied on in the application, the questions for a preliminary ruling must be submitted to the Court ... in exactly the same terms in which they were formulated by the appellant [in the main proceedings], as set out [below]:
- “(1) ... [the Court] is asked for a preliminary ruling on the interpretation of Article 101 TFEU ... in relation to the statutory provisions and rules of conduct regulating the profession of geologist and the institutional responsibilities and rules of procedure of the [CNG], applicable to the present case, as set out below, in order to establish whether they are valid and compatible with European Union competition law (namely, Article 101 TFEU). ...

[reproduction of Article 9 of Law No 112/1963]

[reproduction of Articles 14(1), and Article 17 of Law No 616 of 25 July 1966 containing the implementing provisions of Law No 112 of 3 February 1963 on the protection of the qualification and profession of geologist]

[reproduction of Articles 6 and 7 of the Code of Conduct]

[reproduction of Article 17 of the Code of Conduct]. On that point, in particular, the Court ... is requested to give a ruling on whether it is contrary to Article 101 TFEU to designate Decree-Law No 223/2006, which includes a numerical-chronological system that is the only historically-based and lawful system at both national and Community level, as the applicable statutory provision binding in its entirety, which undoubtedly has no bearing on whether it is possible for those concerned to be aware of the legal rule or its binding force.

[reproduction of Articles 18 and 19 of the Code of Conduct]

Whereas:

- [Regulation No 2137/85, designed] “to facilitate or develop the economic activities of its members”, states, in the sixth recital in the preamble, that the provisions [contained therein] “shall not, however, prejudice the application at national level of legal rules and/or ethical codes concerning the conditions for the pursuit of business and professional activities”;

- [reproduction of recital 43 in the preamble to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22)];
- [reproduction of recital 115 in the preamble to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36)].

Finally, the Court ... is asked to rule on the compatibility with Article 101 TFEU of the distinction made, as a matter of law and in terms of the organisation of professional associations, between a professional undertaking and a commercial undertaking, as well as between professional competition and commercial competition.

- (2) (a) Does Article 101 TFEU or any other provision of European Union law prohibit and/or restrict any reference to professional integrity and dignity – of geologists in this case – as factors to be taken into account for the purpose of determining professional remuneration?
- (b) Under Article 101 TFEU or any other provision of European Union law, does the reference to factors pertaining to professional integrity and dignity give rise to effects which restrict professional competition?
- (c) Does Article 101 TFEU or any other provision of European Union law establish that the requirements of integrity and dignity as factors to be taken into account for the purpose of determining professional remuneration in connection with minimum fees, in respect of which derogations are expressly stated to be permitted – given the express and formal reference in Article 17 of the [Code of Conduct] to the statutory provision which permits that derogation (Decree-Law No 223/2006) – may be regarded as encouraging conduct that restricts competition?
- (d) Does Article 101 TFEU or any other provision of European Union law prohibit the reference to the scale of professional fees – established, in the case of geologists, by a State measure in the form of a ministerial decree of the Minister for Justice, after consultation with the Minister for the Production Sector, and which may be derogated from as regards minimum fees, it must be reiterated, as a result of the express and formal reference to Decree-Law No 223/2006 in Article 17 of the ... Code of Conduct – as a purely technical and professional reference criterion for determining remuneration?
- (e) Does Article 101 TFEU or any other provision of European Union law prohibit any correlation between the scale of the services to be provided and the requirements of integrity and dignity, as also defined in Articles 6 and 7 of the [Code of Conduct] on the one hand, and professional remuneration on the other, as provided for by [the second paragraph of] Article 2233 of the Civil Code, according to which “in any event”, the amount of the [professional] remuneration must be commensurate with the scale of work performed and the dignity of the profession”?
- (f) For the purpose of Article 101 TFEU, therefore, can the reference to [the second paragraph of] Article 2233 of the Civil Code be regarded as legitimate and not likely to have a restrictive effect on competition?

- (g) Does Article 101 TFEU or any other provision of European Union law establish, in the context of the rules on competition, equality in law between a professional association, in this case of geologists, as regulated by specific State rules laid down for the pursuit of their objectives as an institution, and restrictive agreements, decisions or practices and concentrations of commercial undertakings constituting anti-competitive agreements?
 - (h) Does Article 101 TFEU or any other provision of European Union law make it possible to establish equivalence between a contribution to a professional association that is mandatory in law – and is made for the pursuit of institutional functions and objectives – and the activity of selling goods or services and the financial profit accrued as a result of anti-competitive conduct on the part of concentrations of commercial undertakings?
 - (i) Does Article 101 TFEU or any other provision of European Union law justify the imposition of a penalty in this case?
 - (j) Does Article 101 TFEU or any other provision of European Union law justify making contributions to a professional association, which are mandatory in law, subject to a compulsory levy, equating those contributions to profit or revenue deriving from an anti-competitive economic and commercial agreement?
- III. (1) In the alternative, in the event that the Court should answer the questions concerning the interpretation of the third paragraph of Article 267 TFEU to the effect that the national rules of procedure are of no effect and the national court is under a duty to provide assistance, and that the question for a preliminary ruling, as raised by the appellant, is of too general a nature, the question for a preliminary ruling is whether Community law on competition and the professions, in particular the Community provisions relied upon by the appellant in its question, preclude the adoption of codes of professional conduct which make remuneration commensurate with professional integrity and dignity and the quality and scale of the work to be performed, with the result that remuneration which falls below the minimum fee threshold (and is therefore more competitive) may be penalised, at disciplinary level, as being in breach of the rules of professional conduct?
- (2) In the alternative, in the event that the Court should answer the questions concerning the interpretation of the third paragraph of Article 267 TFEU to the effect that the national rules of procedure are of no effect and the national court is under a duty to provide assistance, and that the question for a preliminary ruling, as raised by the appellant, is of too general a nature, the question for a preliminary ruling is whether Community competition law, in particular the rules prohibiting restrictive agreements, may be interpreted as meaning that a restrictive agreement may take the form of rules of professional conduct established by professional associations, where, by referring to professional integrity and dignity, as well as the quality and scale of the work to be performed, as criteria for determining professional remuneration, those rules have the effect of prohibiting derogations from minimum fees and, consequently, also of restricting competition because such derogation is prohibited?
- (3) In the alternative, in the event that the Court should answer the questions concerning the interpretation of the third paragraph of Article 267 TFEU to the effect that the national rules of procedure are of no effect and the national court is under a duty to provide assistance, and that the question for a preliminary ruling, as raised by the appellant, is of too general a nature, the question for a preliminary ruling is whether, if national law lays down rules to safeguard competition which are more stringent than the Community rules, in particular by establishing the possibility of derogating from the minimum fees set by the scale of professional fees, whereas Community law appears still to permit the prohibition on derogating from minimum fees in certain circumstances, and, consequently, if action taken by a professional association prohibiting derogation from minimum fees constitutes an

agreement that is restrictive of competition under national law, but may not be regarded as such under Community law, does Community competition law, in particular the Community rules on agreements which restrict competition, preclude such an outcome whereby a particular form of conduct may incur penalties as a restrictive agreement under national law but not under Community law, whenever national rules for safeguarding competition are more stringent than Community rules?’

The questions referred

The questions relating to the third paragraph of Article 267 TFEU

- 21 By its questions relating to the third paragraph of Article 267 TFEU, the referring court seeks essentially to determine the scope of its power to choose and reformulate the questions proposed by one of the parties in the main proceedings and any duty it may be under to make such a choice and reformulate the questions.
- 22 In that context, the Consiglio di Stato asks the Court, in particular, whether that provision precludes the application of national rules which would have the effect of preventing the national court from exercising its power to make a reference or compelling it to reproduce the questions proposed by the parties.
- 23 Furthermore, in the event that the third paragraph of Article 267 TFEU must be interpreted as imposing on the national court of final instance an unconditional obligation to refer to the Court of Justice for a preliminary ruling a question of interpretation of European Union law raised by a party to the main proceedings, the Consiglio di Stato asks the Court whether the requirement that proceedings be concluded within a reasonable time, enshrined in European Union law, has any effect on the duties of a court of final instance under that provision.
- 24 Moreover, the Consiglio di Stato refers a question concerning the circumstances under which non-compliance with the obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU may constitute a clear breach of European Union law as a prerequisite for non-contractual liability on the part of State for infringement of that law.
- 25 It should be pointed out, first, that in so far as no appeal lies against the decisions of a national court, such a court is, in principle, obliged to make a reference to the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of the TFEU is raised before it (Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 26).
- 26 It follows from the relationship between the second and third paragraphs of Article 267 TFEU that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of European Union law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of justice a question concerning the interpretation of European Union law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case (Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 10).
- 27 On the other hand, if those courts or tribunals consider that recourse to European Union law is necessary to enable them to decide a case, Article 267 TFEU imposes, in principle, an obligation on them to refer to the Court of Justice any question of interpretation which may arise (see *Cilfit and Others*, paragraphs 11 to 20).

- 28 The Court has already held that the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States institutes direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 90, and Case C-104/10 *Kelly* [2011] ECR I-6813, paragraph 62).
- 29 The determination and formulation of the questions to be put to the Court devolves upon the national court alone and the parties to the main proceedings may not change their tenor (Joined Cases C-42/10, C-45/10 and C-57/10 *Vlaamse Dierenartsenvereniging and Janssens* [2011] ECR I-2975, paragraph 43, and Case C-316/10 *Danske Svineproducenter* [2011] ECR I-13721, paragraph 32).
- 30 Although that court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for it alone ultimately to decide both its form and content (*Kelly*, paragraph 65).
- 31 It follows from the foregoing that it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of European Union law which are necessary in order to resolve the dispute in the main proceedings.
- 32 As regards the national rules of procedure to which the referring court alluded without, however, clarifying their exact scope, it suffices, in any event, to note that such rules cannot affect the powers and obligations conferred on a national court such as the referring court under Article 267 TFEU (see, to that effect, *Cartesio*, paragraphs 93, 94 and 98).
- 33 In addition, it is appropriate to point out that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, including procedural provisions, and it is not necessary for the court to await the prior setting aside of that national provision by legislative or other constitutional means (see, to that effect, Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 31).
- 34 As regards, next, the effect, if any, of the requirement that proceedings must be concluded within a reasonable time – a matter raised by the referring court – it should be noted that the Consiglio de Stato has formulated its question in such a way that it is to be put to the Court only in the event that Article 267 TFEU must be interpreted as imposing on the national court of final instance an unconditional obligation to refer to the Court of Justice for a preliminary ruling a question of interpretation of European Union law raised by a party to the main proceedings. In those circumstances, and in the light of paragraphs 25 to 33 above, there is no need to reply to that question.
- 35 Concerning, finally, the clear breach of European Union law as a prerequisite for non-contractual liability on the part of the State for infringement of that law, that question is manifestly irrelevant and hypothetical in the context of the main proceedings. It is not apparent from the order for reference that such liability is in issue in the main proceedings, or even that that issue was raised by one of the parties to the main proceedings as a procedural issue.
- 36 In view of the foregoing considerations, the answer to the questions concerning the third paragraph of Article 267 TFEU is that that provision must be interpreted as meaning that it is for the referring court alone to determine and formulate the questions referred for a preliminary ruling concerning the interpretation of European Union law which it considers relevant for the resolution of the dispute in the main proceedings. National rules which have the effect of undermining that jurisdiction must be disapplied.

The questions concerning European Union competition rules

- 37 Given that, in the present case, the referring court did in fact reformulate the questions proposed by the CNG, it is appropriate to examine the questions as reformulated.
- 38 In essence, that court seeks to establish whether Article 101 TFEU precludes a professional association, such as the National Association of Geologists in Italy, from adopting rules of professional conduct that lay down as criteria for determining remuneration, in addition to the quality and scale of the work to be performed, the dignity of the profession, with the result that, where fees are set below a certain level – a situation comparable to that in which minimum fees are fixed – that may be penalised on grounds of breach of those rules.
- 39 Moreover, the Consiglio di Stato asks the Court whether national law may provide for a more stringent safeguard for competition than that afforded by European Union rules. In that regard, it should be noted that the relevance of that question for the resolution of the dispute in the main proceedings is not apparent from the order for reference. The order for reference does not contain information identifying the relevance of the response to such a question for the resolution of the dispute in the main proceedings. Such an explanation was, however, required as it is apparent from the file before the Court that that dispute concerns the legality of a decision of the Authority, which applied Article 101 TFEU, not the national rules concerning agreements restricting competition. That question must therefore be declared inadmissible.
- 40 The same applies with regard to the questions relating to the interpretation of Regulation No 2137/85 and Directives 2005/36 and 2006/123.
- 41 As regards the question referred to in paragraph 38 above, it is appropriate to examine to what extent a professional organisation such as the National Association of Geologists in Italy should be regarded as an association of undertakings within the meaning of Article 101(1) TFEU when adopting rules such as those laid down by the Code of Conduct.
- 42 In that examination, it is necessary to verify whether, when it adopts rules such as those at issue in the main proceedings, a professional association is to be treated as an association of undertakings or, on the other hand, as a public authority, on the ground that its activity is connected with the exercise of the powers of a public authority (Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 57 and case-law cited).
- 43 As regards the nature of CNG's activities, it is apparent from Articles 8 and 9 of Law No 112/1963 that all geologists entered in the register established by that provision constitute the Association and elect the CNG, the latter being responsible for ensuring compliance with the rules regulating the profession and all other provisions concerning the profession and for adopting disciplinary measures.
- 44 It should be noted that, when it adopts a measure such as the Code of Conduct, a professional organisation such as the National Association of Geologists is neither fulfilling a social function based on the principle of solidarity, nor exercising powers which are typically those of a public authority. It acts as the regulatory body of a profession, the practice of which constitutes an economic activity (see, to that effect, *Wouters and Others*, paragraph 58).
- 45 In the light of those considerations, the Court finds therefore that a professional organisation such as the National Association of Geologists acts as an association of undertakings within the meaning of Article 101(1) TFEU when drawing up rules of professional conduct such as those at issue in the main proceedings.

- 46 As regards the question whether the rules of professional conduct at issue in the main proceedings constitute a decision under Article 101 TFEU, it should be recalled that even a price recommendation, whatever its exact legal status, may be regarded as constituting such a decision (Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 32).
- 47 In the present case, the fact that the Code of Conduct is binding on geologists and that it is possible to impose penalties on them in the event of non-compliance with that code must lead to the conclusion that the rules laid down therein constitute a decision under Article 101 TFEU.
- 48 In order for European Union competition rules to apply to an arrangement or abusive practice it is necessary for it to be capable of affecting trade between Member States (Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 40).
- 49 For that purpose, an agreement, decision or practice must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States (*Manfredi and Others*, paragraph 42).
- 50 An agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 48, and *Manfredi and Others*, paragraph 45).
- 51 That may be the effect of the decision of the association of undertakings in question in the main proceedings, since Italian law provides that geologists, throughout the territory of the Italian Republic, must be members of the professional association, which means that they are subject to rules of professional conduct and liable to disciplinary action for breach of those rules.
- 52 In the light of the foregoing, the Court finds that rules of professional conduct which lay down as criteria for determining professional remuneration the dignity of the profession as well as the quality and scale of the work to be performed are liable to restrict competition within the internal market.
- 53 However, not every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) TFEU. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which a decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which in the present case consist in ensuring that the ultimate consumers of the services in question are provided with the necessary guarantees. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97).
- 54 In that context, it is important to verify whether the restrictions thus imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paragraph 47).
- 55 On the basis of the file submitted to it, the Court is not able to assess whether the existence of the criterion relating to the dignity of the profession may be considered necessary for the implementation of a legitimate objective, such as that connected to the guarantees provided to the final consumers of the services of geologists, since, inter alia, that criterion is but one of a number of criteria for determining remuneration that are closely linked to the quality of geologists' work, such as the scale and difficulty of the task to be performed, technical knowledge and the commitment required.

- 56 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 Association of Geologists, whether there is a restrictive effect on competition within the internal market. That court must also 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.
- 57 In view of all the above considerations, the answer to the questions concerning European Union competition rules is that rules such as those laid down by the Code of Conduct that establish as criteria for determining the remuneration of geologists, in addition to the quality and scale of the work to be performed, the dignity of the profession, 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. 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 Association of Geologists, whether that effect is produced in the present case. That court must also 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.

Costs

- 58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. The third paragraph of Article 267 TFEU must be interpreted as meaning that it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of European Union law which it considers relevant for the resolution of the dispute in the main proceedings. National rules which have the effect of undermining that jurisdiction must be disapplied.**
- 2. Rules such as those laid down by the Code of Conduct concerning the exercise of the profession of geologist in Italy, approved by the Consiglio nazionale dei geologi on 19 December 2006 and amended most recently on 24 March 2010, which establish as criteria for determining the remuneration of geologists, in addition to the quality and scale of the work to be performed, the dignity of the profession, 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. 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 Association of Geologists, whether that effect is produced in the present case. That court must also 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.**

[Signatures]