

JUDGMENT OF THE COURT (Third Chamber)

30 March 2006 \*

In Case C-451/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte d'appello di Milano (Italy), made by decision of 15 October 2003, received at the Court on 27 October 2003, in the proceedings

**Servizi Ausiliari Dottori Commercialisti Srl**

v

**Giuseppe Calafiori,**

intervener:

**Pubblico Ministero,**

\* Language of the case: Italian.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr (Rapporteur), A. Borg Barthet and U. Löhmus, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 May 2005,

after considering the observations submitted on behalf of:

- Servizi Ausiliari Dottori Commercialisti Srl, by F. Capelli and M. Valcada, avvocati,
  
- the Italian Government, by I.M. Braguglia, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,
  
- the Commission of the European Communities, by E. Traversa and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2005,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 4 EC, 10 EC, 82 EC, 86 EC and 98 EC on competition, Articles 43 EC, 48 EC and 49 EC relating to freedom of establishment and freedom to provide services, and Article 87 EC on State aid.
  
- 2 The reference was submitted in the course of proceedings between Servizi Ausiliari Dottori Commercialisti Srl ('ADC Servizi') and Mr Calafiori, a notary, about his refusal to file in the Milan companies registry the decision taken by a general meeting of that company to amend its statutes.

### **National legal framework**

- 3 The national legal framework, as set out in the decision making the reference, can be summarised in the following way.
  
- 4 Legislative Decree No 241 of 9 July 1997, as supplemented by Legislative Decree No 490 of 28 December 1998 ('Legislative Decree No 241/97'), reserves exclusively to Tax Advice Centres ('CAF') the right to pursue certain activities of advice and assistance in tax matters, including activities relating to the annual declaration of the income of employees and persons treated as such.

- 5 Article 34(4) of Legislative Decree No 241/97 confers exclusive powers on the CAF for the purposes of the completion of income tax declarations on the simplified form (form 730), including giving the taxpayer a copy of the completed declaration and of the tax payment schedule, as well as informing the employers responsible for the recovery of the tax assessed of the effect of the declaration for the purposes of adjusting the tax deducted at source, and filing the declarations with the tax authorities.
  
- 6 Article 35(2)(b) of Legislative Decree No 241/97 also reserves to the CAF the power to check that the information given in the declaration is consistent with the documents annexed to it.
  
- 7 CAF must be constituted in the form of public limited companies which carry on their business under authorisation from the Ministry of Finance. They can be set up only by the legal entities specified in Articles 32 and 33 of Legislative Decree No 241/97. These are, in particular, employers' associations, or trade union organisations or territorial organisations appointed by them and having not less than 50 000 members, or certain employers responsible for the collection of tax having not less than 50 000 employees, or workers' associations which have established mutual protection institutions ('istituti di patronato') and have not less than 50 000 members. So far as concerns some of the legal entities mentioned in Legislative Decree No 241/97, it appears that the ability to set up CAF is limited to those which are established in Italy.
  
- 8 In addition, Article 33(2) of Legislative Decree No 241/97 requires CAF to designate one or more persons responsible for giving tax assistance from among those enrolled in the order of chartered accountants or in the order of accountants.

- 9 The legislation in question provides, in respect of the activities reserved to the CAF, for payment to them from State funds of a sum which was fixed initially at ITL 25 000 for each declaration completed and filed and was later raised to about EUR 14.

### **The main proceedings**

- 10 The object of ADC Servizi, established in Milan, was assistance and the provision of advice in accounting and administrative matters.
- 11 On 25 February 2003, an extraordinary general meeting of the company decided to approve the adoption of new statutes in order to take account of the fact that the company was also carrying on activities of tax assistance for undertakings, workers and persons treated as such, and pensioners.
- 12 The notary responsible for taking the minutes of the meeting, Mr Calafiori, refused to file that decision in the Milan companies registry on the ground that the amendment to the statutes authorising the company to carry on those tax assistance activities was, in his view, contrary to Article 34 of Legislative Decree No 241/97.
- 13 ADC Servizi applied to the Tribunale di Milano (Milan District Court) for an order that the decision be filed in the Milan companies registry. By order of 15 May 2003, that court dismissed the action.

- 14 ADC Servizi appealed against that order to the Corte d'appello di Milano (Milan Court of Appeal) on the ground that, by reserving to CAF exclusively certain tax advice and assistance activities, the provisions of Legislative Decree No 241/97 were contrary to the EC Treaty.
- 15 The Corte d'appello di Milano takes the view that the resolution of the proceedings before it raises questions on the interpretation of Community law.
- 16 It states, first of all, that employees, pensioners and persons treated as such apply to CAF also for questions which are not reserved to those bodies by the legislation in question, which results in distortion of competition on that market. Therefore, the system thus created contravenes Articles 10 EC, 81 EC, 82 EC and 86 EC.
- 17 The Corte d'appello di Milano points out next that the exclusive reservation of the completion and submission of declarations of income to certain legal entities, meeting specified criteria, constitutes, not only for the Italian economic operator but also for the operator established in another Member State, an obstacle to the pursuit of its business which can constitute a restriction prohibited by Articles 43 EC, 48 EC and 49 EC.
- 18 Finally, according to that national court, it seems that the payment mentioned in paragraph 9 of this judgment, provided exclusively for CAF from State funds, falls foul of the prohibition in Articles 87 EC and 88 EC.

## The questions referred for a preliminary ruling

19 On the basis of those considerations, the Corte d'appello di Milano decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Must Articles 4 EC, 10 EC, 82 EC, 86 EC and 98 EC be interpreted as precluding national rules such as those laid down in Legislative Decree [No 241/97] read together with the consolidated law on income tax (Decree of the President of the Republic ("DPR") No 917 of 22 December 1986) and Law No 413 of 30 December 1991, which exclusively reserves the right to provide certain types of tax advice to a single category of operators, namely the ... CAF ..., and denies other economic operators in the sector who are nevertheless professionally qualified to provide tax and accounting advice (commercial accountants, lawyers and work consultants) the opportunity of providing, on the same terms and conditions, the type of advice reserved to the CAF?
  
2. Must Articles 43 EC, 48 EC and 49 EC be interpreted as precluding national rules such as those laid down in Legislative Decree [No 241/97] read together with the consolidated law on income tax (DPR No 917 ...) and Law No 413 of 30 December 1991, which exclusively reserves the right to provide certain types of tax advice to a single category of operators, namely the CAF, and denies other economic operators in the sector who are nevertheless professionally qualified to provide tax and accounting advice (commercial accountants, lawyers and work consultants) the opportunity of providing, on the same terms and conditions, the type of advice reserved to the CAF?

3. Must Article 87 EC be interpreted as meaning that a measure such as that arising from the rules laid down in Legislative Decree [No 241/97], and in particular Article 38 thereof, which provides for payment to be made to CAF from State funds in respect of the activities referred to in Articles 34(4) and 37 (2) of that legislative decree, constitutes State aid?

### **The first question referred**

20 At the outset, it must be pointed out that Articles 4 EC and 98 EC establish the fundamental principles of the economic policy of the Community system and set out the context of which the competition rules in Articles 82 EC and 86 EC form part. In those circumstances, the reference by the national court to Articles 4 EC and 98 EC does not call for a reply distinct from that which will be given on the interpretation of Articles 82 EC and 86 EC.

21 By its first question, the referring court is asking, in essence, whether Articles 82 EC and 86 EC preclude national legislation such as that at issue in the main proceedings which reserves exclusively to CAF the right to pursue certain tax advice and assistance activities.

22 In that regard, it must be recalled that, under Article 82 EC, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited.

23 It must also be made clear that the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC. A Member State will be in breach of the

prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 39).

24 Consequently, the question arises not only as to whether the national legislation has had the effect of granting CAF special or exclusive rights within the meaning of Article 86(1) EC, but also as to whether such legislation can have led to abuse of a dominant position.

25 It must be observed that, irrespective of the question whether such special or exclusive rights were conferred on CAF by the national legislation, neither the decision making the reference nor the written observations provide the Court with the factual and legal information which would enable it to determine whether the requirements as to the existence of a dominant position or of abusive conduct, for the purposes of Article 82 EC, are met.

26 In those circumstances, the Court is unable to provide a useful answer to the first question.

### **The second question referred**

27 By its second question, the referring court is asking, in essence, whether Articles 43 EC and 49 EC preclude national legislation such as that at issue in the main proceedings which reserves exclusively to CAF the right to pursue certain tax advice and assistance activities.

- 28 At the outset, it must be mentioned that the Italian Government submits that that question is inadmissible since the activities in question in the main proceedings are confined in all respects within a single Member State.
- 29 In that regard, it should be pointed out that a reply might none the less be useful to the national court in particular if its national law were to require, in proceedings such as those in this case, that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (see order in Case C-250/03 *Mauri* [2005] ECR I-1267, paragraph 21).
- 30 It must therefore be examined whether the Treaty provisions, the interpretation of which is requested, preclude the application of national legislation such as that at issue in the main proceedings, since it would apply to persons residing in other Member States.
- 31 At the outset, it must be borne in mind that Articles 43 EC and 49 EC require the elimination of restrictions on the freedom of establishment and the freedom to provide services and that all measures which prohibit, impede or render less attractive the exercise of such freedoms must be regarded as constituting such restrictions (see, in particular, Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 22).
- 32 In that regard, it is clear from the decision making the reference that Legislative Decree No 241/97 confers exclusive powers on CAF to provide taxpayers with certain tax advice and assistance services and, in particular, tax assistance to employees and persons treated as such in relation to the completion of the simplified tax declaration form.

- 33 So far as the freedom to provide services is concerned, such national legislation, by reserving those activities to the CAF, completely prevents access to the market for the services in question by economic operators established in other Member States.
- 34 As regards the freedom of establishment, such legislation, by restricting the ability to form CAF to certain legal entities meeting strict conditions and, as follows from the information provided, to some of those entities with their registered office in Italy, is liable to make more difficult, or even completely prevent, the exercise by economic operators from other Member States of their right to establish themselves in Italy with the aim of providing the services in question.
- 35 In those circumstances, the conferment of exclusive powers on CAF to provide certain tax advice and assistance services constitutes a restriction on the freedom of establishment and on the freedom to provide services, prohibited, generally, by Articles 43 EC and 49 EC.
- 36 The provisions of the national legislation which restrict the ability to form CAF to certain legal entities already established in Italy are discriminatory. Such provisions can be justified only on the grounds of public interest, public safety or public health, under Articles 46 EC and 55 EC, which have not been invoked in this case (Case C-263/99 *Commission v Italy* [2001] ECR I-4195, paragraph 15).
- 37 By contrast, the provisions of the national legislation at issue which apply to any person or undertaking carrying on an activity in the territory of the host Member State may be justified where they serve overriding requirements relating to the public interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 28, and the case-law there cited).

- 38 In that regard, it must be observed that the public interest in the protection of recipients of the services in question against harm which they could suffer as a result of services provided by persons without the necessary professional or personal qualifications can justify a restriction on the freedom of establishment and on the freedom to provide services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraphs 15 to 17).
- 39 As the Advocate General pointed out in point 49 of his Opinion, some of the services reserved to CAF, such as delivery of a copy of the tax declaration and of the tax payment schedule, filing the tax declarations with the tax authorities and informing employers responsible for the collection of tax of the effect of the tax declaration, are essentially simple and do not require any specific professional qualifications.
- 40 It is obvious that the nature of those services cannot justify their provision being limited solely to holders of a particular professional qualification.
- 41 Although some tasks reserved to CAF are, by contrast, more complex, that is, particularly, checking that the information given in the tax declaration is consistent with the documents annexed to it, the organisations authorised to set up CAF do not appear to offer any guarantees of particular professional abilities to accomplish those tasks.
- 42 As is clear from the decision making the reference, under Article 33(2) of Legislative Decree No 241/97, CAF are to designate the persons responsible for the accomplishment of those tasks from among persons enrolled in the order of chartered accountants or in the order of accountants, that is to say certain professionals who cannot, on their own account, provide the services reserved to CAF.

- 43 In the light of those circumstances, by conferring exclusive power on CAF to provide certain tax advice and assistance services, the provisions of Legislative Decree No 241/97 do not appear to be appropriate to guarantee the public interest mentioned in paragraph 38 of this judgment.
- 44 At the hearing, the Italian Government submitted that the national legislation at issue is, in any event, justified under the first paragraph of Article 45 EC and Article 55 EC, in the words of which the freedom of establishment and the freedom to provide services do not apply to activities connected with the exercise of official authority.
- 45 In that regard, it must be remembered that, as derogations from the fundamental rule of freedom of establishment, Articles 45 EC and 55 EC must be interpreted in a manner which limits their scope to what is strictly necessary for safeguarding the interests which those provisions allow the Member States to protect (Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7, and Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 34).
- 46 Thus, according to settled case-law, derogation under those articles must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; *Commission v Spain*, paragraph 35; and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20).
- 47 It must be held that checking that the information given in the tax declaration is consistent with the documents annexed to it, even though it is in fact rarely questioned by the tax authorities, is not directly and specifically connected with the exercise of official authority but a measure intended to prepare for or facilitate the accomplishment of the tasks for which the tax authorities are responsible.

48 The same is true as regards the other tasks, set out in Articles 34 and 35 of Legislative Decree No 241/97 and mentioned by the national court in its decision making the reference, namely giving the taxpayer a copy of the completed tax declaration and of the tax payment schedule, as well as informing employers responsible for collecting the tax of the effect of the tax declarations, and filing the declarations with the tax authorities.

49 It must therefore be held that activities reserved to CAF such as those referred to in the decision making the reference are not covered by the derogation under Articles 45 EC and 55 EC.

50 In view of the foregoing, the reply to the second question must be that Articles 43 EC and 49 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings which reserves exclusively to CAF the right to pursue certain tax advice and assistance activities.

### **The third question referred**

51 As a preliminary point, it must be noted that, in its third question, the referring court cites the provisions of Article 38 of Legislative Decree No 241/97 concerning the payment of remuneration to CAF, those of Article 34(4) of the same decree concerning the tax assistance activities provided by CAF and those of Article 37(2) of that decree relating to the tax assistance activities provided by other entities.

- 52 However, the grounds of the national court's decision relate solely to the payment of remuneration to CAF.
- 53 In those circumstances, consideration of the third question must be limited to the remuneration paid to CAF under Articles 34(4) and 38(1) of Legislative Decree No 241/97.
- 54 It must therefore be stated that, by its third question, the referring court is asking, in essence, whether remuneration such as that received by CAF for the completion and filing of a tax declaration in accordance with Articles 34(4) and 38(1) of Legislative Decree No 241/97 constitutes State aid within the meaning of Article 87(1) EC.
- 55 At the outset, it must be recalled that, according to settled case-law, classification as 'State aid' requires that all the conditions set out in that provision are fulfilled (see Case C-142/87 *Belgium v Commission* ("*Tubemeuse*") [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 68; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74).
- 56 First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.

57 As regards the first condition, it is fulfilled since the remuneration provided for by Article 38(1) of Legislative Decree No 241/97 is paid from State funds.

58 As to the second condition, it must be observed that significant amounts are liable to be paid to CAF under Article 38(1) of Legislative Decree No 241/97 and that economic operators from other Member States could be authorised to establish CAF which receive such amounts. In such circumstances, the measure in question is liable to affect trade between Member States.

59 As regards the third and fourth conditions, it must be observed that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or must be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 84).

60 On the other hand, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than their competitors, such a measure is not caught by Article 87(1) EC (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 87).

61 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88).

- 62 First, the undertaking receiving such compensation must actually have public service obligations to discharge, and the obligations must be clearly defined (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 89).
- 63 In that regard, a Member State could, conceivably, characterise as a 'public service' the tax assistance services provided by CAF, in accordance with Article 34(4) of Legislative Decree No 241/97, to employees and persons treated as such and intended to help taxpayers to fulfil their tax obligations and to facilitate the accomplishment of the tasks for which the tax authorities are responsible.
- 64 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 90).
- 65 In that regard, it appears that the compensation which has been fixed at about EUR 14 for each declaration completed and filed with the tax authorities may satisfy that condition.
- 66 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 92).

- 67 Fourth, it should be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 93).
- 68 The examination of the two latter conditions concerning the level of the remuneration in question requires an appraisal of the facts in the main proceedings.
- 69 In that regard, it must be recalled that the Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (see Case 13/68 *Salgoil* [1968] ECR 453, 459; Case 51/74 *Van der Hulst* [1975] ECR 79, paragraph 12; Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11; Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881, paragraph 38; and Case C-282/00 *RAR* [2003] ECR I-4741, paragraph 47).
- 70 It is therefore for the national court to determine, in the light of the facts in the main proceedings, whether the remuneration provided for by Article 38(1) of Legislative Decree No 241/97 constitutes State aid within the meaning of Article 87(1) EC.
- 71 In that context, it must also be made clear that the national court has no jurisdiction to determine the compatibility of State aid measures or of a State aid scheme with the common market. That assessment falls within the exclusive competence of the Commission of the European Communities, subject to review by the Community judicature (see Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de*

*saumon* [1991] ECR I-5505, paragraph 14; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 42; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 31).

72 Having regard to the foregoing, the reply to the third question must be that a measure by which a Member State provides for the payment of compensation from State funds to certain undertakings responsible for helping taxpayers in connection with the completion of tax declarations and filing them with the tax authorities must be classified as State aid within the meaning of Article 87(1) EC, where:

- the level of the compensation exceeds what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations, and
  
- the compensation is not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

## **Costs**

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

- 1. Articles 43 EC and 49 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings which reserves exclusively to Tax Advice Centres the right to pursue certain tax advice and assistance activities.**
  
- 2. A measure by which a Member State provides for the payment of compensation from State funds to certain undertakings responsible for helping taxpayers in connection with the completion of tax declarations and filing them with the tax authorities must be classified as State aid within the meaning of Article 87(1) EC, where:**
  - the level of the compensation exceeds what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations, and**
  
  - the compensation is not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.**

[Signatures]