



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

28 February 2013\*

(Association of chartered accountants — Rules relating to a system of compulsory training for chartered accountants — Article 101 TFEU — Association of undertakings — Restriction of competition — Justifications — Article 106(2) TFEU)

In Case C-1/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa (Portugal), made by decision of 15 November 2011, received at the Court on 3 January 2012, in the proceedings

**Ordem dos Técnicos Oficiais de Contas**

v

**Autoridade da Concorrência,**

intervening party:

**Ministério Público,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 December 2012,

after considering the observations submitted on behalf of:

- Ordem dos Técnicos Oficiais de Contas, by D. Abecassis, L. Vilhena de Freitas and R. Leandro Vasconcelos, advogados,
- the Ministério Público, by F. de Jesus Marques de Oliveira, procuradora-geral adjunta,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent, and by M. Caldeira, advogada,
- the Italian Government, by G. Palmieri acting as Agent, and by F. Varrone, avvocato dello Stato,

\* Language of the case: Portuguese.

— the Netherlands Government, by C. Wissels, acting as Agent,  
— the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,  
— the European Commission, by N. Khan, L. Parpala and P. Guerra e Andrade, 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 Articles 56 TFEU, 101 TFEU, 102 TFEU and 106 TFEU.
- 2 The request has been made in the course of proceedings between the Ordem dos Técnicos Oficiais de Contas (Order of Chartered Accountants; ‘the OTOC’) and the Autoridade da Concorrência (Competition Authority; ‘the AdC’) concerning, in particular, the compatibility with Article 101 TFEU of the Training Credits Regulation (Regulamento da Formação de Créditos, *Diário da República*, 2nd series, No 133, of 12 July 2007; ‘the contested regulation’). That regulation was adopted on 18 May 2007 by the Chamber of Chartered Accountants, to which the OTOC is the successor.

### Legal context

#### *The Statute of the OTOC*

- 3 Article 1 of the Statute of the Order of Chartered Accountants (‘the Statute of the OTOC’), which appears in Annex I to Decree-Law No 310/2009 of 26 October 2009, reads as follows:

‘The [OTOC] is a public legal person, organised to include a professional membership, which is responsible, on the basis of mandatory registration, for representing the professional interests of chartered accountants and overseeing all matters relating to the exercise of their functions.’

- 4 Article 3(1) of that Statute provides:

‘1. The powers of the Order shall be as follows:

- (a) granting the professional title of chartered accountant and issuing the related professional identity card;
- (b) protect the dignity and prestige of the profession, ensure compliance with the rules of ethical and professional conduct and defend the interests, rights and prerogatives of its members;
- (c) promote its members’ continued training and professional training and contribute thereto, in particular by the organisation of professional training sessions and programmes, courses and conferences;

...

- (n) exercise disciplinary powers over chartered accountants;
- (o) establish ethical and professional principles and rules;

...

(r) implement, organise and operate systems to monitor the quality of services provided by chartered accountants;

(s) plan, organise and provide compulsory training schemes for its members;

...'

5 Under Article 6 of the Statute:

'1. Chartered accountants carry out the following activities:

(a) planning, organising and coordinating the accounts of the entities which have or must have duly organised accounts in accordance with the officially applicable accounting plans or, as the case may be, the accounts standardisation system, complying with the legal provisions, the accounting rules in force and the guidance of the bodies competent in accounts standardisation;

(b) assuming responsibility for the technical conformity of the entities referred to in the preceding paragraph in accounting and taxation matters;

(c) signing, together with the legal representative of the entities referred to under (a), the financial statements and taxation declarations, testifying to their accuracy, on the terms and conditions defined by the Order, without prejudice to the power and responsibilities conferred by the commercial and taxation law on the bodies concerned;

(d) on the basis of details supplied by the taxpayers whose accounting they perform, assuming responsibility for verifying the social security declarations and the declarations made for taxation purposes in connection with the management of salaries.

2 In addition, chartered accountants shall:

(a) act as consultants in the fields of accounting, taxation and social security;

(b) intervene, as representatives of the taxpayers whose accounting they perform, at the administrative stage of the taxation procedure, in the context of questions concerning their specific competencies;

(c) perform any other function defined by the law connected to the exercise of their functions, in particular that of expert designated by the courts or by other public or private entities.

...'

6 In accordance with Article 57(1)(a) of the Statute of the OTOC, chartered accountants are to comply with all the rules and execute all the acts of the OTOC.

7 Under Article 59(2) thereof, it is a disciplinary offence 'for a chartered accountant to fail, by act, by omission or by negligence, to perform one of the general or specific duties laid down in the ... Statute ... or in other provisions or acts adopted by the Order'.

8 Such infringements are, pursuant to Articles 63 and 64 of the Statute of the OTOC, subject to one of the following disciplinary sanctions: a warning, a fine, suspension of up to three years or removal from the Order.

*The Quality Control Regulation*

- 9 On 30 March 2004, the Chamber of Chartered Accountants adopted the Quality Control Regulation (Regulamento do Controlo de Qualidade, *Diário da República*, 2nd series, No 175, of 27 July 2004). Article 4 of that regulation provides:

‘1. The assessment of the horizontal control is made by verification of the following factors:

...

(e) obtaining, over the two previous years, an annual average of 35 credits for training provided by the [OTOC] or approved by [it];

...’

*The contested regulation*

- 10 Article 3 of the contested regulation provides:

‘Types of training provided by the [OTOC]

1. The [OTOC] promotes the following types of training:

(a) institutional training;

(b) professional training.

2. Institutional training shall consist of events organised by the [OTOC] for its members, of a maximum duration of 16 hours, the objective of which is in particular to make the professionals aware of legislative initiatives and amendments and of questions of ethical and professional conduct.

3. Professional training shall consist of study and consolidation sessions on topics central to the profession, of a minimum duration of more than 16 hours.’

- 11 Under Article 5(1) of that regulation, the OTOC may offer all types of training relevant to the exercise of the profession concerned. In accordance with Article 5(2) thereof, institutional training may be provided only by the OTOC.

- 12 It is apparent from Articles 6 and 7 of that regulation that the higher education establishments and bodies authorised by law to provide training and the bodies registered with the OTOC may provide courses as part of the professional training of chartered accountants.

- 13 The conditions with which training bodies must comply in order to be authorised by the OTOC to provide courses giving an entitlement to training credits are, pursuant to Article 8(1) of the contested regulation, as follows:

‘(a) proven ability to provide training;

(b) possession of the necessary means (financial, equipment and staff) to provide quality training;

(c) proven aptitude of the members of the managing organs of the body in question and of the persons responsible for organising the training;

(d) contributions from university professors and/or persons having recognised ability in the profession and/or professionals having recognised ability in the fields connected to the exercise of the profession.'

- 14 In accordance with Article 9 of that regulation, the decision accepting or rejecting the registration of training bodies for the purposes of providing training giving an entitlement to training credits is to be taken by the management of the OTOC within three months from the date on which the application was made.
- 15 Articles 10 to 12 of that regulation govern the approval procedure for training giving an entitlement to training credits provided by bodies other than the OTOC. The decision on approval of training is to be taken by the OTOC.
- 16 By virtue of Article 15(1) of the contested regulation, chartered accountants taking part in institutional or professional training, provided that the training is given by the OTOC or approved by it, are awarded 1.5 credits per hour of training. In accordance with Article 15(2) thereof, all chartered accountants are required to earn 12 institutional training credits per year.
- 17 Article 16 of the contested regulation provides that the training bodies falling within the scope of Article 8 thereof must pay a fee to the OTOC when applying for registration as a training body and when making each application for approval of the training which they intend to provide. Under Article 17 of that regulation, the amount of that fee is to correspond to the total costs borne by the OTOC for those procedures, without their having been fixed in the contested regulation.

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

- 18 In 2006 and 2009, the AdC received two complaints about the system of compulsory training for chartered accountants put in place by the OTOC.
- 19 During that period, a number of training bodies applied for registration with the OTOC in order to be able to provide professional training for chartered accountants, paying a fee of EUR 200. During the same period, those bodies also applied for approval of the training which they intended to provide, paying a fee of EUR 100 per potential training event.
- 20 Although the OTOC granted most of those applications, it is apparent from the file before the Court that, in certain cases, the OTOC refused to approve training sessions.
- 21 In addition, two training bodies expressly refused to register with the OTOC on the ground that the contested regulation unduly restricted their freedom to provide training for chartered accountants.
- 22 It is also apparent from the file submitted to the Court that, in certain cases, the OTOC did not take a decision, despite the fact that more than five months had passed since the application for approval was made, or responded to such applications after more than one year had elapsed.
- 23 By a decision of 7 May 2010 ('the contested decision'), the AdC found, having defined the relevant market as being that of compulsory training for chartered accountants throughout national territory, that, by adopting the contested regulation, the OTOC had infringed Articles 101 TFEU and 102 TFEU and imposed a fine on it.
- 24 The OTOC sought the annulment of that decision before the tribunal do comércio de Lisboa (Lisbon Commercial Court).

- 25 That court first held that, by requiring all chartered accountants to earn an average of 35 training credits per year for the previous two years through training provided by the OTOC or approved by it, including 12 credits earned from training provided exclusively by the OTOC itself, and by deciding which training bodies are authorised to provide training and which training sessions give an entitlement to training credits, the OTOC has distorted competition on the market of compulsory training for chartered accountants. It also held that the contested regulation was likely to hinder trade between the Member States.
- 26 Next, the tribunal do comércio de Lisboa rejected the argument that the restrictions on competition resulting from that regulation were necessary in order to ensure the proper exercise of the profession of chartered accountant.
- 27 Next, that court considered that the OTOC had not abused its dominant position on the relevant market. It therefore annulled the contested decision in that regard.
- 28 The OTOC sought the annulment of the decision of the tribunal do comércio de Lisboa before the referring court, arguing that it has a public service mission derived directly from the law, consisting of the promotion and contribution to training of its members. Its training activity therefore falls outside the sphere of economic activity and therefore is outside the scope of Article 101 TFEU. In any event, that article does not apply to the present case, as follows from paragraphs 97 et seq. of Case C-309/99 *Wouters and Others* [2002] ECR I-1577, since any restrictive effects of the OTOC's conduct are justified by the need to ensure proper exercise of the profession of chartered accountant. Furthermore, the contested regulation contributes to improving the provision, distribution and promotion of technical or economic progress and gives users a fair share of the benefit within the meaning of Article 101(3) TFEU. In addition, the creation of a system of compulsory training for chartered accountants is a service of general economic interest within the meaning of Article 106(2) TFEU.
- 29 In those circumstances the Tribunal da Relação de Lisboa (Lisbon Court of Appeal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
1. Must an institution such as the [OTOC] be regarded in its entirety as an association of undertakings for the purposes of applying the Community competition law rules (training market)? If so, is ... Article 101(2) TFEU to be interpreted as also rendering subject to those rules an entity which, like the OTOC, lays down binding rules of general application and does so in compliance with legal requirements concerning compulsory training of chartered accountants with a view to providing citizens with a quality service that can be relied on?
  2. If an entity such as the OTOC is required by law to implement a system of compulsory training for its members, may ... Article 101 TFEU be interpreted as allowing the possibility of challenging the setting up of a training system legally imposed by the OTOC and by the regulation governing that system, in so far as the latter strictly confines itself to giving effect to the legal requirement? Or, on the contrary, does this matter fall outside the scope of Article 101 TFEU and must it be examined under ... Article 56 TFEU et seq.?
  3. Having regard to the fact that the [*Wouters and Others*] judgment, and similar judgments, were concerned with rules having an impact on the economic activity of the professional members of the professional association in question, do Articles 101 TFEU and 102 TFEU preclude rules on the training of chartered accountants which have no direct influence on their economic activity?
  4. In the light of European Union competition law (in the training market), may a professional association impose the requirement, for the practice of the profession, of particular training provided only by it?

## Consideration of the questions referred

### *The first to third questions*

#### Preliminary observations

- 30 It is apparent from the file before the Court that the AdC found, in the contested decision, that, by adopting the contested regulation, the OTOC infringed both Article 101 TFEU and Article 102 TFEU. That decision was then annulled by the tribunal do comércio de Lisboa in so far as that authority found that it constituted an infringement of Article 102 TFEU. Before the referring court, the OTOC sought the annulment of the decision of the Commercial Court only in so far as it confirmed the finding of an infringement of Article 101 TFEU.
- 31 It is thus manifest that, as the main proceedings stand, the interpretation requested of Article 56 TFEU et seq. and 102 TFEU bears no relation to the subject-matter of the dispute, such that it is irrelevant to its resolution. Firstly, the compatibility of the contested regulation with Article 56 TFEU et seq. is not the subject-matter of the contested decision and, secondly, the annulment in part thereof by the tribunal do comércio de Lisboa, in that it found an infringement of Article 102 TFEU, has not been disputed before the referring court.
- 32 Consequently, the view must be taken that the first to third questions referred relate only to the interpretation of Article 101(1) TFEU.

#### The questions referred

- 33 By its first to third questions, which it is appropriate to consider together within the limits set out in paragraph 32 of this judgment, the referring court asks, in essence, whether a regulation such as that at issue in the main proceedings, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU. It wishes to know, in particular, whether the fact, firstly, that the OTOC is required by law to adopt binding rules of general application in order to put into place a system of compulsory training for its members with a view to providing citizens with a quality service that can be relied on and, secondly, that those rules do not directly affect the economic activity of chartered accountants is relevant to the application of Article 101 TFEU.
- 34 In order to ascertain whether a regulation such as the contested regulation must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU, it is appropriate to examine, firstly, whether chartered accountants are undertakings within the meaning of European Union competition law.
- 35 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, *Wouters and Others*, paragraph 46 and the case-law cited).
- 36 In that regard, in accordance with settled case-law, any activity consisting in offering goods and services on a given market is an economic activity (see, inter alia, *Wouters and Others*, paragraph 47 and the case-law cited).
- 37 In the present case, it is apparent from the file before the Court that the chartered accountants offer, for remuneration, accounting services consisting in particular, pursuant to Article 6 of the Statute of the OTOC, of planning, organising and coordinating the accounts of entities, signing their financial statements and tax declarations, acting as consultants in the fields of accounting, taxation and social

security and representing the taxpayers whose accounting they perform at the administrative stage of the taxation procedure. In addition, it is common ground that chartered accountants assume, as members of a liberal profession, the financial risks related to the exercise of those activities, since, where there is an imbalance between outgoings and revenue, a chartered accountant is required to bear the deficit personally.

- 38 That being so, chartered accountants, having regard to the manner in which their profession is regulated in Portugal, carry on an economic activity and are, therefore, undertakings for the purposes of Article 101 TFEU. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion (see, by analogy, *Wouters and Others*, paragraph 49).
- 39 Secondly, it is appropriate to examine whether a professional association such as the OTOC must be regarded as an association of undertakings within the meaning of Article 101(1) TFEU when it adopts a regulation such as the contested regulation or, on the contrary, as a public authority.
- 40 In accordance with the case-law of the Court, the FEU Treaty rules on competition do not apply to an 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 (see, inter alia, *Wouters and Others*, paragraph 57 and the case-law cited).
- 41 Firstly, rules such as those at issue in the main proceedings cannot be regarded as not belonging to the sphere of economic activity.
- 42 It is common ground in that regard, on the one hand, that the OTOC itself provides training for chartered accountants and, on the other, that the access of other providers wishing to offer such training is subject to the standards set out in the contested regulation. Consequently, such a regulation has a direct impact on economic activity on the market of compulsory training for chartered accountants.
- 43 In addition, the obligation on chartered accountants to undertake training in accordance with the rules laid down by that regulation is closely linked to the practice of their profession, as the Polish Government and the European Commission point out. Failure to comply with that obligation can therefore lead to disciplinary sanctions under Articles 57(1)(a), 59(2), 63 and 64 of the Statute of the OTOC, such as suspension for a maximum period of three years or expulsion from that professional association.
- 44 Even if that regulation did not directly affect the economic activity of the chartered accountants themselves, as the referring court appears to suggest in its third question, that fact cannot, of itself, remove a decision of an association of undertakings from the scope of Article 101 TFEU.
- 45 Such a decision can be such as to prevent, restrict or distort competition within the meaning of Article 101(1) TFEU, not only on the market on which the members of a professional association practice their profession, but also on another market on which that professional association itself has an economic activity.
- 46 Secondly, when it adopts rules such as the contested regulation, a professional association such as the OTOC does not exercise powers which are typically those of a public authority but appears rather as a regulatory body of a profession the practice of which constitutes, moreover, an economic activity.
- 47 On the one hand, it is not in dispute that the managing bodies of the OTOC are exclusively composed of members of that association. In addition, the national authorities play no part in the nomination of the members of those bodies.

- 48 It is immaterial in that regard that the OTOC is regulated by public law. According to its very wording, Article 101 TFEU applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the European Union rules on competition, and in particular Article 101 TFEU, are concerned (*Wouters and Others*, paragraph 66 and the case-law cited).
- 49 On the other, the regulatory power invested in the OTOC is not subject to any conditions or criteria which that professional association is required to meet when adopting measures such as the contested regulation. In that regard, Article 3(1)(c) and (s) of the Statute of the OTOC merely allocates to the OTOC the tasks of '[promoting] its members' continued training and professional training and [contributing] thereto, in particular by the organisation of professional training sessions and programmes, courses and conferences' and '[planning, organising and providing] compulsory training schemes for its members'.
- 50 Those provisions therefore allow the OTOC a wide discretion as to the principles, the conditions and methods which the compulsory training scheme for chartered accountants must follow.
- 51 In particular, the Statute of the OTOC does not give it the exclusive right to provide training for chartered accountants and does not lay down the conditions for access by training bodies to the market of compulsory training for chartered accountants. The rules concerning those questions appear, however, in the contested regulation.
- 52 Furthermore, it is not in dispute that that regulation was adopted by the OTOC without any input from the State.
- 53 The fact, referred to by the referring court in its second question, that the OTOC is legally required to put into place a system of compulsory training for its members does not call into question the foregoing considerations.
- 54 It is true that, when a Member State grants regulatory powers to a professional association, whilst defining the public-interest criteria and the essential principles with which its rules must comply and retaining its power to adopt decisions in the last resort, the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings (see, to that effect, *Wouters and Others*, paragraph 68).
- 55 However, that does not appear to be the case in the main proceedings, as is apparent from paragraphs 49 to 52 of the present judgment.
- 56 In such circumstances, the rules governing the earning of training credits drawn up by the professional association at issue in the main proceedings are a matter for it alone.
- 57 As regards the effect on the application of Article 101 TFEU of the fact that the OTOC does not seek to make a profit, it should be noted that that does not prevent an entity which carries out operations on the market from being considered an undertaking, where the corresponding offer of services exists in competition with that of other operators which do seek to make a profit (see, to that effect, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 122 and 123, and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 27).
- 58 This is exactly the case in the main proceedings. It is clear from the file before the Court that the OTOC offers professional training for chartered accountants in competition with other training bodies which seek to make a profit.

- 59 In the light of the foregoing considerations, the answer to the first to third questions is:
- A regulation such as that at issue in the main proceedings, adopted by a professional association such as the OTOC, must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.
  - The fact that a professional association, such as the OTOC, is legally required to put into place a system of compulsory training for its members cannot remove from the scope of Article 101 TFEU the rules drawn up by that professional association, in so far as those rules are a matter for it alone.
  - The fact that those rules do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity.

#### The fourth question

- 60 By its fourth question, the referring court asks, in essence, whether European Union competition law precludes a professional association from requiring its members to undertake training provided exclusively by that association in circumstances such as those in the main proceedings.
- 61 The Portuguese Government points out that the infringement of Article 101 TFEU found in the contested decision and forming the subject-matter of the dispute in the main proceedings is not restricted to the fact of requiring the members of the OTOC to undertake training provided by the OTOC alone.
- 62 In that regard, it appears clear from the file before the Court and, in particular, from the contested decision and that of the Tribunal do comércio de Lisboa, and as has been confirmed by the OTOC and the Portuguese Government at the hearing before the Court, that the infringement of Article 101 TFEU of which the OTOC is accused consists of the adoption of the contested regulation, by virtue of which the market of compulsory training for chartered accountants has, in essence, been artificially segmented, a third of it being reserved to the OTOC itself, and, on the other segment of that market, discriminatory conditions being imposed to the detriment of the OTOC's competitors.
- 63 Article 101(1) TFEU prohibits as incompatible with the internal market all 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.
- 64 Accordingly, it must be examined whether those conditions are met in the main proceedings.
- 65 In that regard, it is settled case-law that, for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they 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 they might hinder the attainment of a single market between Member States. Moreover, that influence must not be insignificant (see, inter alia, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited).
- 66 Since they apply to the whole territory of the Member State in question, rules such as the contested regulation are liable to affect trade between Member States, within the meaning of Article 101(1) TFEU (see, by analogy, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 45 and the case-law cited).

- 67 In the light of the considerations in paragraphs 73 to 92 of the present judgment, the conditions for access to the market of compulsory training for chartered accountants laid down in the contested regulation appear liable to be of significant importance in the choice of undertakings established in Member States other than the Portuguese Republic whether or not to exercise their activities in that Member State.
- 68 As regards whether rules such as the contested regulation have as their object or effect the prevention, restriction or distortion of competition within the internal market, it must be noted, as is apparent from the decision for reference, that that regulation seeks to guarantee the quality of the services offered by chartered accountants by putting into place a system of compulsory training.
- 69 Even if that regulation does not have as its object the prevention, restriction or distortion of competition, it is necessary to examine its effects on competition in the internal market.
- 70 In accordance with settled case-law, 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 the structure of the market or markets in question (see, inter alia, *Asnef-Equifax and Administración del Estado*, paragraph 49 and the case-law cited).
- 71 Article 101(1) TFEU does not restrict such an assessment to actual effects alone, as that assessment must also take account of the potential effects of the decision in question on competition within the internal market (*Asnef-Equifax and Administración del Estado*, paragraph 50 and the case-law cited).
- 72 Although it is for the referring court to examine whether the contested regulation has had or is likely to have harmful effects on competition in the internal market, it is for the Court to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see, to that effect, Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, paragraph 42).
- 73 In that regard, the referring court must, firstly, take into consideration the structure of the market of compulsory training for chartered accountants, as it appears from that regulation.
- 74 It must be pointed out in that regard that that regulation provides for two types of training, the first called ‘institutional’ and the second ‘professional’, which differ as to their aim, the bodies authorised to provide them and the duration of the training sessions which can be offered.
- 75 As regards, firstly, the subject-matter of institutional training, as it is defined in Article 3(2) of the contested regulation, it consists of training sessions designed to raise the awareness of chartered accountants of issues of ethics and rules of professional conduct and also as regards ‘legislative changes and initiatives’. It is also possible for the relevant legislative developments to be the subject-matter of professional training, which consists, in accordance with Article 3(3) of that regulation, of ‘study and consolidation sessions on topics central to the profession’. In addition, in accordance with Article 15(1) of that regulation, each training session, whether institutional or professional – provided that it is offered by the OTOC or approved by it – gives an entitlement to 1.5 credits per hour.
- 76 Those factors are liable to show that those two types of training could be regarded, at least in part, as being interchangeable, which is a matter for the referring court to establish.
- 77 Should that be the case, the distinction drawn in the contested regulation between institutional training and professional training on the basis of their subject-matter is not justified. In that regard, it must be borne in mind that, as is apparent from paragraph 7 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), a

relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, their prices and their intended use.

- 78 The division of the market of compulsory training for chartered accountants, as made in the contested regulation, leads, secondly, to the designation of bodies authorised to provide each of those two types of training. In that regard, it is apparent from Article 5(2) of that regulation that institutional training can be provided only by the OTOC. Moreover, of the average of 35 credits per year which chartered accountants are required to earn during the previous two years pursuant to Article 4(1)(e) of the Quality Control Regulation, 12 credits must compulsorily be obtained from institutional training, as follows from Article 15(2) of the contested regulation.
- 79 It follows that that regulation reserves for the OTOC a significant part of the market of compulsory training for chartered accountants.
- 80 Thirdly, those two types of training differ as regards the duration of the sessions which can be provided for each of them respectively. Thus, Article 3(2) and (3) of that regulation provides that institutional training is of a maximum duration of 16 hours, while professional training must last longer than 16 hours.
- 81 That situation can have the result, which is for the referring court to ascertain, that training bodies other than the OTOC, which wish to offer short training programmes, may be prevented from so doing.
- 82 Such a rule therefore appears likely to distort competition on the market of compulsory training for chartered accountants by affecting the normal play of supply and demand.
- 83 Fourthly, while the contested regulation compulsorily requires chartered accountants to earn a minimum of 12 institutional training credits per year, there is no analogous requirement as regards professional training. It follows, as the Portuguese Government submits, that chartered accountants may choose to earn the remaining 23 credits either from professional training or from institutional training. That fact is also liable to confer a competitive advantage on the sessions of institutional training provided by the OTOC, having regard, in particular, to the shorter duration of those sessions, as has been noted in paragraphs 80 and 81 of this judgment, which it is for the referring court to ascertain.
- 84 Secondly, the referring court must examine the conditions of access to the market in question for bodies other than the OTOC.
- 85 In that regard, it is appropriate to note that the training bodies, with the exception of higher education establishments and bodies authorised by law to provide training, which wish to provide training giving an entitlement to training credits must first register with the OTOC. It is for the OTOC's management to accept or reject an application for registration, as is clear from Article 9 of the contested regulation.
- 86 Furthermore, if those bodies wish the training they seek to provide to carry an entitlement to training credits, they must, under Article 12 of that regulation, make an application to the OTOC for approval of each training session. That application must be made at least three months before the start of the training session concerned and must contain a certain amount of information such as the price and the detailed programme of the training session in question. The applicant must also pay a fee for each session proposed, which goes to the OTOC. The approval or rejection decision is taken by the management of that professional association.

- 87 Moreover, it is common ground that, firstly, the OTOC also provides professional training in competition with other training bodies and, secondly, the professional training provided by the OTOC is not subject to any approval procedure.
- 88 A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (*MOTOE*, paragraph 51).
- 89 The elements noted in paragraphs 85 to 87 of the present judgment are liable to have the consequence that the contested regulation does not ensure equality of opportunity between the various economic operators.
- 90 Firstly, the conditions which must be met by the training bodies in order, on the one hand, to register with the OTOC and, on the other, to have professional training approved, in Articles 8 and 12 of the contested regulation respectively, are drafted in vague terms.
- 91 Such rules, which grant a legal person such as the OTOC the power to rule unilaterally on applications for registration or approval submitted with a view to the organisation of training sessions, without that power being made subject by those rules to limits, obligations or a review, could lead the legal person holding such power to distort competition by favouring the training which it organises itself (see, by analogy, *MOTOE*, paragraph 52).
- 92 Secondly, the manner in which the approval procedure is organised by the contested regulation is liable to restrict the offer of training proposed by bodies other than the OTOC. The fact that they have to apply in advance for approval of each training session they propose, three months before the start of that session, may be to the detriment of competitors of the OTOC, since that procedure prevents them from offering, in the near future, training on current issues giving entitlement to those credits, while requiring them systematically to reveal detailed information about all training proposed.
- 93 However, not every decision of an association of undertakings which restricts the freedom of action of the parties 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 the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives (see, to that effect, *Wouters and Others*, paragraph 97).
- 94 In the present case, it is apparent from the decision for reference, as has been pointed out in paragraph 68 of this judgment, that that regulation seeks to guarantee the quality of the services offered by chartered accountants.
- 95 In as much as it puts into place a system of compulsory training for chartered accountants, which is likely to ensure the necessary guarantee of further training and continued professional education, thus contributing to the sound administration of undertakings' accounting and taxation matters, the regulation does effectively contribute to the pursuit of that objective.
- 96 Next, it is necessary to examine whether the restrictive effects which follow from the contested regulation can reasonably be regarded as necessary to guarantee the quality of the services offered by chartered accountants and whether those effects do not go beyond what is necessary to ensure the pursuit of that objective (see, to that effect, *Wouters and Others*, paragraphs 97, 107 and 109).
- 97 It must be pointed out in that regard that the restrictive effects on competition which are likely to ensue from that regulation consist, in essence, as follows from the considerations in paragraphs 73 to 92 of this judgment, of the elimination of competition on a substantial part of the relevant market and the fixing of discriminatory conditions on the other part of the market.

- 98 Elimination of competition as regards training sessions lasting less than 16 hours cannot in any event be regarded as necessary to guarantee the quality of the services offered by chartered accountants.
- 99 Similarly, as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question.
- 100 It follows that such restrictions appear to go beyond what is necessary to guarantee the quality of the services offered by chartered accountants.
- 101 The applicant in the main proceedings submits that the contested regulation is covered, in any event, by the exemption provided for in Article 101(3) TFEU or falls within the scope of Article 106(2) TFEU.
- 102 It must be borne in mind, in that regard, that the applicability of the exemption provided for in Article 101(3) TFEU is subject to the four cumulative conditions laid down in that provision. Firstly, the decision concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose any non-essential restrictions on the participating undertakings; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question (see, to that effect, *Asnef-Equifax and Administración del Estado*, paragraph 65).
- 103 Since, firstly, the contested regulation is liable to make it possible for the OTOC to eliminate competition on a substantial part of the training services for chartered accountants, as has been found in paragraph 97 of the present judgment and, secondly, for the reasons referred to in paragraphs 98 to 100 of this judgment, the restrictions imposed by that regulation cannot be regarded as essential, Article 101(3) TFEU does not apply to a situation such as that in the main proceedings.
- 104 As regards the reference to Article 106(2) TFEU, it is important to bear in mind that that provision provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
- 105 Clearly, in that regard, it is not apparent from either the documents in the file sent by the referring court or from the observations lodged before the Court that the compulsory training of chartered accountants is of general economic interest exhibiting special characteristics as compared with that of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition, would be such as to obstruct the performance of such a task (see, by analogy, Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27).
- 106 In any event, undertakings falling within the scope of Article 106(2) TFEU may rely on that provision of the Treaty to justify a measure contrary to Article 101 TFEU only if the restrictions on competition, or even the exclusion of all competition, are necessary in order to ensure the performance of the particular tasks assigned to them (see, to that effect, Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 65; Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14; and Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 46).
- 107 For the reasons set out in paragraphs 98 to 100 of the present judgment, the restrictions on competition imposed by the contested regulation appear to go beyond what is necessary to ensure the performance of the particular tasks assigned to the OTOC, so that Article 106(2) TFEU does not apply.

108 Having regard to all the foregoing considerations, the answer to the fourth question is that a regulation which puts into place a system of compulsory training for chartered accountants in order to guarantee the quality of the services offered by them, such as the contested regulation, adopted by a professional association such as the OTOC, constitutes a restriction on competition prohibited by Article 101 TFEU to the extent, which it is for the referring court to ascertain, that it eliminates competition on a substantial part of the relevant market, to the benefit of that professional association, and that it imposes, on the other part of that market, discriminatory conditions to the detriment of competitors of that professional association.

### **Costs**

109 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 (Second Chamber) hereby rules:

- 1. A regulation such as the Training Credits Regulation (Regulamento da Formação de Créditos), adopted by a professional association such as the Ordem dos Técnicos Oficiais de Contas (Order of Chartered Accountants), must be regarded as a decision of an association of undertakings within the meaning of Article 101(1) TFEU.**

**The fact that a professional association, such as the Ordem dos Técnicos Oficiais de Contas, is legally required to put into place a system of compulsory training for its members cannot remove from the scope of Article 101 TFEU the rules drawn up by that professional association, in so far as those rules are a matter for it alone.**

**The fact that those rules do not have any direct effect on the economic activity of the members of that professional association does not affect the application of Article 101 TFEU, where the infringement of which that professional association is accused concerns a market on which it itself carries on an economic activity.**

- 2. A regulation which puts into place a system of compulsory training for chartered accountants in order to guarantee the quality of the services offered by them, such as the Training Credits Regulation, adopted by a professional association such as the Ordem dos Técnicos Oficiais de Contas, constitutes a restriction on competition prohibited by Article 101 TFEU to the extent, which it is for the referring court to ascertain, that it eliminates competition on a substantial part of the relevant market, to the benefit of that professional association, and that it imposes, on the other part of that market, discriminatory conditions to the detriment of competitors of that professional association.**

[Signatures]