

# JUDGMENT OF THE COURT (Grand Chamber)

5 April 2011 (\*)

(Freedom to provide services – Directive 2006/123/EC – Article 24 – Prohibition of total prohibitions on commercial communications by the regulated professions – Profession of qualified accountant – Prohibition on canvassing)

In Case C-119/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 4 March 2009, received at the Court on 1 April 2009, in the proceedings

**Société fiduciaire nationale d'expertise comptable**

v

**Ministre du Budget, des Comptes publics et de la Fonction publique,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann, J.-J. Kasel and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Löhmus (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 March 2010,

after considering the observations submitted on behalf of:

- Société fiduciaire nationale d'expertise comptable, by F. Molinié, avocat,
- the French Government, by G. de Bergues and B. Messmer, acting as Agents,
- the Cypriot Government, by D. Kallí, acting as Agent,
- the Netherlands Government, by C. Wissels, M. de Grave and J. Langer, acting as Agents,
- the European Commission, by I. Rogalski and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2010,

gives the following

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 24 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).
- 2 The reference has been made in proceedings between Société fiduciaire nationale

d'expertise comptable (National Association of Qualified Accountants; 'Société fiduciaire') and the Ministre du Budget, des Comptes publics et de la Fonction publique (Minister for the budget, public accounts and civil service) in an action for annulment of Decree No 2007-1387 of 27 September 2007 on the Code of professional conduct and ethics of qualified accountants (décret n° 2007-1387, du 27 septembre 2007, portant code de déontologie des professionnels de l'expertise comptable; JORF of 28 September 2007, p. 15847) in so far as it prohibits canvassing.

## **Legal context**

### *European Union legislation*

3 Recitals 2, 5 and 100 in the preamble to Directive 2006/123 are in the following terms:

'2. A competitive market in services is essential in order to promote economic growth and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises (SMEs), from extending their operations beyond their national borders and from taking full advantage of the internal market. This weakens the worldwide competitiveness of European Union providers. A free market which compels the Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.

...

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. ...

...

(100) It is necessary to put an end to total prohibitions on commercial communications by the regulated professions, not by removing bans on the content of a commercial communication but rather by removing those bans which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communication, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.'

4 Article 4(12) of Directive 2006/123 provides that for the purposes of the directive:

“commercial communication” means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:

- (a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an e-mail address;
- (b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.'

5 Article 24 of Directive 2006/123, entitled 'Commercial communications by the regulated professions', is worded as follows:

‘1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.

2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.’

6 Under Articles 44 and 45 of Directive 2006/123, it entered into force on 28 December 2006 and the Member States were to transpose it by 28 December 2009 at the latest.

#### *National legislation*

7 The establishment of the Order of qualified accountants and the regulation of the qualification and profession of qualified accountant are governed by the provisions of Regulation No 45-2138 of 19 September 1945 (ordonnance n° 45-2138, du 19 septembre 1945; JORF of 21 September 1945, p. 5938). According to that regulation, the qualified accountant’s principal task is to keep and inspect the accounts of undertakings and organisations to which they are not connected by an employment contract. They are authorised to certify the regularity and fairness of financial statements and may also be involved in all the accounting, economic and financial aspects of the formation of undertakings and organisations.

8 Until the adoption of Regulation No 2004-279 of 25 March 2004 simplifying and adapting the requirements for the practice of certain professional activities (ordonnance n° 2004-279, du 25 mars 2004, portant simplification et adaptation des conditions d’exercice de certaines activités professionnelles; JORF of 27 March 2004, p. 5888), qualified accountants were forbidden to engage in any personal advertising. Decree No 97-586 of 30 May 1997 on the functioning of the authorities of the Order of qualified accountants (décret n° 97-586, du 30 mai 1997, relatif au fonctionnement des instances ordinales des experts-comptables; JORF of 31 May 1997, p. 8510), which sets forth the conditions under which qualified accountants might thenceforth engage in promotional activities, provides, in Article 7, that those conditions are to be the object of a code of professional duties the provisions of which are to be enacted in the form of a decree by the Conseil d’État.

9 Thus, Decree No 2007-1387 was adopted on the basis of Article 23 of Regulation No 45-2138 and Article 7 of Decree No 97-586.

10 Article 1 of Decree No 2007-1387 is in the following terms:

‘The rules of conduct and ethics applicable to qualified accountants are prescribed by the Code of Ethics annexed to this decree’.

11 Article 1 of the Code of professional conduct and ethics of qualified accountants (‘the Code’) provides:

‘The provisions of this Code shall apply to qualified accountants, regardless of their mode of practising the profession, and, where appropriate, to trainee qualified accountants and employees referred to in Article 83b and Article 83c respectively of Regulation No 45-2138 of 19 September 1945 on the establishment of the Order of qualified accountants and the regulation of the qualification and profession of qualified accountant.

Except for those which are applicable only to natural persons, they shall also apply to accountancy firms and management and accountancy associations.’

12 Article 12 of the Code states:

I. The persons referred to in Article 1 are prohibited from carrying out any unsolicited canvassing with a view to offering their services to third parties.

Their participation in symposiums, seminars or other academic or scientific events is authorised in so far as they do not, on that occasion, carry out acts comparable to canvassing.

II. The persons referred to in Article 1 are permitted to carry out promotional activities in so far as those activities provide the public with useful information. The methods used for that purpose shall be exercised with discretion, so as not to prejudice the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

When they present their professional activity to third parties, by whatever means, the persons referred to in Article 1 shall not adopt any form of expression liable to undermine the dignity of their role or the reputation of their profession.

Those modes of communication and any others are allowed subject to being practised in a restrained and respectable manner, and on condition that their content does not contain inaccuracies, is not liable to mislead the public, and does not contain any comparative element.'

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

13 By application lodged on 28 November 2007, Société fiduciaire applied to the Conseil d'État for the annulment of Decree No 2007-1387 in so far as it prohibits canvassing. Société fiduciaire submits that the general and absolute prohibition on any canvassing under Article 12-I of the Code is contrary to Article 24 of Directive 2006/123 and seriously undermines the implementation of that directive.

14 The national court considers that the reference for a preliminary ruling is necessary in the proceedings before it because, were the prohibition on canvassing enacted by Decree No 2007-1387 to be regarded as contrary to Article 24 of Directive 2006/123, it would seriously compromise that directive's implementation.

15 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Was Directive 2006/123 ... intended to proscribe, in respect of the regulated professions falling within its scope, any general prohibition, whatever the form of commercial practice concerned, or does it leave the Member States the option of maintaining general prohibitions in respect of certain commercial practices, such as canvassing?'

### **Admissibility**

16 The referring court seeks the interpretation of Directive 2006/123, the time-limit for the transposition of which, 28 December 2009, had not yet expired on the date of the decision to refer, which was 4 March 2009.

17 The French Government, without explicitly raising a plea of inadmissibility as regards the reference for a preliminary ruling, expresses certain objections as regards the relevance of the question referred by the national court and its assessment that, were the national legislation at issue in the main proceedings to be regarded as contrary to Directive 2006/123, it would seriously compromise that directive's implementation.

18 Indeed, in that Government's submission, whilst it is true, according to the Court's case-law, that during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the

attainment of the result prescribed by that directive (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 38), that would not be so in the main proceedings, where the application of the national legislation at issue during the period for transposition of Directive 2006/123 would not produce effects such as would, first, persist after that transposition period's expiry and, second, be particularly serious as regards the objective pursued by that directive.

- 19 In that respect, it follows from the same case-law that it is for the referring court before which the main proceedings are pending to assess whether the national provisions whose legality is challenged are liable seriously to compromise the attainment of the result prescribed by a directive. In making that assessment, the referring court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as determining the effects in practice of applying those incompatible provisions and of their duration in time (see, in particular, *Inter-Environnement Wallonie*, paragraphs 46 and 47).
- 20 It is not for this Court to review the correctness of that assessment as part of an examination of the admissibility of a reference for a preliminary ruling.
- 21 In any event, according to 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 enjoy a presumption of relevance (see, to that effect, Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 67; Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-0000, paragraph 20; and Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 33).
- 22 It follows that the reference for a preliminary ruling is admissible.

### **Consideration of the question referred**

- 23 By its question, the referring court asks, in essence, whether Article 24 of Directive 2006/123 must be interpreted as precluding national legislation which prohibits the members of a regulated profession, such as the profession of qualified accountant, from engaging in canvassing.
- 24 As a preliminary point, Article 24 of Directive 2006/123, entitled 'Commercial communications by the regulated professions', imposes two obligations on the Member States. First, Article 24(1) requires the Member States to remove all total prohibitions on commercial communications by the regulated professions. Second, Article 24(2) obliges the Member States to ensure that commercial communications by the regulated professions comply with professional rules, in conformity with EU law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Those professional rules must be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.
- 25 To establish whether Article 24 of Directive 2006/123, and particularly Article 24(1), proscribes a prohibition on canvassing such as that laid down by the national legislation at issue in the main proceedings, it is necessary to interpret that provision by reference not only to its wording but also to its purpose and context and the objective pursued by the legislation in question.
- 26 In that regard, it is clear from Recitals 2 and 5 in its preamble that Directive 2006/123 is intended to remove restrictions on the freedom of establishment for providers in Member States and on the free movement of services between the Member States, in order to

contribute to the completion of a free and competitive internal market.

- 27 The purpose of Article 24 of that directive is stated in Recital 100 in its preamble, according to which it is necessary to put an end to total prohibitions on commercial communications by the regulated professions, prohibitions which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media.
- 28 As regards the context of Article 24 of Directive 2006/123, it is contained in Chapter V thereof, entitled 'Quality of services'. However, as the Advocate General noted in point 31 of his Opinion, that chapter, in general, and Article 24, in particular, are intended to safeguard the interests of consumers by improving the quality of the services of the regulated professions in the internal market.
- 29 It follows from both the purpose and the context of Article 24 that, as the European Commission correctly submits, the intention of the EU legislature was not only to put an end to total prohibitions, on the members of a regulated profession, from engaging in commercial communications whatever their form but also to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of Directive 2006/123, such as, for example, advertising, direct marketing or sponsorship. Having regard to the examples in Recital 100 of that directive, professional rules forbidding the communication, in one or more given media, of information on providers or their activities must also be regarded as total prohibitions proscribed by Article 24(1) of that directive.
- 30 However, under Article 24(2) of Directive 2006/123, read in the light of the second sentence of Recital 100 in its preamble, the Member States retain the right to lay down prohibitions relating to the content or methods of commercial communications as regards regulated professions, provided that the rules laid down are justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession, as well as the professional secrecy necessary in its practice.
- 31 In order to establish whether the national legislation at issue falls within the scope of Article 24 of Directive 2006/123, it must, first of all, be determined whether canvassing constitutes commercial communication, within the meaning of that article.
- 32 The concept of 'commercial communication' is defined in Article 4(12) of Directive 2006/123 as including any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. However, that concept does not encompass, first, information enabling direct access to the activity of the undertaking, organisation or person, such as a domain name or an e-mail address, and, secondly, communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.
- 33 Therefore, as the Netherlands Government argues, commercial communication covers not only traditional advertising but also other forms of advertising and communications of information intended to obtain new clients.
- 34 As regards the concept of canvassing, neither Directive 2006/123 nor any other measure of EU law contains a definition of that concept. In addition, its scope can vary in the legal systems of the different Member States.
- 35 Under Article 12-I of the Code, unsolicited contact by qualified accountants with third parties with a view to offering them their services is to be regarded as canvassing.
- 36 In that regard, although the exact scope of the concept of 'canvassing' in the sense of the national legislation is not apparent from the decision to refer, the Conseil d'État and all the

parties who submitted observations to the Court consider that canvassing comes within the concept of 'commercial communication' in Article 4(12) of Directive 2006/123.

37 Société fiduciaire submits that the meaning of 'canvassing' is an unsolicited personal offer of goods or services to a certain natural or legal person. The French Government adopts that definition, whilst suggesting that two elements be distinguished, namely, first, an element of action, which resides in the fact of making unsolicited contact with a third party and, second, an element of content which consists in the delivery of a commercial message. In that Government's submission, it is particularly the second element which constitutes commercial communication within the meaning of Directive 2006/123.

38 It follows from those elements that canvassing constitutes a form of communication of information intended to seek new clients. However, as the Commission maintains, canvassing involves personal contact between the provider and a potential client, in order to offer the latter services. It can, therefore, be classified as direct marketing. Consequently, canvassing comes within the concept of 'commercial communication', within the meaning of Articles 4(12) and 24 of Directive 2006/123.

39 The question then arises whether the ban on canvassing can be regarded as a total prohibition on commercial communications within the meaning of Article 24(1) of that directive.

40 It is clear from the text of Article 12-I of the Code and from the 'Indicative grid of communication tools' established by the Conseil supérieur de l'ordre des experts-comptables (Higher Council of the Order of Qualified Accountants) annexed to the French Government's written observations that, by virtue of that provision, qualified accountants must abstain from any unsolicited personal contact which could be regarded as touting for clients or a concrete proposal of commercial services.

41 The ban on canvassing, as laid down by the said Article 12-I, is of broad conception, in that it prohibits any canvassing, whatever its form, content or means employed. Thus, that ban includes a prohibition of all means of communication enabling the carrying out of that form of commercial communication.

42 It follows that such a ban must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123.

43 That conclusion is consistent with that directive objective's which is, as noted in paragraph 26 of the present judgment, the removal of restrictions on the free movement of services between Member States. Indeed, legislation of a Member State forbidding qualified accountants from any canvassing could affect professionals from other Member States more, by depriving them of an effective means of penetrating the national market in question. Such a prohibition constitutes, therefore, a restriction on the freedom to provide cross-border services (see, by analogy, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 28 and 38).

44 The French Government maintains that canvassing prejudices the independence of members of that profession. In its submission, since qualified accountants are responsible for inspecting the accounts of companies and organisations to which they are not connected by an employment contract and to certify the regularity and fairness of those companies' and organisations' financial statements, it is essential that they are not suspected of any complicity with respect to their clients. They run the risk, by making contact with the manager of an undertaking or organisation concerned, of changing the nature of the relationship which they should usually have with their client, which is detrimental to their independence.

45 However, as held in paragraph 42 of the present judgment, the legislation at issue in the main proceedings totally prohibits a form of commercial communication and, therefore, comes within the scope of Article 24(1) of Directive 2006/123. It is therefore incompatible with that directive and cannot be justified under Article 24(2) of Directive 2006/123, even if it is non-discriminatory, based on an overriding reason relating to the public interest and proportionate.

46 In the light of all those considerations, the answer to the question referred is that Article 24(1) of Directive 2006/123 must be interpreted as precluding national legislation which totally prohibits the members of a regulated profession, such as the profession of qualified accountant, from engaging in canvassing.

### **Costs**

47 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 (Grand Chamber) hereby rules:

**Article 24(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding national legislation which totally prohibits the members of a regulated profession, such as the profession of qualified accountant, from engaging in canvassing.**

[Signatures]