OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 March 2001 [1]

I — Introduction

1. In these proceedings for failure to fulfil obligations the Commission asks the Court to declare that by adopting certain provisions on the activity of traffic consultant, the Italian Republic has breached the principles of freedom of establishment and freedom to provide services laid down in the Treaty.

II — Italian law

2. The rules at issue are those in Law No 264 of 8 August 1991 on the activity of traffic consultant (hereinafter: 'the Law').

3. Under Article 3(1)(a) of the Law, the provincial authorities issue authorisation to carry out traffic consultancy business to the owner of an undertaking only if he is an Italian citizen or a citizen of a Member State of the European Economic Community resident in Italy.

4. According to Article 3(2)(a), (b) and (c), this condition applies to all the partners in the case of a partnership, to unlimited partners in the case of a limited partnership or a limited share partnership, and to the directors of any other type of firm.

5. According to Article 3(4) of the Law, authorisation is granted only if a security, the amount of which is determined by ministerial decree, is lodged at the same time with the provincial authorities.

6. According to Article 8(1) of the Law, the minimum and maximum fees for traffic consultancy business are set annually by decision of a committee.

7. Article 9(4) of the Law states that anyone carrying out such business without the

1 — Original language: German.

required authorisation will be subject to a fine of between ITL 5 million and ITL 20 million.

III — Proceedings

8. By letter dated 16 November 1993, the Commission brought to Italy's attention the fact that the Law was not consistent with Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and asked Italy to provide more detailed information on the Law and on the measures envisaged in order to remedy that inconsistency with Community law within two months.

9. Having received no reply to that letter, the Commission, by letter of formal notice dated 7 November 1995, put the Italian Government on notice to submit observations within two months.

10. As the Commission considered the reply by the Italian Government of 21 March 1996 to be unsatisfactory, it sent the Italian Government a reasoned opinion on 14 July 1997, calling on it to adopt measures consistent with Articles 43 EC and 49 EC within two months.

11. As there was no response to the reasoned opinion from the Italian Government, the Commission initiated on 2 July 1999 the present action, registered at the Court on 16 July 1999, in which it claims that the Court should:

(a) declare that by placing restrictions on the pursuit of the activity of traffic consultant the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;

(b) order the Italian Republic to pay the costs.

12. The Italian Government submits that the dispute has been deprived of purpose.

IV — Submissions of the parties

13. In the application the Commission states that the residency requirement for citizens of other Member States is not compatible with the general prohibition on discrimination on grounds of nationality in Article 12 EC or the more specific prohibition in Article 13 EC on all restrictions on freedom of establishment.

14. The Commission submits that the residency requirement negates the freedom to provide services under Article 49 EC as it completely rules out occasional provision of services by providers resident in other Member States.

15. The provisions relating to the requirement to lodge a security, the setting of minimum and maximum fees and the application of fines in the case of the business in question being carried out without authorisation do not take account of the fact that service providers in other Member States may already be subject to comparable rules in their country of origin.

16. On 10 November 1999 the Italian Republic lodged its defence, in which it submits that the condition of residency should be understood rather in the sense of establishment.

17. Italy claims that it is necessary to set a minimum fee as abolition of the fee would destabilise the market and lower the quality of services.

18. It also points out that it is difficult to know whether the Commission is contesting the requirement for authorisation itself or simply the different conditions for authorisation.

19. In the absence of any Community harmonisation in the sector, there are grounds of general interest — that is, the need to verify the professional qualifications of service providers, their integrity and propriety, and whether they have sufficient financial resources — which justify the requirement for authorisation.

20. The Italian Republic also states that an amendment to the Law is being considered which would remove the requirements of residency and of lodging a security as well as the setting of a maximum fee, and that for this reason the proceedings have become deprived of purpose.

21. In its reply of 6 December 1999 the Commission states that the planned amendment to the Law is irrelevant for the purpose of these proceedings.

22. As regards the requirement for a minimum fee, the Commission points out that fees below the minimum level set may be obtained not only — as Italy fears — by a reduction in quality, but also by better business management. Furthermore, consumers may check quality themselves, by means of comparison.

23. In its rejoinder, lodged on 24 February 2000, the Italian Republic once again maintains that the proceedings have become deprived of purpose since, following a legislative amendment in the intervening period, the condition of residency has been replaced by one of establishment and the requirement to lodge a security has been abolished.

V — Opinion

24. The argument of the Italian Government that the proceedings have become deprived of purpose following the amendment of certain provisions of the Law is not relevant: it is established case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. [2]

A — *Breach of Article 43 EC*

25. It is not clear from the wording of the Law whether the requirement of residency in Italy applies only to citizens of other Member States or also to Italian citizens. If it applied only to foreigners, this would clearly constitute discrimination on grounds of nationality. The principle of equality of treatment with nationals prohibits discriminatory treatment on grounds of nationality. If the criterion of residency was applied in a non-discriminatory manner, this would constitute covert discrimination since residency requirements 'are liable to operate mainly to the detriment of nationals of other Member States'. [3]

26. The residency requirement results in a limitation on freedom of establishment; the scope of that requirement is extremely broad. In the case of a partnership all the partners must be resident in Italy; in the case of a limited partnership or limited share partnership, the requirement applies to all unlimited partners; for all other firms the residency requirement is applied to directors.

27. It is thus more difficult for operators resident in other Member States to set up an establishment in Italy. As a rule, partners reside in their country of origin and would be obliged to transfer residency to Italy in order to pursue their business there. The Court has held that similar residency conditions provided for by the legislation of

2 — Case C-316/96 *Commission* v *Italy* [1997] ECR I-7231, paragraph 14.

3 — Case C-350/96 *Clean Car* [1998] ECR I-2521, paragraph 29.

other Member States are an unlawful restriction on the freedom of establishment.[4] That view should also be applied to the case in question.

28. Italy has put forward no arguments to justify such discrimination under Article 46 EC for reasons of public security or public order, a justification of this kind being valid only if there exists a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[5]

29. The Italian Government maintains, however, that the condition of residency should be understood in the broader sense of establishment. It claims that the word 'residency' is a flaw in the wording of the Law or a mistake in the drafting of the text, which should be corrected by an interpretation in accordance with Community law.

30. That argument cannot, however, be accepted since, if the text was to be interpreted only with the correction added, such a state of affairs would create grave legal uncertainty for those affected by the Law.

B — *Breach of Article 49 EC*

31. A Member State cannot make establishment subject to the same conditions as those relating to the provision of services without depriving the right to provide services from another State of effect.[6] The provision of services, unlike establishment, takes place only from time to time and does not therefore require any long-term integration into the commercial activities of the recipient State. Accordingly, the conditions imposed must differentiate between those providing services and those who wish to establish themselves on a long-term basis, since otherwise the freedom to provide services would be of no practical use. This is made strikingly clear by the condition of residence as a requirement for the issue of authorisation. That obligation prevents an operator residing in another Member State from providing services in Italy on a short-term basis. For this reason the contested provisions constitute an unlawful restriction under Article 49 EC.

32. National rules which make the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of administrative authorisation constitute a

4 — Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32, Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 44, and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 31.

5 — Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35.

6 — Case C-76/90 *Saeger* [1991] ECR I-4221, paragraph 13; also Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31.

restriction on the freedom to provide services.[7] The requirement for authorisation may itself, in principle, constitute an unlawful restriction.

33. Such a restriction can only be compatible with Article 49 EC if the rules are applied in a non-discriminatory manner and are specifically justified. This is the case if the rules are justified by imperative requirements in the general interest, if they are suitable for securing the attainment of the objective which they pursue and if they do not go beyond what is necessary to attain it.[8]

34. As authorisation is required for both Italian service providers and those from other Member States, it is not discriminatory *per se.* Despite that fact, the requirement, as a rule, constitutes a greater restriction on services provided from other Member States since the providers are subject both to the laws of the State of origin and the laws of the Member State in which the service is provided. However, there is no intention to discriminate inherent in this condition as — unlike the case of the residency requirement — national service providers must also meet it.[9]

35. The Italian Republic submits that the requirement of authorisation is justified by the need to verify whether the service provider holds the necessary professional qualifications, to verify his integrity and propriety, and whether he has sufficient financial resources.

36. However, it is not necessary to require such specific authorisation where the general interest is already safeguarded by rules applicable to the service provider in the Member State where he is established.[10] In expecting all undertakings to meet the same requirements in order to obtain authorisation, the Italian rules do not allow account to be taken of obligations to which the service provider is already subject in the Member State where he is established.[11]

37. If there is already a procedure to check the requirements for the consultancy business in the country of origin of the service provider, the checks in this instance may institute unlawful duplication. Proof of professional qualifications and the meeting of particular conditions as to probity should be sufficient. The Italian Republic does not take that into account and thus

7 — *Saeger* (cited above in footnote 6), paragraph 14; see also *Parodi* (cited above in footnote 6), paragraph 32, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15, and *Commission* v *Belgium* (cited above in footnote 4), paragraph 35.

8 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

9 — *Holoubek, Schwarze, EU-Kommentar*, 1st ed. 2000, Baden-Baden, Article 49 EC, paragraph 77.

10 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; *Saeger* (cited above in footnote 6), paragraph 15, *Vander Elst* (cited above in footnote 7), paragraph 16, Case C-3/95 *Reiseburo Broede* [1996] ECR I-6511, paragraph 28, and *Commission* v *Belgium* (cited above in footnote 4), paragraph 37.

11 — *Commission* v *Belgium* (cited above in footnote 4), paragraph 38.

breaches the principle of the country of origin.

38. It is also of critical importance to know on what terms authorisation is granted. According to the Court's case-law it is not necessary to stipulate a residency requirement for directors. Checks can be made and penalties imposed on any undertaking established in a Member State whatever the place of residence of its directors. [12] In this way, consumer protection is given due consideration.

39. Furthermore, we are dealing here, as I have already explained, with discrimination, either overt or covert, on the basis of nationality. [13]

40. Italy has made no claim to justification based on Article 46 EC relating to grounds of public security or public order.

41. Under Article 3(4) of the Law, authorisation is granted only when a security has been lodged with the provincial authorities.

12 — *Commission* v *Spain* (cited above in footnote 4), paragraph 47.

13 — See paragraph 17 of this Opinion.

42. The fact that that payment is required constitutes a restriction for every service provider on the freedom to provide services, since the provider is obliged to make the payment in advance. Although this measure is not discriminatory, in that both national and foreign service providers are expected to lodge a security, it represents an inadmissible restriction on the freedom to provide services within the meaning of Article 49 EC if it is not justified by imperative requirements in the general interest (a claim not put forward by the Italian Republic).

43. Setting minimum and maximum fees for the pursuit of the activity of traffic consultant in Italy may also be considered to constitute a restriction on the freedom to provide services.

44. The fact that maximum fees are set may make it more difficult for service providers from another Member State to provide their services on the Italian market as, not being resident in Italy, they incur greater costs than national service providers and can, therefore, only work in a higher price range.

45. That measure may, nevertheless, be considered admissible if it is applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable for securing the attain-

ment of the objective which it pursues, and does not go beyond what is necessary in order to attain it. [14]

46. The requirement applies both to Italian service providers and to those from other Member States and is therefore applied in a non-discriminatory manner. It might, however, constitute covert discrimination since service providers resident in another Member State are generally subject, as mentioned above, to higher costs. There is no specific intention to discriminate, however, given that, since it may be equally difficult for national service providers (for different financial reasons) to abide by the maximum rate, it has effects also on those national service providers. [15]

47. In any case, the Italian Government has not invoked imperative requirements in the general interest which might justify the restriction. It must be concluded accordingly that the measure constitutes a restriction.

48. The provision relating to the setting of minimum fees also restricts the freedom to provide services. This is because it does not allow service providers to offer their services at a price which might make their services more attractive to the customer than those of another firm on the basis of cost.

14 — *Gebhard* (cited above in footnote 8), paragraph 37.

15 — Holoubek, *Schwarze, EU-Kommentar* (cited above in footnote 9), paragraph 77.

49. That measure, too, is applied in a non-discriminatory manner, so that it is necessary to consider whether it is justified by imperative requirements in the general interest. The Italian Republic claims that to abolish minimum prices might destabilise the market, which might lead to unfair competition and in turn to a drop in the quality of service provision to the detriment of the consumer. The Commission rightly objects that prices below the minimum level may be the result not only of a reduction in quality as feared by Italy but, principally, also of improved cost structure in the provision of the service, that is to say from good management. If the absence of minimum fees were actually to influence the quality of the service, consumers would be able to find this out by means of comparisons and draw the appropriate conclusions.

50. Moreover, a restriction of this kind would not be proportionate as it would go beyond what is necessary to attain the objective. Setting uniform quality criteria according to which service providers must operate would be sufficient to ensure quality and protect consumers.

51. If the conditions for authorisation laid down in Article 3(1) of the Law are contrary to Community law, the provision concerning the fine to be paid if the activity of traffic consultant is carried out without

previous authorisation under Article 9(4) of the Law is all the more so.

In fact, the fine is the legal consequence of the failure to observe the condition of authorisation. The lawfulness of that fine is therefore dependent on the lawfulness of the relevant provision.

VI — Costs

52. Under Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs where such a claim is made. In so far as the Italian Republic is unsuccessful, it should be ordered to pay the costs.

VII — Conclusion

53. In view of the foregoing observations, I propose that the Court rule as follows:

(1) By placing restrictions on the pursuit of the activity of traffic consultant in Law No 264 of 8 August 1991 the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

(2) The Italian Republic is ordered to pay the costs.