# OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 December 1990 *

*Mr President,*
*Members of the Court,*

## A — Facts

1. The three proceedings for Treaty infringements brought against France, Greece and Italy before the Court today have not been joined, but they are so closely related from a factual point of view that I have taken the liberty of dealing with them in the same Opinion.

2. It is alleged against all three Member States that they have infringed Article 59 of the EEC Treaty, and in all three cases the facts underlying that claim are essentially the same. The allegation is that the activities of tourist guides travelling with groups of tourists from another Member State are being impeded.

3. There has not so far been any harmonization at Community level of these matters, or indeed of the activities of tourist guides in general. In the first place, such activities do not fall within the terms of Directive 89/48/EEC 'on a general system for the recognition of higher-education diplomas awarded on completion of professional education of at least three years' duration,' [1] since the States in which they are regulated lay down less strict requirements for the acquisition of a licence than are provided for in that Directive (cf. Article 1(a) and Article 2). As for Directive 75/368 'on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities,' [2] the activities of tourist guides are excluded from the scope of its provisions (cf. Article 2(5)).

4. In the three defendant Member States there are legal provisions governing the activities of tourist guides, whereas in a number of other Member States those activities are not regulated.

5. The concept of tourist guide (in France: 'guide-interprète') is defined in different terms in the relevant national legislation. I see no substantial differences, however. The activity is described in each case as involving conducted tours and commentary upon specific objects or localities. The French definition is essentially linked to the places where the activity is carried on (public thoroughfares, museums, historical monuments, public transport), while the Greek definition focuses on the objects viewed or commented upon. The Italian definition contains both

* Original language: German.

1 — Council Directive of 21 December 1988 (OJ 1989 L 19, p. 16).

2 — Council Directive of 16 June 1975 (OJ 1975 L 167, p. 22).

aspects. However, all the definitions are clearly aimed at including conducted tours and commentary in relation to virtually all attractions likely to be of interest to tourists, irrespective of whether such interest is artistic, architectural, historical or otherwise cultural, so that only visits to places having merely entertainment value probably do not fall within the definitions.

6. In those States only persons in possession of a licence (attested by a special document) may carry on the activity of tourist guide as so defined; in France that restriction only applies in those departments and municipalities listed in a decree of the Minister responsible for tourism.

7. In all three cases the grant of that licence requires a specific qualification normally obtained by success in an examination. At the hearing we received additional information on the conduct and content of those examinations. It appears that in all three cases they are held in the language of the relevant country, except in France, where half of the thirty-minute oral examination is conducted in the candidate's mother tongue. In addition, knowledge of at least one foreign language must be demonstrated. As to factual knowledge, in France knowledge of the cultural heritage of that country, its history and its economy are examined; the examination also tests the candidate's ability to conduct guided tours. As far as Greece is concerned, I can say only that the examination is taken at the Greek school for tourist guides, so that its content must be determined by what was taught at the school during the preceding session. In Italy, the examination requires basic knowledge of the works of art, monuments, archaeological remains, places of natural beauty or in any event the tourist facilities of the place in which the person concerned carries on his activity.

8. As I have already stated, the Commission's claim is not directed against those rules as a whole, but only against the fact that a tourist guide's licence is required for the performance of services by such persons travelling with a closed group of tourists from another Member State.

9. Moreover, the claim relates only to restrictions on the right to act as a tourist guide in places other than museums or historical monuments.

10. For further details of the factual background reference may be made to the three reports for the hearing. I shall turn now to a legal assessment of the case, although I shall revert to certain specific matters of detail.

## B — Opinion

11. *1.* In order to ascertain whether the applications are well-founded — it is no longer necessary to discuss the direct effect of the freedom guaranteed in this connection by the Treaty.[3] I must first examine the question whether the activity in issue constitutes a service within the meaning of Article 59 et seq. of the EEC Treaty, so as to fall within the material scope of those provisions.

12. *1.* We may begin by assuming that the activity — conducting tourists and providing commentary to them on objects of all kinds or landscapes — by its nature constitutes a service within the meaning of Article 60(1) of the EEC Treaty. A service is provided for remuneration[4] which does not fall within the scope of the free movement of goods or capital or the free movement of persons (freedom of movement for workers or freedom of establishment).

13. *2.* It is also clear that the service is not provided on a purely national basis, so as to remove it from the scope of Article 59 et seq. It is common ground that in performing the service the tour operator, either personally or through an employee[5] or self-employed person, temporarily carries on his activity in a different State from the one in which he is resident. The service provided by the operator to the tourists is performed and received in the host State, as is any service provided to the tourist by a self-employed person on behalf of the tour operator, since the situation is that the tourists are in the host country in accordance with the intention of the operator in order to receive the service. Both services Nefico — those of the operator and where appropriate those of the self-employed person working for him correspond to the situation mentioned in Article 60(3), so that there is no reason not to treat them as falling under Article 59 et seq. of the EEC Treaty.

14. *3.* The Greek Government, however, considers that approach to be incorrect, and takes the view that the wording of the first paragraph of Article 59 of the EEC Treaty is not complied with if the provider of the service and its recipient are resident in the same State.

15. The Greek Government is right to say that the wording of the first paragraph of Article 59 of the EEC Treaty proceeds on the assumption that the provider of the service and its recipient are resident in different Member States and that that condition is not normally fulfilled in the cases arising in the present proceedings.

16. However, I share the Commission's view that these cases do come within the purview of Articles 59 et seq. of the EEC Treaty on freedom to provide services in the

3 — Judgment in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299: that judgment primarily deals with direct effect in connection with the prohibition of discrimination: the judgment in Joined Cases 110 and 111/78 *Ministère public* v *Van Wesemael* [1979] ECR 35, at paragraphs 19 et seq. and 24 et seq. goes further.

4 — The fact that the three applications only relate to such remunerated services is evident in each case from the terms of the application which refer expressly to 'services' and thus in that respect to Article 60.

5 — See the judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco* v *EVI* [1982] ECR 223, at paragraph 8.

same way as cases where the provider of the service (alone) goes to the State in which the recipient is resident (cf. the first paragraph of Article 59 in conjunction with the third paragraph of Article 60 of the EEC Treaty), the recipient goes to the State where the person providing the service is established,[6] or the service itself is simply provided on a transfrontier basis.[7] On closer examination the problem concerns not only those situations in which, as in this case, the provider and recipient of the service travel at the same time from the State where both are established to the State in which the service is to be performed and the recipient is to receive it. The problem also arises even without any simultaneous change of location by the recipient whenever the provider and the recipient of the service are resident in the same Member State.[8]

17. In my opinion in the Cowan case[9] I pointed out that delimitation of the substantive scope of Articles 59 et seq. of the EEC Treaty must be oriented towards the model of a common market in which all economic activities within the Community are freed from all restrictions on grounds of nationality or residence. In the context of the activities which are distinguished from services in the first paragraph of Article 60 and form the subject matter of other freedoms secured by the Treaty, the freedom to provide services at all events includes the transnational exchange of 'products' which are not 'goods'. As is apparent from a comparison of the first paragraph of Article 59 and the third paragraph of Article 60, the authors of the Treaty regarded as particularly problematic, and therefore in need of express regulation, the case in which the person providing the service performs his activity in the State in which the recipient is resident. In such a situation the interference with the interests of the host State appeared to be particularly manifest:

(i) the person providing the service physically enters the territory of the host State, so that on this ground alone the territorial interests of the State are in issue, at any rate when, as in most cases, the person providing the service is not a national of the host State;

(ii) the service is performed by a person who is subject to less stringent control than persons resident in the territory of the host state;

(iii) where there are provisions of the kind referred to in the third paragraph of Article 60 for the protection of consumers resident in the host State (recipients of the service), that protection could be jeopardized;

(iv) persons offering the service concerned who are resident in the host State are exposed to competition from undertakings from other Member States.

18. Articles 59 et seq. secure the freedom to provide services in spite of these potential

6 — See the judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377 and in Case 186/87 *Cowan* v *Tresor Public* [1989] ECR 195

7 — See judgment in Case 155/73 *Procureur du Roi* v *Sacchi* [1974] ECR 409 at paragraph 6, judgment in Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833 at paragraph 8, judgment in Case 62/79 *Coditel* v *Cine Vog Films and Others* [1980] ECR 881, judgment in Case 262/81 *Coditel* v *Cine Vog Films* [1982] ECR 3381 and judgment in Case 252/85 *Bond van Adverteerders* v *Netherlands* [1988] ECR 2085, see also the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755

8 — Example: a French building company builds a house in Italy for a client resident in France

9 — Loc. cit., p. 205

interests of the host State. In comparison with that situation the interests of the host country are jeopardized less when the person providing a service and its recipient are resident in the same State. The interest in protecting consumers resident in the host State is not affected when provider and recipient of the service are resident in the same — other — Member State.[10] As regards the specific case in issue here, the competition between tourist guides from the host State and the tour operator is less keen than in the case described above, since the operator's offer is generally not aimed at persons resident in the host State. Thus there is normally competition with tourist guides from the host State only with regard to tourists from the State where the person providing the service is established, and in no way in regard to tourists from the host State.

19. In the light of these circumstances I therefore consider it permissible to reason *a fortiori* and conclude that the present case falls within the terms of Articles 59 et seq. That conclusion is also made necessary by the objective underlying the freedom to provide services; that freedom might otherwise not be able to play its part alongside the other freedoms, and a *lacuna* would arise which was clearly not intended by the authors of the Treaty.

20. The correctness of this viewpoint may be illustrated by a simple example. Assuming that after advertising a French tour company had attracted tourists from Belgium or Luxembourg as customers, in addition to tourists from France, for a journey to Greece or Italy. I see no reason why the services of a tourist guide performed in Greece or in Italy for the Belgian or Luxembourg customers should fall within Article 59 (since the provider of the service and its recipient are resident in different Member States), but those provided to the French customers should not.

21. In the result I am of the view that the service in question here falls under Article 59 of the EEC Treaty.

22. *II.* The next question to be examined is whether the legal provisions of the defendant Member States in the case at issue contain a restriction covered by Article 59 et seq. of the EEC Treaty, for which justification must then be advanced in order for them to subsist in the light of those provisions.

23 *1.* As a simple matter of fact, I am in no doubt that tourist guide services are impeded by the contested legal provisions. It is not disputed by the defendant Member States that within the area of application of those provisions tour operators are not able to conduct tours with their own staff (as defined above), where those persons do not have the tourist guide licence of the State in question, but are obliged to engage local tourist guides who do have such a licence. Conversely, tourists are not able to receive the services offered by the accompanying tourist guide even where they prefer them to the services of the local tourist guide. Nor may those inconveniences be circum-

10 — However, the interests of persons resident in the host State may be concerned in other respects, for example in the event of building works by the provider of the service.

vented — as in other cases — [11] by any other arrangements, since the places and things in question are unique and may only be visited in the State in which they are located. The impediment is therefore absolute in nature.

24. Whether the services of the tour operator are rendered more expensive as a result of the need to have recourse to the services of local tourist guides, which is denied by the Italian Government, is irrelevant in this connection, since the operator himself wishes to provide the service, using exclusively his own staff, but is prevented from doing so. [12]

25. The provision of services to the operator by a self-employed tourist guide is also impeded. The effect of the contested regulations is that he will be able to conduct fewer visits (and therefore his remuneration will be smaller) or — as is more likely particularly in the case of Greece and Italy — he will not even be engaged in the first place.

11 — This is to say, with regard to a number of services the recipient of the service may travel to the State where the person providing the service is established, if the latter is impeded in carrying on his activity in the State in which the recipient of the service is resident

12 — See the judgment of 27 March 1990 in Case 113/89 *Rush Portuguesa* v *Office national d'immigration* [1990] ECR I-1417, at paragraph 12 *in fine*.

26. *2.* The question is, then, whether that impediment is relevant in the context of Article 59 of the EEC Treaty.

27. In accordance with the third paragraph of Article 60 and Article 65, national provisions must be applied without discrimination to providers of services within the meaning of Article 59. That means not only overt discrimination as between nationals or persons resident in that State and persons not fulfilling those conditions, but also forms of covert discrimination which, although appearing to be based on neutral criteria, in practice lead to the same result. [13]

28. Conversely, that prohibition of discrimination does not mean that all national legislation applicable to nationals of the host State, which normally applies to the permanent activities of undertakings established there, may be similarly applied in its entirety to the temporary activities of undertakings established in other Member States. [14]

29. As the Commission rightly points out, it follows from the cases cited on this last point, that any provision, even a non-discriminatory one, which in fact or in law impedes the freedom to provide services

13 — See judgment in *Seco* v *EVI*, cited above, at paragraph 8 *in fine*; the same consideration clearly underlies the judgment in *Rush Portuguesa* cited above, particularly at paragraphs 11 and 12 We are not here concerned with discrimination justified under Article 56 in conjunction with Article 66

14 — Judgment in Case 279/80 *Webb* [1981] ECR 3305, at paragraph 16, judgment of 4 December 1986 in Case 205/84 *Commission* v *Germany* (freedom to provide insurance services) [1986] ECR 3755, at paragraph 26, see to that effect also the judgment in the *Van Wesemael* case, cited above

may constitute an infringement of Article 59 of the EEC Treaty,[15] and the question whether the hindrance is compatible with Article 59 of the EEC Treaty in a given case must be determined on the basis of the criteria developed in the case-law of the Court.

30. Accordingly, as a matter of principle any impediment, in fact or in law, to the provision of services within the meaning of Article 59 may fall under the prohibition laid down in that provision. That means that the impediments which have been found to exist are in any event relevant for the purposes of Article 59, without it being necessary to find discrimination.

31. *3.* The examination of the infringement, to which I must now proceed, may be carried out both from the point of view of discrimination and from the point of view that the legislation is not compatible with Article 59 of the EEC Treaty even in the absence of any such discrimination.

32. *(a)* Since the latter point of view is the broader, I shall start with it. The Court has held in this connection that, regard being had to the particular nature of certain services, specific requirements imposed on the persons providing the services may be considered compatible with the Treaty where they result from the application of legislation governing such activities. However, the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and are imposed on all persons or undertakings operating in the State, and only in so far as that interest is not safeguarded by legal provisions to which the provider of the service is subject in the Member State where he is established.[16]

33. According to the judgments in *Commission* v *Germany* and *Van Wesemael* the requirements must also be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.

34. *(i)* The French and Italian Governments submit that under the case-law of the Court there can be no infringement of Article 59 in a case where the host State takes into consideration qualifications acquired in other Member States. Where a host State requires a qualification for a particular activity that State is obliged to take into consideration qualifications acquired in other Member States and to assess their equivalence; it does not, however, have to allow providers of services to carry on their activities if they have no (equivalent) qualification.

35. I do not share this view. As is apparent from what I have set out above, the host country, quite apart from taking into consideration qualifications acquired abroad, must first of all demonstrate that the restriction in question is imposed on overriding grounds of public interest. Thus the Member State concerned must demon-

15 — See the wording of the judgment in Case 39/75 *Coenen* v *Sociaal-Economische Raad* [1975] ECR 1547, at paragraph 6 *in fine*: '(requirements) ... which may prevent or otherwise obstruct the activities of the person providing the service'.

16 — See the judgment in Case 205/84 *Commission* v *Germany*, cited above, at paragraph 27; judgment in Case 279/80 *Webb*, cited above, at paragraph 17; and the *Van Wesemael* judgment, cited above, at paragraph 27 et seq.

strate that it *is in all respects* necessary in order to protect that interest. The requirement for Member States to take into consideration the fact that the interest to be protected 'is already protected by the rules of the State of establishment' in fact represents only part of that comprehensive assessment of necessity: a restriction may prove not to be necessary where the rules of the State of establishment sufficiently protect the interest in question. Where there are no such rules (as in many cases covered by the present proceedings), that does not necessarily mean that the restriction is necessary. It must in each case be examined whether 'the same result cannot be obtained by less restrictive rules' (I would add: even by rules which provide for no restrictions). The point is in my view particularly clearly brought out in the judgment in *Commission* v *Germany*. [17]

36. After observing that the host State must have regard to the fact that the general interest is 'safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment', the Court goes on to state in paragraph 27:

'*In addition*, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.' [18]

37. In paragraph 29 of that judgment the Court summarizes the conditions which the requirements laid down by the host State must satisfy. It states:

'It follows that those requirements may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment *and* that the same result cannot be obtained by less restrictive rules.' [19]

38. It is clear from that wording and from the fact that the Court examined the various points separately [20] that the 'necessity of the restriction' must be assessed *from every point of view.*

39. Unlike the defendant Member States, I can see no conflict between this conclusion and the Commission's proposal 'for a Council Directive on a second general system for the recognition of professional education and training which complements Directive 89/48/EEC'. [21] Under that proposal (Article 5) the Member States may not in the cases covered — including the activities of tourist guides, where that occupation is regulated in individual Member States (see Article 2) — refuse to authorize the pursuit of the regulated occupation if the applicant holds a diploma acquired in another Member State or has two years' occupational experience.

17 — Case 205/84, cited above

18 — Emphasis added.

19 — Emphasis added.

20 — See *Commission* v *Germany* at paragraphs 30 et seq., 34 et seq.; 42 et seq.

21 — OJ 1989 C 263, p. 1.

40. However, that is not to say that permission to carry on the activity may be refused where that would infringe Article 59. If the proposed text had already been adopted it would have to be interpreted to that effect, regard being had to the fundamental freedom guaranteed in Article 59. Moreover, I do not find the argument put forward by the defendant Member States on this point convincing, since the text relied on forms part of secondary Community law and in addition is only a proposal, so that even if there were truly a contradiction it could not affect the application of Article 59.

41. *(ii)* As is already clear from the extracts quoted, the test for determining whether a restriction is justified is the existence of 'imperative reasons relating to the public interest'.

42. In this connection the defendant Member States rely on two grounds:

(i) the conservation and proper appreciation of historical, artistic and cultural resources or — according to the French government — the widest possible dissemination of knowledge about the cultural and artistic heritage of the country;

and (in particular Italy)

(ii) consumer protection.

43. As far as the precise scope of these interests and their interrelationship is concerned, one common factor and one difference may be observed. It is common to both interests that they are fostered by the provision to tourists of the fullest and most relevant information possible, and in the converse situation those interests are adversely affected. The difference is that consumer protection seeks to safeguard the interests of every individual consumer, whilst in relation to the proper appreciation of the resources mentioned above the collective effect of the information provided is the determining factor. The intangible value of such a place or thing is enhanced if as many people as possible have the most accurate and — taking into account the purpose and the possibilities of a tourist visit — the fullest knowledge possible. [22] Massive dissemination of incorrect information would have a negative effect on that value.

44. Consumer protection may without any doubt constitute an imperative public interest. As to the proper appreciation of the resources in question, it is certainly true that such an interest may be established with regard to certain places or things of historical, artistic or cultural value. The exact scope of this seems to me to be questionable, and I am not convinced that everything that falls under the definition of tourist guide activity in the legal provisions of the three Member States also comes within an overriding public interest. The matter does not in the end turn on that point, however, as will become clear from what I have to say below.

45. *(iii)* At this juncture the question to be examined is whether the restrictions challenged by the Commission may be justified on one of the two grounds put forward, or indeed on both of them.

22 — For this reason I also see a difference between 'proper appreciation' and the 'widest possible dissemination of knowledge', put forward as an interest by the French Government.

46. (1) I should like first of all to relate the Commission's line of argument — which recognizes the objectives pursued but does not approve of the means used in this case (licence requirement) — to the judgments cited. As I have said, under that case-law a Member State is allowed to take only such measures restrictive of the freedom to provide services as are *necessary* in the light of the objectives pursued. However, the Commission challenges the disputed measures not only on the basis it describes as the criterion of 'necessity'; it also considers that the measures are ineffective in protecting one of the two interests[23] put forward — in other words they are *not appropriate*. There can be no doubt that this, too, is a significant criterion. A measure which is inappropriate for obtaining the objective pursued can never be deemed to be 'necessary'. If the suitability of a measure for that purpose is established, it must then be determined whether the Member State could have safeguarded the interest in question equally well by a less stringent measure or indeed whether it is adequately safeguarded without any regulation. Conversely, such examination may be dispensed with if the measure is deemed from the outset not to be necessary because it is not appropriate.

47. Accordingly, the arguments put forward by the Commission and the defendant Member States on the two grounds of justification — consumer protection and proper appreciation of the resources in question — cannot be classified under one or the other ground without the risk of distortion. I shall therefore deal with them together in the following sections in accordance with the criteria of *suitability* and *necessity* (in the wider sense).

48. (2) The Commission first disputes the appropriateness of the measures, in relation primarily to the concern for the proper appreciation of the cultural, historical and artistic heritage. The Commission takes the view that the dissemination of information concerning such resources is already ensured to a large extent by the media. Freedom of the press and of expression means that this information is not subject to any effective control. Such information therefore has at least as great an impact on the appreciation of such resources as information provided by tourist guides.

49. The defendant Member States reply to that point with two main arguments.

50. (a) The first argument, put forward by the Greek Government, is that Greece regulates the printed matter disseminated in its territory and with regard to printed matter disseminated abroad takes appropriate measures with the sole concern of ensuring that the historical and cultural heritage of the country is correctly represented. With regard to publicity there is a significant difference between the supply of written information and the oral information in question here. Tourist guides give their information within a closed group of tourists. It is therefore less easy to control than the views about the country freely presented by an author of printed material.

23 — Namely the proper appreciation of the resources in question.

51. I cannot but share the Commission's view on this point. As regards first of all the proper appreciation of the artistic, historical and cultural heritage, a comprehensive view must be taken, as I have already said. The idea which the public has of such resources, on which their appreciation depends, is to a large extent influenced by printed matter, and also by radio and television broadcasts. I cannot imagine that Greece (or any other of the defendant Member States) can effectively control *within their own borders* all these sources of information without unjustified censorship. As far as the products of *foreign* publishing houses or radio and television stations are concerned, there is no jurisdiction. And even influence without any legal compulsion does not seem to me to be always possible, either in the case of Europeans or in the case of interested persons from other countries, for example the United States, whose impression of the resources in question is just as significant as that of Europeans in relation to the proper appreciation of those resources.

52. All information from all available sources performs essentially the same function, namely that of *informing* interested persons about the places and things in question.

53. Having regard to this aspect alone we may, I think, assume that the measures in question are also inappropriate for the purposes of consumer protection, since the consumer cannot in the end be effectively protected from incorrect information; on the contrary, the multiplicity of available information permits comparison of different sources and thus protects the consumer as far as possible.

54. (b) At this point the French and Italian Governments argue that information conveyed by a tourist guide has a greater impact on the recipient than information disseminated by the media. Tourists, it is said, are strongly influenced by the service provided by the tourist guide, because of their differing cultural origins and the normally limited period of the visit. Moreover, tourist information disseminated in printed matter is subjected to the reader's great critical faculty. Since the attitude of a person being led in a closed tourist group is more passive than that of the reader of written information, it is necessary for tourist guides to be trained.

55. I do not think that this argument carries conviction, at least as regards the proper appreciation of artistic, historical and cultural heritage.

56. It must first of all be borne in mind that a much wider circle of persons is reached through the media than in individual tours. Whether the public forms a false idea of a particular place or thing of artistic, historical or cultural interest is therefore determined from a numerical point of view much more than by information disseminated outside such tours.

57. Moreover, I seriously doubt whether the intangible value of such places and things can be affected by visitors who follow the visit 'passively' and 'uncritically', irrespective of whether the information is correct or not. Such visitors cannot be assumed to

show an interest going beyond mere curiosity in such a visit, so that the spoken information given by the tourist guide will be forgotten after a very short time. A really interested and critical visitor will obtain written information to assist his memory (and will judge what he hears against that material). The requirement imposed by the defendant Member States has no effect on any of these matters.

58. As far as consumer protection is concerned, it must be acknowledged that these considerations are not relevant to the same extent, since it is the individual consumer that must be taken into account, not the public as a whole. In that connection it is not impossible that a consumer on a conducted tour may receive incorrect information which detracts from the value of the service paid for by him, and that he never subsequently discovers the true facts so as to redress the situation.

59. It may therefore be concluded that the measures challenged by the Commission are inappropriate in relation to the objective of ensuing proper appreciation of artistic, historical and cultural heritage. In regard to consumer protection their appropriateness is also questionable, although it has not been convincingly refuted by the Commission in all respects. As I will show, however, nothing in the end turns on this point.

60. (3) In my opinion the Commission rightly contests the *necessity* of the restrictions in question.

61. In the Commission's view, we are dealing with a closed group: the tourist guide representing the tour company and the tourists (as consumers) travel together from the Member State in which the tour company is established in order respectively to provide and receive the service in another Member State. In those circumstances the business reputation of the tour company in conjunction with the competition on that market affords sufficient protection for the consumer.

62 (a) On this point it seems appropriate to make a preliminary observation relating to the nature and content of the service. As I have already pointed out, this case concerns solely the provision of information, indeed information of a kind intended to enrich tourists culturally in their leisure time. For the tourist as consumer defective information has no far-reaching consequences, and in particular does not seriously injure him physically, psychologically or financially. As to the proper appreciation of the resources in question, it should be borne in mind that we are not here concerned with the provision of academic education, much less with scientific research. Furthermore, the detriment incurred can in no way be said to be irreparable, either for the consumer as an individual or for the cultural resource in question. As soon as the tourist discovers the true facts from information available to him, the defect is corrected.

63. It may therefore be said that the danger for the interests involved is slight and any damage is not irreversible, and that distinguishes this case from cases of medical, legal or building services to which in particular the Italian Government has referred. Whether the protection of certain interests can be left to market forces, thereby allowing the fundamental right of freedom of services to take priority over restrictive provisions, cannot be determined independently of such considerations. If that were not so, the Member States could at will impose licence requirements (the licence being obtained by success in an examination), even for quite simple and innocuous activities in order to impede the freedom to provide services on grounds, say, of 'consumer protection'.

64. That seems to me to be the approach taken by the Court in examining whether restrictions on the freedom to provide services were justified when it has assessed the actual threats to the interests in question; in doing so it did not rely on abstract concepts (such as 'consumer protection') but had regard to the actual circumstances.

65. Thus in the *Webb* judgment[24] it was held that:

'It must be noted in this respect that the provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned. That is evident, moreover, in the legislation of some of the Member States in this matter, which is designed first to eliminate possible abuse and secondly to restrict the scope of such activities or even prohibit them altogether.'

66. In *Commission* v *Germany* it was stated:[25]

'... the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer both as a policy-holder and as an insured person. This is so in particular because of the specific nature of the service provided by the insurer, which is linked to future events, the occurrence of which, or at least the timing of which, is uncertain at the time when the contract is concluded. An insured person who does not obtain payment under a policy following an event giving rise to a claim may find himself in a very precarious position. Similarly, it is as a rule very difficult for a person seeking insurance to judge whether the likely future development of the insurer's financial position and the terms of the contract, usually imposed by the insurer, offer him sufficient guarantees that he will receive payment under the policy if a claimable event occurs.

It must also be borne in mind ... that in certain fields insurance has become a mass phenomenon. Contracts are concluded by such enormous numbers of policy-holders that the protection of the interests of insured persons and injured third parties affects virtually the whole population.'

24 — Loc. cit., at paragraph 18.

25 — Loc. cit., at paragraphs 30 and 31.

67. (b) Accordingly, I think the Commission is correct to say that market pressure on tour operators (which has an indirect effect on the choice and supervision of the tourist guides employed or engaged) affords sufficient guarantees for consumer protection and the proper appreciation of cultural heritage.

68. The customers of tour operators entrust the latter with the arrangement of their holidays, that is to say of a considerable part of their free time — the best time of the year, as the slogan of a well-known operator has described it. The service provided by the operator is not limited from the point of view of the traveller to the technical details of the journey, but extends also to providing satisfaction in this — compared with the rest of the year — brief period. If that is not provided, there is nothing to stop the traveller from choosing a different operator for the next tour. Customer fidelity to a brand strikes me as a difficult concept here. Moreover, the operator has a reputation to uphold, which may not be of much significance in retaining existing customers but is important in extending his clientele. Since the correctness of information given at the destination may be checked at any time, deficiencies in this respect may have a negative effect on the development of a circle of customers as described above. In that connection I should like to make two observations.

69. In the first place the examination required by the defendant Member States can only ensure the general reliability and possibly the specific knowledge of tourist guides, but not the correctness of individual items of information given; that can only be done by means of permanent supervision. Thus there can be no reliable system of protection against *systematically false information*. I even take the view that such systematic deficiencies can be more easily avoided with the help of the market mechanisms referred to than if those mechanisms are rendered inoperative by the restrictions challenged by the Commission.

70. Moreover, as regards the problem of *incorrect items of information*, it seems obvious to me that every conducted tour must be prepared by the tourist guide, at least on the first occasions in the case of repeated tours. That preparation must be carried out — I do not know of any other way — by drawing on generally accessible sources. The examination requirement can only have a qualified impact here, and none at all if the examinations are of a general nature, as in France and Greece. Here too, market forces in the tour operator's State of establishment afford at least equivalent guarantees.

71 (c) In addition, it may be thought that the tourist is protected as a consumer by the choice available to him on the spot. Local guides who have a licence are probably identifiable as such. Should the tourist wish to have recourse to such a guide, he may do so at any time; the tour operator cannot in any event compel the tourist to avail himself of the services (already paid for by him) of the tourist guide acting on behalf of the operator.

72. It must therefore be concluded that, in so far as the defendant Member States

permit tourist guides to carry on their activities only on the basis of a licence obtained by success in an examination, that is not necessary in order to achieve the objectives put forward, at least with regard to the tourists in question in these proceedings.

73. Thus it is not necessary to address the question whether the contents of the examination are such that its necessity *in that form* may be denied. As the Commission rightly points out, that is probably true where the examination is held wholly or to a considerable extent in another language or knowledge is examined of languages other than the language of the tourist guide which he uses when accompanying groups of tourists, normally the language of the country in which the operator is established. As far as the language of the host country is concerned the manner in which the operator establishes contacts on the spot should be left to him. That need not necessarily be through the intermediary of the tourist guide.

74. Nor do I need to go into the fact that Greece clearly does not recognize tourist guide licences issued by other States, a matter which would also fall to be examined under the heading of necessity.

75. *(b)* The question may also remain open whether the requirement to take the examination in a language other than that of the State of establishment constitutes *indirect discrimination*, in which regard the notion of equal treatment would have to be weighed against the fact that the Member State concerned could not be expected to conduct examinations in all the official languages of the Community.

76. *III.* Before formulating a proposal on the basis of the foregoing, I must briefly deal with the fact that the Commission seeks judgment against the three defendant Member States only to the extent to which they impede the activities of tourist guides at places other than museums or historical monuments.

77. If I have correctly understood the arguments at the hearing, this qualification arises from the fact that at one point there was a possibility of a compromise between the Commission and the three defendant Member States. If that compromise had been reached the Commission would have accepted the contested restriction on the freedom to provide services in regard to museums and historical monuments but not otherwise. That does not explain why freedom to provide services should be thought to be affected in an unacceptable manner only in the latter case. On the basis of the considerations set out above the services of a tourist guide in the case of museums or historical monuments may not be treated differently from the other services mentioned in the application. However, we are, of course, precluded from going beyond the submissions put before us.

## C — Conclusion

78. For all these reasons I can only propose that the Commission's applications in Cases C-154/89, C-180/89 and C-198/89 be upheld and the three defendant States ordered to pay the costs as requested in the applications.