Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 5 September 2013 [1]

Case C-327/12

Ministero dello Sviluppo Economico
Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture
v
Soa Nazionale Costruttori — Organismo di Attestazione Spa

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Private companies responsible for verifying and certifying that undertakings tendering for public works comply with the statutory requirements — Compulsory minimum tariffs established by the Government — Article 106 TFEU — Rules governing competition — Concept of 'undertaking' — Concept of 'special or exclusive rights' — Freedom of establishment — Article 49 TFEU — Justification)

1. By this reference for a preliminary ruling, the Consiglio di Stato expresses its doubts as to the conformity with EU law of the Italian statutory scheme of compulsory minimum tariffs applicable to 'società organismi di attestazione' (companies classified as certification organisations, 'SOAs'), authorised to issue feasibility certification to undertakings seeking to participate in procedures for the award of public works contracts.

2. This case will allow the Court to rule once again on a scheme of national compulsory tariffs, albeit in an unprecedented context. In *Arduino* [2] the Court had the opportunity of analysing the Italian scheme of compulsory minimum tariffs applicable to the legal profession in the light of the rules on competition (Articles 101 TFEU and 106 TFEU). Subsequently, *Cipolla and Others* [3] allowed the Court to analyse that legislation afresh, but from the perspective of the freedom to provide services (Article 54 TFEU). This case, however, concerns semi-public bodies that operate in a competitive market and have the function of issuing certification with significant legal force and economic value, facts which in themselves make this case unique.

I – Legal framework

A – *EU legal framework*

3. Article 52 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts provides that the Member States may create certification bodies established in public or private law.

1 — Original language: Spanish.

2 — Judgment in Case C-55/99 *Arduino* [2002] ECR I-1529.

3 — Judgment in Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421.

‘Article 52

Official lists of approved economic operators and certification by bodies established under public or private law

1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Articles 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list/to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards Articles 45(1) and (2)(a) to (d) and (g), Article 46, Article 47(1)(b) and (c), and Article 48(2)(a)(i), (b), (e), (g) and (h) in the case of contractors, (2)(a)(ii), (b), (c), (d) and (j) in the case of suppliers and 2(a)(ii) and (c) to (i) in the case of service providers.

4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statement can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

...

7. The certification bodies referred to in paragraph 1 shall be bodies complying with European certification standards.

...'

B – *National legal framework*

4. Law No 109 of 11 February 1994 reforming the Italian legislative framework for the public works sector introduced the 'single system of qualification', which is compulsorily applicable to any undertaking wishing to participate in a procedure for the award of public works contracts of an amount greater than EUR 150 000. The legislation, in accordance with the option granted to the Member States under Article 52 of Directive 2004/18, requires the undertakings in question to obtain certification attesting that they fulfil minimum technical and financial requirements, certification which SOAs have the exclusive responsibility for issuing.

5. Under Decree No 34 of the President of the Republic of 25 January 2000, amended and supplemented in 2010 by Decree No 207 of the President of the Republic of 5 October 2010, it is clear that SOAs are private joint-stock companies governed by private law, authorised to operate in the market on prior authorisation by the supervisory authority for public works, services and supplies contracts. The legislation referred to lays down the conditions for authorisation of SOAs and the requirements of autonomy and independence that they must guarantee in carrying out their activities. Similarly, the exclusive object of the SOAs' company activities is the certification of undertakings participating in procedures for the award of public works contracts.

6. Article 70(4) and (5) of Decree No 207 lays down the following rules in relation to the tariffs of SOAs:

'4. All qualification certification and the renewal thereof, and also all supplementary revision or amendment activities, shall be subject to the payment of a price to be determined on the basis of the total amount and number of general or specialised contracts for which certification is sought, in accordance with the formulas set out in Annex C — Part I. With regard to permanent consortia, the price chargeable by SOAs for any activity shall be reduced by fifty per cent; as regards undertakings having obtained certification in procurement procedures related to Classification II, the price of any activity carried out by SOAs shall be reduced by twenty per cent.

5. The amounts established in accordance with paragraph 4 shall be deemed to be minimum prices for the service provided. The amount payable may not exceed twice the price established in accordance with the criteria laid down in paragraph 4. Any agreement to the contrary shall be void. ...'

7. Decree No 207 also establishes the system for calculating the basic price, in such a way that the tariffs vary on the basis of the amount of the public works contract or contracts in which the undertaking applying for certification is to participate and the number of invitations to tender to which it intends to respond. To that end, public works are classified by 'categories', which are subdivided into 'subclassifications' with the aim of adapting each type of procedure to the conditions that must be verified by the SOA.

8. According to the information before the Court, there are currently some thirty SOAs operating in Italy and competing with each other in the market sector in question.

II – Facts and main proceedings

9. Following the entry into force of Decree-Law No 223/2006 on the repeal of compulsory minimum tariffs relating to the pursuit of professional activities (also known as 'the Bersani Decree'), the Italian administration, by means of two decisions, one of the Autorità per la vigilanza sui contratti pubblici di lavori and the other of the Ministerio dello Sviluppo Economico, declared that that decree-law did not apply to the services provided by SOAs.

10. SOA Nazionale Costruttori Organismo di Attestazione SpA ('SOA Nazionale') brought an administrative appeal before the Tribunale Regionale del Lazio against the two decisions. SOA Cqop and Associazione Unionsoa, as interveners, intervened in support of the defendant authorities.

11. According to the information before the Court, the applicant at first instance, SOA Nazionale, is now in liquidation.

12. On 18 May 2011, the Tribunale Regionale del Lazio upheld that administrative appeal, declaring Decree-Law No 223/2006 applicable to the services provided by SOAs.

13. The Ministero dello Sviluppo Economico and the Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture, the bodies which adopted the annulled decisions, together with the interveners in the main proceedings, appealed to the Consiglio di Stato against the judgment at first instance.

14. By order of 6 March 2012, the Consiglio di Stato decided to make a reference to the Court for a preliminary ruling. In that decision, the referring court settled part of the proceedings, staying the remainder pending the response of the Court to its question on the compatibility with EU law of a scheme of compulsory minimum tariffs such as that laid down in Decree No 34 of the President of the Republic of 25 January 2000 and Decree No 207 of the President of the Republic of 5 October 2010.

III – The question referred and the procedure before the Court of Justice

15. On 10 July 2012, the reference for a preliminary ruling from the Consiglio di Stato was received at the Registry of the Court; the question referred is worded as follows:

'Do the principles of Community competition law and Articles 101 TFEU, 102 TFEU and 106 TFEU of the Treaty on the Functioning of the European Union preclude the application of the tariffs laid down by Presidential Decree No 34 of 25 January 2000 and by Presidential Decree No 207 of 5 October 2010 to the attestation activities carried out by [a specific category of company, namely,] the società organismi di attestazione (SOAs)?'

16. Written observations were presented by SOA Nazionale Costruttori Organismo di Attestazione SpA, SOA Cqop, Associazione Unionsoa, the Italian Republic and the European Commission.

17. At the hearing, held on 16 May 2013, oral arguments were presented by the above parties.

IV – Admissibility

18. UNIONSOA argued that the question referred is inadmissible because hypothetical. In its view, SOA Nazionale Costruttori being at present in liquidation, it may reasonably be asked whether any preliminary ruling by the Court will have any practical consequences in the proceedings before the Consiglio di Stato. SOA Nazionale disputes that argument, submitting that the decision of the Court will, in any event, be relevant as regards bringing an action for damages in the future.

19. According to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[4]

20. However, this does not apply to the question referred by the Consiglio di Stato, for, as SOA Nazionale has itself confirmed, the answer to be given by the Court, whatever its possible effect may be, will also have consequences on the future situation of SOA Nazionale, if the latter were to bring an action for damages. Accordingly, I consider that these proceedings bear sufficient relation to the actual facts and to the subject-matter of the main proceedings to prevent their being described as hypothetical. For all those reasons the Court should, in my opinion, declare the question referred admissible.

V – Substance

A – *Preliminary observation*

21. The Consiglio di Stato asks the Court whether the Italian scheme of compulsory minimum tariffs applicable to SOAs is compatible with Articles 101 TFEU, 102 TFEU and 106 TFEU, provisions which are all concerned with the rules governing competition in the internal market. The Commission, however, has submitted both in its written observations and in oral argument that those provisions are not to be relied upon, proposing, on the contrary, that the contested national legislation be considered from the perspective of the rules on freedom of establishment. For the reasons I shall set out below, a strong case can be made for that position of principle put forward by the Commission. Not for nothing did the Court write to the parties to these proceedings, inviting them to state their position at the hearing on the compatibility of the legislation at issue with Article 49 TFEU.

22. As I shall now explain, I concur with the approach put forward by the Commission. That is tantamount to saying that I consider that the question referred must be reworded somewhat. In the first place, I shall proceed by analysing the applicability of Articles 101 TFEU, 102 TFEU and 106 TFEU, as the Consiglio di Stato proposed to the Court. Next, after excluding the suitability of using those provisions to resolve this case, I shall focus on the scheme of compulsory minimum tariffs in the light of the freedom of establishment set out in Article 49 TFEU. The fact that the parties have, as proposed by the Court, had the opportunity of giving their views on that second point at the hearing makes it possible for me to consider the matter without risk of infringing the principle that proceedings should be *inter partes*.

4 — See, inter alia, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited therein.

B – *Compulsory minimum tariffs and Articles 101 TFEU, 102 TFEU and 106 TFEU*

23. The Consiglio di Stato considers that SOAs are 'undertakings' within the meaning of Articles 101 TFEU, 102 TFEU and 106 TFEU. From that starting point, the Consiglio di Stato considers that it is necessary to clarify whether they are undertakings having 'special or exclusive rights' and, if so, to what extent the scheme of compulsory minimum tariffs infringes Article 101 TFEU in conjunction with Articles 102 TFEU and 106 TFEU.

24. In that regard, the parties have adopted opposing positions. On the one hand, UNIONSOA, Cqop and the Italian Government consider, with some qualifications, that SOAs are indeed 'undertakings' having 'special or exclusive rights', whose scheme of compulsory minimum tariffs is justified by the object of guaranteeing independence and quality of service. On the other hand, SOA Nazionale Costruttori, while accepting the relevance of Articles 101 TFEU, 102 TFEU and 106 TFEU, reaches the opposite conclusion. In its view independence and quality of service are guaranteed by means of the rules to which SOAs are subject, including strict rules on penalties. SOA Nazionale Costruttori is of the opinion that those provisions are sufficient in themselves to ensure independence and quality of service.

25. The European Commission proposed a very different approach to the issue. It considers that Articles 101 TFEU, 102 TFEU and 106 TFEU are not applicable to the present proceedings, their subject-matter being State legislative activity (the scheme of compulsory minimum tariffs approved by decree). The European Commission argues that, in those circumstances, the relevant provision is Article 49 TFEU, which guarantees freedom of establishment.

26. Similarly, the fact that SOAs perform tasks related to official authority has been referred to throughout the pleadings and oral arguments of all the parties, though not always when dealing with the same issues. If, for UNIONSOA, Cqop and the Italian Government, those certification tasks formerly carried out by the State confirm the existence of 'special or exclusive rights' which, in turn, justify the lawfulness of the legislation at issue, for the Commission and for SOA Nazionale Costruttori that fact has no bearing on the resolution of the case, whether in the interpretation of Article 106 TFEU or in that of Article 49 TFEU.

27. It is true that Article 106 TFEU, interpreted in conjunction with Article 101 TFEU or 102 TFEU, allows the Member States to entrust certain undertakings with the performance of tasks that could, in principle, affect the functioning of the market. Nevertheless, the rules under which Member States are permitted to adopt such measures are very strict and must be analysed in the light of a review of proportionality. In the present case, I consider that the conditions for applying the special scheme under Article 106 TFEU have not been fulfilled, which relieves me of the need to analyse the proportionality of the contested measure.

28. For the purposes of determining whether a national measure is consistent with Article 106 TFEU, in conjunction with either Article 101 TFEU or Article 102 TFEU, the beneficiary of the measure must be an 'undertaking' and must have 'special or exclusive rights'. That is the starting point when determining whether those provisions are applicable to a State's conduct.

29. There is no doubt that SOAs, as they are presently structured, constitute 'undertakings' within the meaning of Article 106 TFEU. Ample case-law of the Court confirms that finding. The Court had previously held in the 1990s, in *Höfner and Elser*, that the concept of 'an undertaking' encompasses every entity 'engaged in an economic activity, regardless of the legal status of the entity and the way

in which it is financed'.[5] Similarly, 'economic activity' must be understood as meaning 'any activity consisting in offering goods and services on a given market'.[6]

30. The fact that the 'undertaking' performs functions connected with official authority does not necessarily mean that Article 106 TFEU is not applicable. In so far as the activity entails active participation in the market offering goods and services by means of which, whether directly or indirectly, it obtains a return, the 'undertaking' must be regarded as falling within the scope of Articles 101 TFEU, 102 TFEU and 106 TFEU.[7]

31. That is precisely the case of SOAs, which are private undertakings operating for profit, entrusted with providing a technical certification service, for which service they receive consideration. The fact that the certification enjoys a presumption of legality which has a direct impact on public tendering procedures in no way changes the fact that SOAs are economic operators operating in a competitive market. Accordingly, I consider that the requirements laid down in the case-law for regarding an entity as an 'undertaking' within the meaning of Articles 101 TFEU, 102 TFEU and 106 TFEU are fully satisfied.

32. Greater difficulty may be raised by the second requirement, that relating to the granting by the State of 'special or exclusive rights'. The case-law has remained somewhat ambiguous in defining those rights, but their main features are now sufficiently established. Indeed, in *Ambulanz Glöckner*,[8] the Court, in keeping with the proposal put forward by Advocate General Jacobs, held that 'special or exclusive rights' are those 'legislative' measures whereby 'protection is conferred… on a limited number of undertakings which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions'.

33. That definition of 'special or exclusive rights' is consistent with the developments which have taken place in the case-law.[9] Broadly speaking, 'rights' must be granted by means of an instrument which is essentially 'legislative' and thus possesses a certain gravity and stability. Similarly, an element of *privilege* must be inherent in 'rights', that is to say, they must place some operators in a position of competitive advantage in relation to others. The advantage may arise because a right is specifically granted to several operators, a situation falling within the category of 'special right'.[10] Where the advantage is conferred on a single operator, the right in question would constitute an 'exclusive right'.

34. SOAs are characterised by the exercise of a power previously exercised by the Italian State: the preliminary assessment of undertakings with respect to their technical and financial capacity to carry out public works. In the case of SOAs, that assessment may lead to certification in the form of a document which, though actually private, has special evidentiary value conferred by law. In that regard, SOAs must be regarded as having been expressly entrusted by means of a 'legislative' measure with performing tasks for the purposes of which those undertakings have special powers not enjoyed by other economic operators.

5 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Féderation française des sociétés d'assurance and Others* [1995] ECR I-4013, paragraph 21; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

6 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

7 — Environmental protection activities (Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraph 16) and air traffic control activities (Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, and Case C-113/07 P *SELEX Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraphs 91 and 92) do not constitute an undertaking.

8 — Judgment in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

9 — Judgments in Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case C-260/89 *ERT* [1991] ECR I-2925; Case C-393/92 *Almelo* [1994] ECR I-1477; Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077; Case C-387/93 *Banchero* [1995] ECR I-4663, and Case C-134/95 *USSL No 47 di Biella* [1997] ECR I-195.

10 — Buendía Sierra, J.L., *Exclusive Rights and State Monopolies under EC Law*, Ed. Oxford University Press, Oxford, 2000.

35. However, the fact is that SOAs operate in a highly restricted market, in that there is no cross competition with other similar services. That is to say, the certification of public works undertakings is a service which, as such, is in neither direct nor indirect competition with any other service, given that there are no similar services that an undertaking may use in order to be able to participate in a tender for public works in Italy. In such a context, that of a market that could be described as 'watertight', the fact that *all* SOAs perform special tasks which the legislature has decided to entrust to the private sector excludes the risk of competitive advantage to the detriment of another operator on the market. There is no sector adversely affected by the attribution *ex lege* to SOAs of the power to issue certification such as that at issue before the court. Accordingly, it is not possible to conclude that the Italian State has granted SOAs 'special or exclusive rights' within the meaning of Article 106 TFEU. That conclusion clearly means that that provision is inapplicable in the present case.

36. Notwithstanding the foregoing conclusion, and as the Commission rightly pointed out, the fact that Article 106 TFEU is not applicable does not necessarily mean that the State's activities, in this case a scheme of compulsory minimum tariffs, are wholly immune from review in the light of the Treaty provisions governing competition. It is clear that, even if a Member State does not confer 'special or exclusive rights' on one or several 'undertakings', the State's activity may possibly infringe Article 101 TFEU or 102 TFEU, interpreted in conjunction with Article 4(3) TUE, that is to say in the light of the principle of sincere cooperation. The Court has consistently held that the competition rules read in conjunction with the principle of sincere cooperation require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, that may render ineffective the competition rules applicable to undertakings. Such would be the case, according to the case-law, 'where a Member State requires or favours the adoption of agreements, decisions or concerted practices …, or where it deprives its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere'. [11]

37. The Court has previously had the opportunity of applying that line of case-law in a situation concerning compulsory minimum tariffs, specifically that of tariffs for Italian lawyers approved by the Government on a proposal from a body representing the profession. In *Arduino*, and subsequently in *Cipolla and Others*, the Court drew the conclusion that the Government's decision to approve a scheme of compulsory minimum tariffs on a proposal from a professional organisation did not constitute a 'delegation to private traders of responsibility for taking decisions affecting the economic sphere', for the Government was free at any time to depart from the proposal and establish a tariff scheme which it considered to be more appropriate.

38. Unlike the situation above, in the present case it cannot even be asserted that SOAs or any of their representative organisations participate in the approval process for the compulsory minimum tariffs. According to the information before the Court, this case is concerned with a strictly official decision adopted by the Government on the basis of certain predetermined criteria. In the final analysis, the absence of consultation in the adoption of that decision does not make the tariff scheme for SOAs a State measure delegated to private operators and, in the same way, neither requires nor favours the adoption of 'agreements, decisions or concerted practices' within the meaning of the case-law cited above. Accordingly, I also consider that neither Article 101 TFEU nor 102 TFEU in conjunction with Article 4 TEU is applicable.

39. To conclude, and to summarise what has been set out above, I consider that the general status of SOAs does not involve the granting of 'special or exclusive rights', which excludes the application in this case of Article 106(1) TFEU. Likewise, and with regard to the specific subject-matter of the present dispute, Articles 101 TFEU and 102 TFEU, in conjunction with Article 4 TEU, are not applicable

11 — See, inter alia, Case 231/83 *Cullet* [1985] ECR 305, paragraph 16; Case 229/83 *Leclerc* [1985] ECR 1, paragraph 14; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-2/91 *Meng* [1993] ECR I-5751, paragraphs 14 and 15; Case C-198/01 *CIF* [2003] ECR I-8055, paragraphs 45 and 46; Case C-250/03 *Mauri* [2005] ECR I-1267, paragraphs 29 to 31; and Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraphs 20 and 21.

either, in so far as the Italian scheme of compulsory minimum tariffs applicable to SOAs neither requires nor favours the adoption of agreements, decisions or concerted practices, nor does it deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

C – *Compulsory minimum tariffs and Article 49 TFEU*

40. Notwithstanding the foregoing, the European Commission considers that the present case ought to be analysed from the perspective of the freedom of establishment. In that regard, it asks the Court to rule on the interpretation of Article 49 TFEU in a case such as this. As has been pointed out above, the Court, in the light of that proposal by the European Commission, sent a written question to the parties before the hearing, inviting them to express their views on that matter.

41. At the hearing only the European Commission and the Government of the Italian Republic responded to that invitation, though they adopted opposing positions. While the European Commission disputed that the activity carried out by the SOAs is an activity connected with the exercise of official authority, the Italian Republic considered that it is. Moreover, in relation to the infringement of the freedom in question, the Commission considered that the measure was restrictive and without justification, inasmuch as it went beyond what was necessary in order to attain the legitimate public interest objectives pursued. In contrast, the Italian Republic considered that the guarantee of quality and independence in the SOAs' service provision fully justified the imposition of compulsory minimum tariffs.

42. Before considering the substance of the case, it is necessary to address an issue raised at the hearing by the Italian Republic. That Member State takes the view that the present case is characterised by the fact that all the elements of the dispute are confined to a single Member State. SOA Nazionale Costruttor, a company in liquidation established in Italy, is contesting an Italian measure, and none of its direct competitors is an undertaking established in another Member State or providing services in Italy. Accordingly, and again in the view of the Italian Government, there is no cross-border element to justify the applicability of the freedom of establishment.

43. Although it is true that all the elements of the present case are confined to the territory of a single State, I think that the Court has jurisdiction to give a ruling on the freedom of establishment. According to settled case-law, the Court may rule on a purely internal matter if the response which it gives in the case allows the referring court to resolve a case of reverse discrimination in the light of its domestic law. That possibility, which has existed in the case-law of the court since *Guimont*,[12] applies solely to the freedoms of movement, including, since *Cipolla*, *Blanco Pérez and Chao Gómez* and *Duomo*, the freedom of establishment.[13] Accordingly, the Court, strictly for the purposes of interpreting Article 49 TFEU, has jurisdiction to give a ruling on the interpretation of that provision in a case such as that before the Court.

12 — Case C-448/98 [2000] ECR I-10663, paragraph 23; followed, inter alia, by Joined Cases C-515/99, C-519 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 26; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 41, and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 29.

13 — Joined Cases C-94/04 and C-202/04 [2006] ECR I-11421, paragraph 30; Joined Cases C-570/07 and C-571/07 [2010] ECR I-4629, paragraph 39, and Joined Cases C-357/10 to C-359/10 [2012] ECR, paragraph 28.

1. Derogation from Article 51 TFEU on the basis of the existence of activities based on the exercise of official authority

44. The Italian Government and, indirectly, UNIONSOA and Cqop consider that the activities carried out by SOAs entail a delegation of official powers which removes them from the scope of the freedoms. In their view, SOAs perform an activity which is in practical terms administrative, thus transforming those entities into a contracting authority, at least in so far as assessment of the technical and financial requirements required of tendering undertakings is concerned.

45. Although it is true that SOAs have been entrusted with a responsibility traditionally borne by the Italian public authorities, it is also true that the Court has already had several opportunities to rule in its case-law on Article 51 TFEU and has not yet held that provision to apply to an economic activity. The case-law has actually been notable for its highly restrictive interpretation of that provision, a representative example of that tendency being the case of notaries, whose activity has not been regarded by the Court as an exercise of official authority. [14]

46. In view of the foregoing, it is difficult to conclude that an SOA, whose purpose of making a profit in a competitive market is evident, can possibly benefit from Article 51 TFEU. The fact that the activity of SOAs does not constitute the exercise of official authority within the meaning of that provision is confirmed by the judgments of the Court in *Commission* v *Portugal* [15] and *Commission* v *Germany*, [16] both relating to undertakings entrusted *ex lege* with performing certification activities.

47. In *Commission* v *Portugal*, the Court had to determine whether the activities of roadworthiness testing undertakings involved the exercise of 'official authority' within the meaning of Article 51 TFEU. The activity of roadworthiness testing is, as is well known, a form of certification activity delegated to private undertakings. None the less, in that case the Court pointed out that 'the decision whether or not to certify roadworthiness, which essentially only records the results of the roadworthiness test, on the one hand, lacks the decision-making independence inherent in the exercise of public authority powers and, on the other hand, is taken in the context of direct State supervision'. [17] The Court therefore drew the conclusion that roadworthiness testing undertakings were subject to the Treaty rules on freedom of movement.

48. The Court arrived at the same conclusion when analysing whether private bodies entrusted with the inspection of organically-farmed products were carrying out an activity connected with the exercise of official authority. As in *Commission* v *Portugal*, *Commission* v *Germany* emphasised the importance of State supervision of private certification bodies. The Court pointed out that 'private bodies carry out their activities under the active supervision of the competent public authority which, in the final analysis, is responsible for the inspections and decisions of those bodies, as is demonstrated by that authority's obligations noted in the preceding paragraph of the present judgment'. [18] It follows from all the foregoing that the true official function remains in the hands of the State and not those of the certification undertakings, which will consequently remain subject to the freedoms of movement.

49. If the activity carried out by SOAs is now considered, it will be observed that their function is in fact to issue certification based on compliance with technical requirements predetermined by law. Although the issuing of that certification preserves some elements that previously characterised the activity when carried out by the State, for the certificates are instruments which enjoy a presumption

14 — See, by way of example, among the various decisions relating to the profession of notary, Case C-47/08 *Commission* v *Belgium* [2011] ECR I-4105.

15 — Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219.

16 — Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 29, and Case C-404/05 *Commission* v *Germany* ECR I-10239.

17 — *Commission* v *Portugal*, paragraph 41.

18 — Ibid., paragraph 44.

of legality similar to that enjoyed by acts of the administration, it is also true that it is a regulated and technical activity. SOAs exercise discretion, albeit a technical discretion within the context of criteria predetermined by rules adopted by the legislature and the Government. Moreover, the fact that there are strict mechanisms of public supervision of the activities carried out by SOAs, supervision with disciplinary consequences based on compliance with requirements also predetermined by law, confirms that official authority continues to play a significant role, albeit one of monitoring, in the sector of certification of undertakings carrying out public works.

50. Accordingly, and in view of the arguments put forward, I consider that SOAs are not undertakings entrusted with performing an activity connected with the exercise of official authority within the meaning of Article 51 TFEU.

2. Freedom of establishment under Article 49 TFEU

a) Restriction of the freedom

51. Both the Commission and the Italian Government agree that a scheme of compulsory minimum tariffs restricts the freedom of establishment, in so far as it is a measure capable of making it less attractive to establish an economic activity in a Member State. As was acknowledged in the course of the proceedings, the restriction is obvious, since the impossibility of lowering the price of a service may create a competitive disadvantage benefiting national operators already established in the market and having a clearly favourable position. The Court drew the same conclusion in relation to the compulsory minimum fees of lawyers in *Cipolla*, a measure which it considered 'is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in that Member State'. [19]

b) Justification

52. Because this measure is restrictive and applicable without distinction to any undertaking exercising the activities of an SOA in Italy, it must be determined whether that measure may be regarded as justified by an overriding reason relating to the general interest. In that regard, UNIONSOA, Cqop and the Italian Government consider that the compulsory minimum tariffs are an essential requirement in guaranteeing the quality and independence of the services provided by SOAs. However, neither the European Commission nor SOA Nazionale Costruttori considers that that justification is proportionate.

53. The Court has on several occasions held that the protection of recipients of services, and the quality of such services, may constitute an overriding reason relating to the general interest, capable of justifying a restriction of a freedom of movement. [20] However, it is also settled case-law that legislation having such aims may go beyond what is necessary if it makes the exercise of the professional activity subject to disproportionate requirements. In the present case, the principal objective of the compulsory minimum tariffs is to ensure, on the one hand, the quality of the certification service and, on the other hand, the independence of SOAs in the performance of their tasks. Those objectives are, in my opinion, perfectly legitimate and inherent in any privatisation process, since by transferring a public activity to the private sector it is logical that the State would

19 — *Cipolla*, paragraph 58.

20 — See, inter alia, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 16: 'In that respect, it should first be pointed out that national legislation, such as that described by the national court, is clearly intended to protect the recipients of the services in question against the harm which they could suffer as a result of legal advice given to them by persons who did not possess the necessary professional or personal qualifications.'

wish to ensure that the service continues to provide standards of quality and objectivity equivalent to those previously provided by the official authority. However, it is not the lawfulness of the objective pursued that is at issue in these proceedings, but the proportionality of the measure, in other words, the compulsory minimum tariffs, in the light of the above aims.

54. With regard to the quality of the service, the Italian Government, UNIONSOA and Cqop SOA have pointed out the effects of the work of SOAs in the carrying out of public works. In that regard, it is, as those parties argue, undeniable that the efficient performance of the SOAs' activities has direct repercussions on the carrying out of public works, for only by guaranteeing the technical capacity and financial solvency of all the undertakings involved is it possible to ensure the effective performance of the works. The obligation to comply with minimum tariffs thus performs the task of ensuring the financial integrity of SOAs, so that, by having tariffs which will at all events cover the costs of the service, SOAs always have the necessary means to carry out their analysis properly.

55. The independence of SOAs is the other reason relied upon to justify the restriction. In order for SOAs to provide their services efficiently they must be sufficiently independent of their clients. A system of certification would serve no purpose if the certifying body offered no guarantees of impartiality when verifying whether or not an undertaking fulfilled the requirements for obtaining the relevant certification. This is where the compulsory minimum tariffs come into play, for they ensure that SOAs have sufficient financial resources to ensure independence in their decision making.

56. In analysing whether that measure is appropriate in the light of the objectives pursued, I must start by pointing out that the Court has held on several occasions that a system of compulsory minimum tariffs applicable to a professional activity is, viewed in the abstract, an appropriate measure for safeguarding legitimate objectives such as, for example, quality services.[21] That assessment is a preliminary one, however, and it is subsequently necessary to analyse in more detail the context in which it applies, having regard, as stated in the case-law, to the reference market and to the nature of the services in question. If the assessment is carried out in the context of a reference for a preliminary ruling, the task also requires a joint analysis by both the Court and the national court.

57. As regards the market, it must first be pointed out that SOAs operate in a context of free competition in which there is no *numerus clausus* of authorised SOAs. Accordingly, it is a competitive market in which any undertakings satisfying the mandatory conditions may provide the certification service. However, given the characteristics of the activity and the strictness of the conditions required for providing the service, it is not surprising that the number of SOAs is relatively small. Although it is not a market limited to two or three operators, the documents before the Court show that at present there are about 30 SOAs. Accordingly, it is not a market in which the number of professionals is very high or in which there exists an informational imbalance between the service provider and service recipient. Those two factors were decisive in *Cipolla and Others* when the circumstances in the Italian market for lawyers were assessed. Nevertheless, in the present case the opposite situation prevails: the number of operators is relatively small and the recipients of the service are required to maintain a mandatory distance so as to allow SOAs to operate with complete autonomy. The relationship of service provider to recipient in the case of SOAs is fundamentally different from that which may exist in the case of a lawyer-client relationship, in which trust and the protection of a common interest are decisive criteria. In the case of an SOA, such trust and protection not only ought not to exist, but also would wholly compromise the very existence of an SOA.

21 — *Cipolla and Others*, paragraph 67.

58. Therefore, the question whether the compulsory minimum tariffs are appropriate must be assessed, in the present case, in the context of a small market in which it is necessary to safeguard the decision-making autonomy of an SOA having regard to any demands or interests of its clients. Viewed in that way, the imposition by the State of a binding scheme of compulsory minimum tariffs is a measure consistent with the purpose of guaranteeing the quality of the service and the independence of the undertakings entrusted with certification.

59. The issue of whether the measure is necessary raises more significant questions. Indeed, the fact that the compulsory minimum tariffs are appropriate measures for ensuring the proper provision of the service does not automatically mean that there exist no less restrictive measures that also guarantee such objectives. The European Commission took that view in its written observations and oral argument, considering that there are excessively strict elements that do not justify a compulsory minimum tariff. For its part, SOA Nazionale Costruttori points out that the quality of service and independence of SOAs are guaranteed by means of particularly strict disciplinary rules applied by the public authorities. Those rules, again in the view of SOA Nazionale Costruttori, are sufficient for ensuring compliance with the objectives referred to.

60. In order to propose a reply on this head, I shall begin by analysing the legislative context of SOAs and, as has just been explained, the disciplinary rules applicable to those undertakings. According to the information before the Court, Decree Nos 34/2000 and 207/2010 lay down disciplinary rules that include financial penalties and even the withdrawal of authorisation to carry out SOA activities. The Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture is responsible for monitoring and enforcing those disciplinary rules.

61. It is true that, in certain circumstances, a scheme of minimum tariffs coexisting with disciplinary rules may constitute an excessive burden on economic operators. Nevertheless, the case of SOAs is very particular and therefore deserves detailed consideration by reason of their independence. As already stated, the independence required of SOAs is reflected in the fact that they maintain a distance from the recipient of the service in order to guarantee impartiality and decision-making autonomy in providing their service. Precisely because SOAs must act within a framework of *increased* independence vis-à-vis tenderers, the existence of disciplinary rules may prove insufficient. That increased independence in fact requires sufficiently comprehensive rules guaranteeing the independence of the service provider. Such comprehensiveness may take the form of strict disciplinary rules accompanied by compulsory minimum tariffs.

62. In a market in which several SOAs compete on the basis of both quality and prices, the possibility of negotiating a price with prospective tenderers would run the risk of having an adverse effect on the mandatory autonomy which should be a feature of such undertakings. Furthermore, although it is true that negotiations on pricing do not necessarily mean that an SOA would lose its independence or no longer appear to be an independent body, such negotiations could have a similar outcome if the price finally agreed were abnormally low. Accordingly, I consider that a scheme of compulsory minimum tariffs, which supplements disciplinary rules applied by the public authorities, constitutes a measure necessary in order to guarantee the mandatory independence of SOAs in a market such as that in Italy.

63. Notwithstanding the foregoing, I consider that further clarification is necessary. The fact that, as a general rule, the scheme of compulsory minimum tariffs is necessary does not mean that all aspects of the system of calculation presently in force are necessary. As the Commission has correctly pointed out, the weak point of the scheme at issue here lies in the method of calculating the tariffs, which, in its view, is not always proportionate.

64. Let it be borne in mind that the method of calculating the compulsory minimum tariffs applies to those public works whose amount is over EUR 150 000, beyond which level a formula applies based, in so far as its most salient features are concerned, on the relevant amount, the number of works for which the tenderer is bidding and the application of a consumer price coefficient (ISTAT). Accordingly, if an undertaking participates in various procedures for the award of a public contract, the compulsory minimum tariff increases automatically on the basis of the number of works. According to the information before the Court, it is not possible to apply any moderating criterion to the compulsory minimum amount resulting from the formula.

65. I am of the opinion that that system raises serious doubts as regards the necessity of the measure, precisely when certification is sought for several public works. As I have already stated, payment by a tenderer of a compulsory minimum tariff is justified when it applies for certification by an SOA, a task which an SOA carries out having regard to the technical and financial conditions of the undertaking in the light of the public works contract for which it submits a tender. What is not sufficiently explained, or at least what the parties to these proceedings have been unable to justify adequately, is why an SOA is automatically able to multiply the amount of its tariffs because an undertaking is participating in several tenders. The structure, activity, personnel, physical means and other features of the undertaking will generally be the same, since an undertaking with sufficient means will typically be in a position to carry out several public works at once, whether they are few or many in number.

66. It is true that if an undertaking submits tenders for several public works, an SOA must assess an individual situation in the light of several public contracts. Logically, the SOA's workload is greater and in such circumstances it is acceptable for the compulsory minimum tariff to reflect that greater responsibility. However, a system that automatically multiplies the amount of the compulsory minimum tariff on the basis of the number of works for which tenders are submitted does not objectively reflect that greater workload borne by the SOA. On the contrary, the system allows SOAs to carry out an assessment of a single undertaking while applying a compulsory minimum tariff far higher than that which would be payable if an undertaking were responding to a single invitation to tender.

67. Accordingly, and in the light of the foregoing, a calculation formula such as that described, which, if applied to an application for certification for several public works automatically multiplies the amount of the tariff on the basis of the number of tenders, goes beyond what is necessary in order to attain the objectives of quality and independence pursued. Accordingly, I consider that in that specific regard the scheme of compulsory minimum tariffs applicable to SOAs, and in particular its calculation formula in the event of an application for certification for several public works, is not justified by overriding reasons relating to the general interest and is therefore incompatible with Article 49 TFEU.

VI – Conclusion

68. In the light of the arguments set out, I propose that the Court reply in the following terms to the question referred for a preliminary ruling by the Consiglio di Stato:

Articles 101 TFEU, 102 TFEU and 106 TFEU must be interpreted as not applying to a scheme of compulsory minimum tariffs such as that laid down for SOAs.

Article 49 TFEU must be interpreted as precluding a scheme of compulsory minimum tariffs such as that laid down for SOAs, in so far as it provides for a calculation formula whereby the tariff is automatically multiplied on the basis of the number of public works for which the tenderer applying for certification submits bids, which last point is to be confirmed by the referring court.