Professional services

Free movement rules and competition law

*by **John Gould** and **David Webster****

The law relating to competition and that relating to freedom of movement both derive from similar core policy principles. Markets which operate more freely over an economic area tend to produce better results. But are these two areas of law complementary or just different? Although the key competition law provision of article 101 of the EC treaty only imposes obligations on private undertakings, the ECJ has in the past accepted an indirect application to member states. In recent years, the ECJ has also considered anticompetitive practices by member states in the context of obligations relating to freedom of establishment and movement. In this article, we seek to illustrate the interaction of the two regimes by reference to professional services.

Freedom of establishment and the free movement of services

The basic principles of freedom of establishment and the freedom to provide services are set out in articles 49 and 56 respectively of the EC treaty. Article 49 prohibits restrictions on the freedom of establishment of member state nationals in a different member state, and article 56 prohibits the imposition of restrictions on the provision of services by member state nationals established in a member state other than that of the intended recipient.

These treaty provisions are supported by delegated legislation which applies both generally (principally the Professional Qualifications Directive, Directive 2005/36/EC) and rules specific to certain professions (such as lawyers pursuant to Directives 77/249/EEC and 98/5/EC). The most important recent development is perhaps the introduction of the Services Directive, Directive 2006/123/EC.

Interaction of the two regimes: the example of legal fees

Both the free movement provisions and competition law provisions are fundamental to implementing the single market. One clear dividing line between the two regimes is that article 101 imposes obligations on private actors but does not impose obligations directly on member states. In contrast, the legal obligations imposed by free movement legislation are generally obligations applying to member states (albeit they may require the enactment of laws imposing rights and obligations on private undertakings). In many cases, therefore, it will be clear whether competition law or free movement provisions apply. In circumstances where action taken by member states prevents or distorts effective competition, however, there may be an overlap between the two regimes.

Although article 101 does not in itself impose obligations on member states, article 4(3) requires them to take all appropriate measures to ensure fulfilment of obligations arising out of the EC treaty. The argument has been run on numerous occasions, with varying degrees of success, that a particular anticompetitive law or practice of a member state is in breach of its obligations under the treaty by virtue of article 4(3) as it is incompatible with article 101. Generally a breach may arise on this basis in two situations:

(1) where a member state requires or favours the adoption of agreements, decisions or concerted practices contrary to article 101, or reinforces their effects; or
(2) where it deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

Although there are a number of cases where the ECJ has been willing to find that member state legislation is in breach of the treaty on this basis, most of these decisions are relatively old. More recently, the Court has been less sympathetic to such arguments.

Italian lawyers' fees

One example of the Court's approach in this area is the case law relating to Italian lawyers' fees. Historically, Italy set a tariff of minimum and maximum fees for various types of legal work. These levels were determined on the basis of recommendations from the Italian Bar Council, but the suggested tariffs had to be approved by the relevant minister after consultation with the interministerial committee on prices. Attempts were made to challenge this pricing system on the basis that Italy was in breach of articles 4(3) and 101 of the EC treaty in *Arduino* (Case C-35/99), *Cipolla* (Cases C-94/04 and C-202/04) and *Hospital Consulting* (Case C-386/07).

In all these cases, the ECJ rejected challenges based on competition law, principally on the grounds that it could not genuinely be argued that the Italian state had delegated its responsibility in this area to private undertakings. The tariffs in question were subject to effective supervision by the state. (Italy had, however, previously been held to be in breach of the competition rules in relation to a similar tariff scheme for customs agents where this level of state supervision did not exist – Case C-35/96.)

However, in the *Cipolla* case, the ECJ held that the fee tariffs were prima facie in breach of article 56. It then left the referring national court in Italy to determine whether the rules could be objectively justified (in respect of which, see further below). The decision in *Cipolla* focused mainly on the minimum tariff imposed in Italy and, as a result of this judgment, the rules in Italy were amended and the minimum tariff was abolished. However, rules relating to maximum fees were retained.

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The Commission subsequently took enforcement proceedings against Italy on the basis, not of competition law concerns, but that the remaining national rules (and particularly maximum fee tariffs) were incompatible with free movement provisions. In its judgment of 29 March 2011 (Case C-565/08), the ECJ rejected the Commission's arguments on the basis that it had not established that the necessary restriction on freedom of establishment or freedom to provide services existed.

The Jakubowska case

The limits of using free movement provisions as a substitute for competition law arguments are also illustrated by another recent case. In *Jakubowska* (Case C-225/09), the legislation in question was a rule which prevented part-time civil servants from acting as lawyers. The purpose of the rule, it was argued, was to avoid conflicts of interest and to ensure that lawyers were independent of public authorities.

While acknowledging the basic principle that articles 4(3) and 101 required member states not to introduce or maintain measures which might render ineffective the competition rules which applied to private actors, the ECJ was clear that the national rules in question did not offend these provisions – they were rules made by the state and the bar councils had no influence over the automatic adoption of the resultant removals from the register. The Court also rejected arguments based on secondary freedom of establishment legislation, principally on the grounds that the rules in question were genuine professional conduct rules – which had not been harmonised and in respect of which member states retained a discretion – rather than a condition for registration.

However, it is clear that the ECJ does take arguments based on free movement provisions seriously and perhaps in the current climate is more likely to be receptive to this type of argument than a suggestion that a member state has indirectly breached article 101. In the most recent case in this area (Case C-119/09), the ECJ declared a French prohibition on canvassing by qualified accountants to be prohibited by the Services Directive.

Freedom of establishment and free movement of services – key hurdles

There are two main findings required to establish that a member state has breached the free movement provisions.

First, there needs to be a "restriction" within the scope of article 49 and/or 56. Focusing on the free movement of services as an example, the ECJ has held previously that article 56 requires the elimination of any restrictions that are liable to prohibit or impede the activities of a provider of services established in another member state where it lawfully provides similar services. This is so even where applied without distinction on the basis of nationality. Article 56 also precludes the application of national rules that have the effect of making the provision of services between member states more difficult than the provision of services purely within one member state.

It is not sufficient in itself to establish that a member state applies less strict, or more commercially favourable, rules to providers of services than equivalent rules which apply in other member states. However, such a restriction will exist where the object or effect of such rules is to deny providers of services established in another member state the opportunity to gain access to the market of the host member state under conditions of normal and effective competition.

Taking the Italian rules on tariffs for lawyers, for example. In *Cipolla,* the ECJ held that the minimum tariff was liable to render access to the Italian legal services market harder for lawyers established in the EU outside Italy. In particular, the prohibition on charging fees below this level could stop other EU lawyers from competing more effectively with lawyers established on a stable basis in Italy, and limited the choice of legal service providers for Italian consumers. Conversely, in Case C-565/08 referred to above, the ECJ held that the rules in relation to a maximum tariff did not prevent the access of lawyers from other member states to the Italian market – in particular, the system had the necessary flexibility to allow proper remuneration for all types of services.

Secondly, even if the necessary restriction does exist, it is possible that it can be justified where it serves an overriding requirement relating to the public interest, is suitable for securing the attainment of the objective which they seek to pursue and does not go beyond what is necessary in order to attain it. Although, in the *Cipolla* case, the ECJ left this for the national court to determine, the advocate general's opinion firmly rejected the arguments of the Italian government that excessive competition between lawyers could lead to price competition, which would result in a deterioration of the services provided to the detriment of consumers.

It is also worth noting that one advantage of using free movement provisions to challenge national rules is that it is not necessary to show any underlying act of private undertakings. Even where a member state takes action which produces effects similar to a cartel, this cannot be challenged under article 101 if there is no related private agreement, decision or concerted practice which itself breaches article 101.

Conclusion

The overlap between free movement and competition rules is relatively limited but should not be ignored. Perhaps most significantly, there will need to be an element of state involvement. Although there are a number of cases where the potential application of free movement provisions has overlapped with competition law, these cases have involved the indirect application of essentially private competition law provisions to actions of member states. It is difficult to imagine circumstances where the reverse is likely to be true, namely, the anticompetitive practices of private undertakings could be subject to direct challenge on the basis of free movement provisions (unless, of course, they were in breach of domestic legislation).

However, where there is a possible overlap, arguments relating to freedom of movement can offer an alternative avenue of attack. In recent years, the ECJ has been reluctant to apply article 101 indirectly to member states through the application of article 4(3). However, there is clearly a strong political determination within the EU at the moment to break down barriers to free movement, particularly in the context of services. At least to an extent, the ECJ seems to be willing to follow this lead.