

JUDGMENT OF THE COURT (Sixth Chamber)

29 May 2001 \*

In Case C-263/99,

**Commission of the European Communities**, represented initially by A. Aresu and M. Patakia, and, subsequently, M. Patakia and G. Bisogni, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Italian Republic**, represented by U. Leanza, acting as Agent, assisted by O. Fiumara, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by placing restrictions on the pursuit of the activity of transport consultant, the Italian Republic has failed to fulfil its

\* Language of the case: Italian.

obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,  
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2001,

gives the following

### Judgment

- 1 By application lodged at the Court Registry on 16 July 1999, the Commission of the European Communities brought an action under Article 226 EC for a

declaration that, by placing restrictions on the pursuit of the activity of transport consultant, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC).

## National legislation

2 Law No 264 Disciplina dell'attività di consulenza per la circolazione dei mezzi di trasporto (Law No 264 on the activity of transport consultancy), of 8 August 1991 (GURI No 195 of 21 August 1991, hereinafter referred to as 'Law No 264/91'), reserves the pursuit of that activity to undertakings and companies which have obtained express authorisation from the relevant provincial administrative authorities.

3 Article 3 of Law No 264/91 makes the obtaining of that authorisation subject to a number of conditions, including, according to Article 3(1)(a), that the proprietor of the undertaking should be 'an Italian national or a national of a Member State of the European Community residing in Italy'.

4 Article 3(4) of Law No 264/91 makes the issuing of the authorisation subject to the lodgement, with the provincial administration, of a security in an amount to be determined.

5 Article 8 of Law No 264/91 provides for the fixing of minimum and maximum fees for the pursuit of the activity in issue.

- 6 Article 9(4) provides that whoever pursues the activity of transport consultant without being in possession of the requisite authorisation is liable to administrative fines or, depending on the circumstances, fines under the criminal law.

### Pre-litigation procedure

- 7 Considering that Article 3(1)(a) of Law No 264/91 was incompatible with the fundamental principle prohibiting any discrimination on grounds of nationality, laid down, with regard to freedom of establishment, by Article 52 of the Treaty, and that the provisions of Article 3(1)(a), in conjunction with Articles 4, 8 and 9(4) of that Law, were incompatible with the fundamental principle of freedom to provide services laid down in Article 59 of the Treaty, the Commission, by letter dated 7 November 1995, gave the Italian Government formal notice to submit observations within two months.
- 8 Deeming the reply of the Italian Government unsatisfactory, the Commission, on 14 July 1997, sent a reasoned opinion to the Italian Republic, in which it reiterated its criticisms of the Italian legislation and invited that Member State to adopt, within two months from the notification of that opinion, the measures necessary to fulfil its obligations under Articles 52 and 59 of the Treaty.
- 9 Since the Italian Government has not replied to that reasoned opinion, the Commission brought the present action, which comprises two complaints which must be examined in turn.

## Infringement of Article 52 of the Treaty

- 10 The Commission submits that, by restricting the pursuit of the activity of transport consultant solely to nationals of other Member States residing in Italy, Article 3(1)(a) of Law No 264/91 constitutes discrimination on the ground of nationality prohibited, so far as concerns the right to take up and pursue self-employed activities, by Article 52 of the Treaty.
- 11 The Italian Government replies that Article 35 of Law No 472, Interventi nel settore dei trasporti (Law No 472 on the transport sector), of 7 December 1999 (GURI No 294 of 16 December 1999, suppl. ord., hereinafter 'Law No 472'), entitled 'Amendments to Law No 264/91 of 8 August 1991', replaced, in Article 3(1)(a) of Law No 264/91, the term 'residing' with the term 'established'. It states that, even before that amendment, the concept of 'residence' used in Article 3(1)(a) of Law No 264/91 was to be understood in the wider sense of 'establishment'.
- 12 In that connection, it should be pointed out, first, that it is settled 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 that the Court cannot take account of any subsequent changes (see, in particular, Case C-316/96 *Commission v Italy* [1997] ECR I-7231, paragraph 14).
- 13 It must be borne in mind, secondly, that, under the second paragraph of Article 52 of the Treaty, freedom of establishment, so far as nationals of a

Member State are concerned, ‘includes the right to take up and pursue activities as self-employed persons... under the conditions laid down for its own nationals’.

- 14 However, it must be observed that, by requiring that only nationals of other Member States, not including Italian nationals, reside within Italy in order to be entitled to the requisite authorisation in order to take up and pursue activities as transport consultants in Italy, the wording of Article 3(1)(a) of the Law of 1991, as in force upon expiry of the period prescribed in the reasoned opinion, constituted discrimination on the ground of nationality, prohibited by virtue of Article 52 of the Treaty.
  
- 15 Since no public-interest reason based on Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC) and capable of justifying such discrimination has been put forward by the Italian Government, the complaint alleging infringement of Article 52 of the Treaty must therefore be held to be well founded.

### **Infringement of Article 59 of the Treaty**

- 16 The Commission submits that the residency condition imposed on nationals established in the other Member States is also contrary to Article 59 of the Treaty on the ground that it constitutes a de facto negation of the freedom to provide services guaranteed by that provision. Moreover, the provisions of Law No 264/91 relating to the lodging of a security, the fixing of minimum and maximum fees and to imposition of fines for the unauthorised pursuit of the activity concerned does not take account of the fact that service providers from other Member States can, in some circumstances, be subject to similar obligations in the Member State in which they are established. In any event, those provisions are disproportionate by comparison with the objectives which, according to the Italian Government, they seek to attain.

- 17 The Commission concludes that the provisions of Article 3(1)(a) of Law No 264/91, in conjunction with Articles 4, 8 and 9(4) thereof, are incompatible with the fundamental principle of freedom to provide services.
- 18 The Italian Government contends that, in the absence of any harmonisation at Community level in the matter, the requirement of prior authorisation for the pursuit, even occasionally, of the activity of transport consultant and the conditions to which the granting of such authorisation is subject are justified by the need to verify the professional qualifications, integrity, propriety and financial resources of the persons concerned. As for the minimum fees, they are necessary in order to avoid, in the interests of consumers, destabilising the market and lowering the quality of the services offered.
- 19 Moreover, after the Italian Government indicated, in its defence, that it expected to abolish, in the context of the legislative procedure which led to the adoption of Law No 472/99, the fixing of maximum fees provided for in Article 8 of Law No 264/91, it explained, in its rejoinder, that the fixing of such fees, like the fixing of minimum fees, did not restrict the freedom to provide services, whether by Italian nationals or by nationals of other Member States, and that, moreover, it was necessary in order to avoid price increases.
- 20 In order to determine whether the Commission's second complaint is well founded, it must be observed, first, that the condition that nationals of the other Member States wishing to pursue the activity of transport consultant in Italy must have their residence in that Member State directly negates the freedom to provide services in so far as it makes it impossible for persons established in other Member States to provide services in Italy (see, to that effect, Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 27).

- 21 Moreover, according to consistent case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation, failing which a fine is imposed, constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see, in particular, Case C-355/98, cited above, paragraph 35). The same is true for the conditions to be met for obtaining such authorisation, such as the lodging of a security.
- 22 So far as concerns, secondly, the reasons invoked by the Italian Government in order to justify those restrictions, it need only be observed that the legislative provisions complained of go, in any event, beyond what is necessary to attain the objective pursued, which is to ascertain whether the persons concerned fulfil certain conditions deemed necessary for the pursuit of the activity in question.
- 23 The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case C-355/98, cited above, paragraph 37).
- 24 By requiring all persons to fulfil the same conditions for obtaining prior administrative authorisation required for the pursuit, in Italy, of the activity of transport consultant, Law No 264/91 makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established (see, to that effect, C-355/98, cited above, paragraph 38).



- 25 Thirdly, it must be observed that, in its application, the Commission did not argue that the existence of minimum and maximum fees in respect of the pursuit of the activity of transport consultant entailed, as such, restrictions on the freedom to provide services, but merely claimed that, by providing, in Article 8 of Law No 264/91, for the fixing of such fees, the Italian Republic failed to take account of similar conditions existing in the same field in the other Member States.
- 26 It must however be observed that the Commission has not made clear how and to what extent a service provider, even if he is required to comply with minimum and maximum fees within the Member State in which he is established, is subject to restrictions to the freedom to provide services within the meaning of Article 59 of the Treaty by reason of the fact that, in another Member State, in which he pursues his activity temporarily or occasionally, he is likewise required to comply with similar fees.
- 27 In proceedings under Article 226 EC for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled (see, in particular, Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraph 102).
- 28 In those circumstances, it must be concluded that the complaint alleging infringement of Article 59 of the Treaty is well founded so far as it relates only to Articles 3(1)(a), 4 and 9(4) of Law No 264/91. On the other hand, it must be rejected so far as it concerns Article 8 of that Law.
- 29 It follows from all the foregoing considerations that, by subjecting, in the context of Law No 264/91, the pursuit of the activity of transport consultant to

possession of an administrative authorisation, failing which liability to penalties is incurred and by making its issue subject to the condition that nationals of other Member States reside in Italy and lodge a security, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty.

## Costs

- 30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, by subjecting, in the context of Law No 264 *Disciplina dell'attività di consulenza per la circolazione dei mezzi di trasporto* (Law

No 264 on the activity of transport consultancy), of 8 August 1991, the pursuit of the activity of transport consultant to possession of an administrative authorisation, failing which liability to penalties is incurred, and by making its issue subject to the condition that nationals of other Member States reside in Italy and lodge a security, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC);

2. Orders the Italian Republic to pay the costs.

Gulmann	Skouris	
Schintgen	Colneric	Cunha Rodrigues

Delivered in open court in Luxembourg on 29 May 2001.

R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber