

OPINION OF ADVOCATE GENERAL LENZ

delivered on 4 March 1997 \*

A — Facts

1. This reference for a preliminary ruling from the *Simvoulitis Epikrateias* (Council of State), Athens, concerns a question relating to a provision of Greek law regulating legal relationships between tourist guides and tourist organizations. In the main action the *Sindesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* (Association of Tourist and Travel Agencies in Greece, 'the plaintiff') seeks the annulment of an order of the Greek Minister for Labour declaring enforceable a decision of the Second Instance Administrative Arbitration Tribunal, Athens. The latter had upheld a decision of the First Instance Administrative Arbitration Tribunal, Athens, determining, pursuant to Article 37 of Law No 1545/1985, a collective labour dispute between, on the one hand, the plaintiff and the *Enosis Efopliston Epivatikon Plion* (Union of Owners of Passenger Vessels) and, on the other, the *Somatio Diplomatouhon Xenagon* (Association of Certified Tourist Guides). The dispute concerned the working and payment conditions of tourist guides.

2. Article 37 of Law No 1545/1985 provides that 'tourist guides who possess the said licence to pursue the profession of guide and who have entered into agreements with tourist or travel agencies, with members of the Union of Owners of Passenger Vessels and with tourist agencies abroad directly or with their branch offices in Greece, in order to run tourist programmes organized by the latter, are bound by an employment relationship and are subject to the relevant provisions of Greek employment legislation as regards their relationship with their employers.'

3. The abovementioned licence to pursue the profession of tourist guide has once before been the subject of a case before the Court.<sup>1</sup> The question there was whether the Hellenic Republic could make the provision of services by tourist guides accompanying groups of tourists from another Member State subject to the possession of a licence which requires specific training evidenced by a diploma, where those services consist in guiding tourists in places other than museums or historical monuments which may be visited only with a specialized professional

\* Original language: German.

<sup>1</sup> — See the judgment in Case C-198/89 *Commission v Greece* [1991] ECR I-727.

guide. The Court's reply was in the negative because it found that this was a breach of Article 59 of the Treaty.

provide services. It has therefore referred the following question to the Court for a preliminary ruling:

4. The national court points out that, under Article 37, the legal relationship between tourist guides and tourist agencies must be deemed a relationship of employment if the conditions of Article 37 are fulfilled, with the result that the provisions of Greek legislation apply. In this connection the court refers to the preamble to the measure and the aim of the legislature which, according to the national court, was to bring to an end once and for all the long-standing disputes between the parties to the collective agreement.

'Is Article 37 of Law No 1545/1985 which, in the circumstances referred to therein, prescribes a mandatory legal form of employment relationship between the parties — the legal form under which it is usual for the services of tourist guides to be provided in the circumstances described in that article — contrary to Article 59 et seq. of the EEC Treaty? If the answer is in the affirmative, is that provision justified by reasons relating to the general interest in maintaining industrial peace in the sensitive area of the supply of tourist services, in respect of which the Greek State, as a country for which tourism is important, has a reasonable and justifiable interest in intervening by regulation?'

5. The Somateio Diplomatouchon Xenagon (Association of Certified Tourist Guides) and the Panellinia Omospondia Xenagon (Panhellenic Federation of Tourist Guides) joined in the main action as interveners.

#### B — Analysis

6. The question raised by the national court is whether Article 37 of the Greek Law is contrary to Article 59 et seq. of the EC Treaty, which regulates the freedom to

7. As worded, the question asked by the national court is whether Article 37 of Law No 1545/1985 is contrary to Article 59 et seq. of the EC Treaty. This means that the Court is being asked to examine and construe national law. However, under Article 177 of the Treaty the Court has no jurisdiction to give a ruling on the interpretation of

national law or its compatibility with Community law.<sup>2</sup> According to settled case-law, however, the question must be interpreted as meaning that the national court seeks to ascertain whether Article 59 et seq. of the EC Treaty must be construed as precluding the application of a provision — such as that in the present case — which, under the circumstances described above, mandatorily classifies the contractual relationships of tourist guides as contracts of employment.<sup>3</sup>

8. The Commission has mentioned a further point which could entail the inadmissibility of the questions submitted by the national court. In its written observations, the Commission states that it is not clear from the order for reference whether nationals of other Member States are involved in the main action. The Commission is therefore uncertain whether Community law applies at all and whether the interpretation of Community law is necessary for the decision. In principle, the Court has consistently held, it must be left to the national court to decide whether a question relating to Community law is relevant for the solution of the dispute in the main action. Moreover, the question whether Article 37 is compatible with Community law involves the question whether Article 37 is valid and therefore applicable in the main action.<sup>4</sup> The Court has refused to admit requests for a preliminary ruling only in cases where the national court was clearly

abusing the procedure under Article 177.<sup>5</sup> However, there is no manifest abuse of that kind here. On the contrary, it is quite conceivable that the plaintiff in the main action, the Association of Tourist and Travel Agencies in Greece, also represents foreign tourist and travel agencies established in that country. Consequently the national court's questions should not be regarded as inadmissible. Moreover, in its observations the Commission has stated its position on those questions.

9. Another point, mentioned by the interveners and discussed at length during the oral procedure, is whether Article 37 applies to nationals of other Member States at all, and thus whether there is any connection with Community law. In their written observations, the interveners do not take a clear position on this. They state that the provision applies only to qualified tourist guides who are *established* in Greece, while tourist guides from other Member States are not affected. The interveners base their argument on the fact that the contested provision applies only to qualified tourist guides and the qualification in question is not necessary for guides from other Member States who accompany a group to Greece, as the Court found in the earlier judgment. That qualification is only required for guided tours to

2 — See the judgments in Case 16/83 *Prantl* [1984] ECR 1299, paragraph 10; Case 7/75 *Mr and Mrs F* [1975] ECR 679, paragraph 10; and Case 54/72 *FOR v VKS* [1973] ECR 193, paragraph 8.

3 — See the judgments in Case 212/87 *UNILEC* [1988] ECR 5075, paragraph 6 et seq.; Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 15 et seq.; and Case 54/85 *Mirepoix* [1986] ECR 1067, paragraph 6.

4 — See the judgment in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 11 et seq.

5 — See my Opinion in Case C-415/93 *Bosman* [1995] ECR I-4921, I-4930, paragraph 68 et seq., with further references.

museums and particularly important sites. In other words, the interveners conclude from the fact that a qualification is not absolutely essential for foreign tourist guides that Article 37, which applies only to qualified guides, does not apply to foreign guides.

oral procedure, that in very rare cases Article 37 might apply to foreigners. In this connection it should be observed that, with regard to a possible infringement of the fundamental freedoms guaranteed by the Treaty, the scale of any such infringement is irrelevant. Even minor breaches are contrary to Community law.<sup>6</sup>

10. This reasoning cannot be accepted. The fact that guides from other Member States do not need such a qualification does not justify the conclusion that there are no foreign guides who do not possess one. In any case, nationals from other Member States of the Union should not be prohibited from obtaining such a qualification. It is also quite possible that a foreign guide might be interested in obtaining it. A guide can arrange tours throughout Greece and therefore provide a comprehensive service for a tour group only if he possesses that special licence. It is therefore quite conceivable that a qualified guide would have an advantage over any other guide on recruitment because it may be advantageous to the tour operators themselves to employ a guide who can conduct tours throughout Greece. For this reason guides from other Member States may well possess such a qualification, with the result that Article 37 also applies to them.

12. Finally, there is also a connection with Community law in the fact that Article 37 expressly refers to foreign travel agencies or their branch offices, thereby including them in the ambit of that provision.

13. It follows that Community law, specifically Article 59 et seq. of the EC Treaty, may in principle apply here. As to whether the freedom to provide services has in fact been infringed, that is the question now to be examined.

14. Article 59 et seq. of the EC Treaty regulate the freedom to provide services. Under the first paragraph of Article 60, services are considered to be 'services' within the meaning of the Treaty where they are normally

11. As the interveners point out, although it is not the Court's task to interpret national law, the Greek Government itself admitted, in response to a question put to it during the

<sup>6</sup> — See the judgment in Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8.

provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. In accordance with subparagraph (d) of the second paragraph, 'services' include in particular activities of the professions. Under the third paragraph, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

different location for the provision of services, with the result that different types of obstacle can be envisaged.

15. As the Court observed in the judgment in the *Commission v Greece* case, the activities of a tourist guide from a Member State other than Greece who accompanies tourists on an organized tour from that other Member State to Greece may be subject to two distinct sets of legal rules. A tour company may itself employ guides, but it may also engage self-employed guides. In the former case, the tour company provides the service for the tourists through its own guides. In the latter, the service is provided by the guide to the tour company.<sup>7</sup>

16. If Article 37 is considered in terms of the involvement of foreign tourist guides or tour companies, it will be seen that there are various situations each corresponding to a

17. The first situation I should like to mention is the one to which the previous judgment relates. A tourist guide from another Member State comes to Greece with a group of tourists to accompany them on an organized tour there, in the course of his work for a tour company which is also established in a Member State other than Greece. For Article 37 to apply to this situation, the guide must be assumed to possess an appropriate qualification. As the Court has already ruled, a self-employed guide may also engage in such work. In that case, the guide would provide the service to the tourist agency from another Member State in looking after the tour group in Greece. Greece would then be the place where the service was provided. For this purpose it is immaterial if the person providing the service and the recipient of the service are established in the same Member State. The delimitation of the substantive scope of Article 59 et seq. of the EC Treaty must be based on 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

<sup>7</sup> — See the judgment in Case C-198/89, cited in footnote 1, paragraph 5.

of 'products' which are not 'goods'.<sup>8</sup> Consequently Article 59 must apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established.<sup>9</sup>

18. The question here, therefore, relates to a provision of services within the meaning of Article 59 et seq., so that a possible restriction of the freedom to provide services also falls to be considered.

19. In this connection it should be noted that, according to the national court, it is usual for the services of tourist guides to be supplied to tour companies for organized programmes on the basis of a contract of employment. The national court refers to certain criteria which, in the opinion of specialists in labour law and according to the case-law of the Greek courts, are the main characteristics of an employment relationship, for instance the fact that the time and the subject-matter of the service are laid down with binding effect. For this reason the legal form of an employment relationship, laid down as mandatory, is in actual fact the usual means by which the services of tourist guides are provided in the circumstances

described above. The interveners also refer to the relationship of technical, economic and personal dependence which characterizes such contracts for services in the context of organized tours. At the same time, anyone who is engaged simultaneously by more than one employer is deemed to be an employee. The Greek Government also observes that the Greek courts have on several occasions upheld the view that the contractual relationship between guides and tour companies in relation to organized tours constitutes an employment relationship under Greek law.

20. On this point it must be observed that these statements refer to the principles of Greek labour law and the Greek definition of 'employee'. Furthermore, the type of contractual relationship in question is the one which is normally chosen in Greece. However, this does not rule out the possibility that such a contract for services may take a different form in other Member States, thereby constituting a relationship involving the provision of services. Even in Greece a different form, not corresponding to the usual one, is entirely possible. In addition, other services provided under the same conditions — in the oral procedure the plaintiff mentioned interpreters and language teachers as examples — need not always be provided in the framework of an employment relationship. Therefore it cannot be assumed that, in the context of organized tours, the contract for services between the guide and the company must always be deemed to be an employment relationship, particularly as in the previous case the Court expressly stated that, in relation to organized tours, a tourist guide may work either as a self-employed person, that is to say, by way of providing a service, or on the basis of a

<sup>8</sup> — See my Opinion in Case C-154/89 *Commission v France* [1990] ECR I-659, I-666, paragraph 17.

<sup>9</sup> — See the judgment in the *Commission v Greece* case, cited in footnote 1, paragraph 10.

contract of employment. So far as concerns the Greek Government's reference to the fact that the Greek courts have repeatedly reaffirmed that the contracts in question are covered by labour law, it must be observed that, as the statement makes clear, the courts have always arrived at this conclusion after examining individual cases by reference to specific criteria. Consequently it was not certain from the outset whether the contract for services in question constituted an employment relationship.

21. In this connection the Greek Government observes that on practical grounds it is virtually impossible in Greece for a tourist guide to work on a freelance basis. Greece is strewn with important archaeological sites which are widely scattered and not always close to built-up areas or towns. Therefore guides cannot reside at each of these places. Nor do they have the resources for taking tourists to the various sites. Consequently they must work with tour companies and travel agencies. This may be so in the majority of cases. In principle, however, it is possible for a tourist guide to work on a freelance basis in Greece. All the situations to be considered here, moreover, relate to guides working for tour companies in the framework of an organized tour. Here too, it must be open to a guide to conclude a contract for the provision of services. Whether he does so ultimately because of practical considerations is a matter for him to decide. The crucial factor is whether he at least had that possibility.

22. For those reasons the provisions concerning the freedom to provide services apply to the present situation.

23. The next question is whether, in that situation, the guide's freedom to provide services for the tour company is restricted by Article 37. Since under the third paragraph of Article 60 of the Treaty, the services may be provided under the same conditions as are imposed on nationals, all discrimination on grounds of nationality is prohibited. In the present case there is no overt discrimination of that kind because Article 37 does not distinguish according to a guide's nationality.

24. There may also be covert discrimination. This occurs where, although criteria other than nationality are applied, in the final analysis they lead to discrimination against nationals of other Member States.<sup>10</sup>

25. Again, there is no covert discrimination, in this situation at least, as Article 37 does not lay down any distinguishing criteria. On the contrary, it applies to all qualified tourist

<sup>10</sup> — See my Opinion in the *Commission v France* case, cited in footnote 8, paragraph 27.

guides without distinction. For this reason the interveners and the Greek Government consider that there is no infringement here of the freedom to provide services.

to the right of self-employed tourist guides to provide services. Regardless of how the contract is ultimately formulated, it is now classified by Greek law as a contract of employment and it therefore imposes the corresponding obligations on the employer and the employee.

26. Nevertheless, it must be observed that Article 59 of the EC Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>11</sup> As the Commission and the plaintiff rightly observe, Article 37 imposes an absolute restriction on the freedom of tourist guides from other Member States to provide services.<sup>12</sup> The fact that a contract for services concluded by a foreign guide travelling with a group of tourists in Greece is mandatorily classified by Greek labour law as an employment relationship prevents the guide from working on a freelance basis and thereby denies him the opportunity to provide a service. The plaintiff points out that even if both parties would prefer a contract for the provision of services, no such contract can be concluded. The plaintiff adds, correctly, that in its previous judgment the Court expressly referred

27. In this connection the Greek Government and the interveners observe that foreign guides may still accompany a group to Greece as freelance tourist guides, as was in fact established and required by the Court in its previous judgment. That is correct. However, it does not alter the fact that a foreign guide who is qualified can work in Greece only in the framework of an employment relationship. This means that his freedom to provide services is totally restricted because he no longer has access to the market for services in Greece.<sup>13</sup>

28. In this first situation account must also be taken of a service of another kind, the provision of which could be restricted, namely the tour company's service to tourists. In the previous case the Court held that the supply of the service by the tour company could be impeded by the fact that it could not engage its own guides from its own country to accompany groups to

11 — See the judgment in Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12.

12 — See the judgments in Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 52; and Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 31. It is regarded as a negation of the freedom to provide services if establishment is required in order to provide a service.

13 — See the judgment in Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 35 et seq.



Greece.<sup>14</sup> The situation is different in the present case, but it may be assumed that the service provided by tour companies is impeded here as well because they are prevented from concluding a contract for the provision of services with the qualified guides who are meant to accompany tour groups. Instead, the contract for services has to be classified as an employment relationship under Greek law.

29. It should also be borne in mind that, as *recipients* of the services of tourist guides, tour companies could claim that there is a restriction on the freedom to provide services. With regard to the rights of recipients of services, the Court has so far ruled that they are free to go to another Member State in order to receive a service there.<sup>15</sup> In the previous judgment the Court also considered whether tourists were adversely affected, which could be relevant only because they were so affected as *recipients* of a service.<sup>16</sup>

30. In this case, although the tour company, as the recipient of services, is not hindered in its freedom of movement for the purpose of receiving services, it cannot receive any services because the provision of services is excluded by Article 37. In that situation the

recipient must be able to rely on its freedom to benefit from the provision of services.

31. In the *Commission v Greece* case it was also found that tourists were adversely affected in that they could not choose between their foreign courier and a Greek guide. This does not appear to be the case here because they can still choose a foreign guide or a Greek guide who is not bound by contract to a tour company.<sup>17</sup> At first sight the form taken by the contract for services, whether it is an employment relationship or a relationship involving the provision of services, would not appear to affect tourists adversely. Should it have such an effect, owing to Greek labour law and the corresponding terms of the contract of employment, it would be for the national court to examine it and assess it accordingly.

32. The second situation I wish to consider is where a foreign tourist guide who is qualified within the meaning of Article 37 concludes a contract in Greece with a Greek or a foreign tour company concerning an organized tour. Here again, the guide provides

14 — See the judgment in the *Commission v Greece* case, cited in footnote 1, paragraph 17.

15 — See the judgments in Case 186/87 *Cowan* [1989] ECR 195, paragraph 15; and Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

16 — See the judgment in the *Commission v Greece* case, cited in footnote 1, paragraph 17. See also the judgment in Case C-18/93 *Corsica Ferries France* [1994] ECR I-1783, paragraph 21.

17 — For example, a member of an organized tour group might well choose to engage a qualified freelance Greek guide to show him round the Acropolis, rather than visit it accompanied by the (qualified) group guide.

the company with a service. There is no difficulty in classifying this as a service within the meaning of Article 59 because the guide supplies the service in a Member State other than that in which he resides. For this purpose, it is immaterial where the tour company is established.

33. Once again, there is no overt discrimination here. However, the plaintiff claims that Article 37 leads to covert discrimination against foreign guides on the ground of their nationality. The Commission also mentions this possibility. Both proceed on the assumption that, because the contract for services takes the form of an employment relationship, it is essential for the guide, as an employee, always to be present at the tour company's place of business or the place where the service is supplied. This means that, to perform such a contract of employment in Greece, the tourist guide must transfer his residence to Greece. However, as only temporary activities in Greece are covered in connection with the freedom to provide services, performance of a contract of employment in Greece under those circumstances would be impossible. For practical reasons it is impossible to set up a residence in Greece for temporary work and at the same time to maintain the principal residence in the home State for the main activity carried on. According to the plaintiff's submissions during the oral procedure, which were not contested, this is all the more difficult in that there is at present no guaranteed monthly salary for tourist guides in Greece. This means that Article 37 leads to discrimination against guides who are not established in Greece. As these are usually nationals of other Member States, Article 37 therefore

gives rise to discrimination on grounds of nationality as well.

34. In my view that argument cannot be accepted. Discrimination in relation to the freedom to provide services is not possible here for the simple reason that all qualified guides are absolutely prohibited from providing services in connection with an organized tour. For this reason the right to provide a service cannot be more restricted for guides from other Member States than it is for Greek guides. The contention of the plaintiff and the Commission relates to the work of guides in the context of a contract for services which has already been mandatorily classified as an employment relationship. The issue in that regard is whether it is possible for foreign guides to work in Greece as employees, that is to say their freedom of movement under Article 48 of the EC Treaty.

35. According to the plaintiff and the Commission, by mandatorily prescribing an employment relationship, Article 37 creates an obstacle to the activities of foreign guides in Greece, also with regard to freedom of movement. This reasoning is not entirely clear. Even in the context of a contract involving the provision of services the guide would be under an obligation to be present when providing the service. In that respect the existence of an employment relationship does not entail an additional burden for foreign guides. Therefore it cannot be said that

in this connection there is discrimination against guides who are not from Greece.

tour company concerned in connection with an organized tour. It is therefore quite impossible for him to provide services.

36. It should be noted, however, that it is for the national court to interpret national rules concerning contracts of employment. As the Court stated in the *Bosman* judgment, rules which directly affect access to the employment market in other Member States are capable of impeding freedom of movement for workers.<sup>18</sup>

37. Although the question from the national court does not mention Article 48, the Court has consistently held that the scope of the Court's examination is determined by the objective of providing the national court with an appropriate answer for the purpose of the application of Community law in the dispute before it.<sup>19</sup> As it is important for the national court in the present case to ascertain whether Article 37 conflicts with a provision of Community law, it is also necessary to consider the possibility of a breach of Article 48.

38. Moreover, in this situation the guide's freedom to provide services is again restricted in that he cannot conclude a contract for the provision of services with the

39. The plaintiff adds that, if the principle stated in the *Bosman* judgment — to the effect that freedom of movement for workers is impeded where access to the employment market in another Member State is obstructed — is applied by analogy, the freedom to provide services is also impeded.<sup>20</sup> It is not entirely clear from the plaintiff's submissions wherein this analogy lies. The issue here is the existence of a restriction on access to the market in services in the other Member State. Such a restriction arises here because it is simply not possible to provide services. However, the plaintiff's proposed analogy is unnecessary. The Court has found, also in relation to the freedom to provide services, that measures which directly affect access to the market in services in other Member States fall within the ambit of Article 59.<sup>21</sup> Consequently it is unnecessary to apply the case-law relating to Article 48 by analogy.

40. If a guide from another Member State concludes a contract with a tour company established in a Member State other than

18 — See the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 103.

19 — See the judgment in Case 70/77 *Simmenthal* [1978] ECR 1453, paragraphs 57 to 58.

20 — See the *Bosman* judgment, cited in footnote 18, paragraph 103.

21 — See the *Alpine Investments* judgment, cited in footnote 13, paragraph 33 et seq.

Greece, the service provided by the company to tourists in Greece could also be a provision of services under Article 59 of the EC Treaty. This is because a tour company which is not established in Greece provides a service across the border. There is no discrimination in relation to this provision of services either, because the rules applying to Greek tour companies are the same as those for foreign ones and no distinction at all is made between them. Once again, however, it must be said that the company's freedom to receive services is restricted in that it cannot conclude a contract for the provision of services with the guide in question. For this reason it may also claim, as the recipient of the guide's service — and as I have already explained in relation to the first type of situation — that there is a restriction of the freedom to provide services. With regard to the question of the conditions under which a tour company established in Greece may rely on the freedom to provide services as against the Greek State, I would refer to my observations concerning the third type of situation.<sup>22</sup>

41. Regarding the adverse effect, if any, for tourists, I refer to my remarks concerning the first type of situation.<sup>23</sup>

42. Finally, I should like to consider the case of a Greek guide who conducts an organized tour in Greece for a foreign tour company. Under Article 37 a contract of employment would also be mandatory for him provided, of course, that he is a qualified guide. Once again, he provides a service falling within Article 59. He supplies the service to the foreign tour company which, in the person of the tourists, crosses the border and goes to Greece in order to receive the service provided.

43. On the question of overt and covert discrimination, I refer to my observations concerning the previous types of situation.<sup>24</sup>

44. With regard to restriction of the freedom to provide services in general, it arises again in this case because the possibility for the guide to provide a service on the basis of Article 59 is limited unconditionally. In that case the tour company from another Member State may, as a recipient, rely on the freedom to provide services.<sup>25</sup> Here the question is whether the Greek guide may also rely on his freedom to provide services as against the Greek State. The Court has consistently held that this possibility exists where the services

22 — See paragraph 44.

23 — See paragraph 17 et seq., particularly paragraph 31.

24 — See paragraphs 23 et seq. and 33 et seq.

25 — See the judgment in the Joined Cases *Luisi and Carbone*, cited in footnote 15, paragraph 16.

are supplied for recipients established in another Member State.<sup>26</sup>

45. This is the case here because the service is supplied to the tour company established in another Member State. The important point, in other words, is that a cross-border factor is involved. Consequently it matters not that the service is supplied in Greece because, so far as the actual provision of the service is concerned, it is the tourists who cross the border on the company's behalf in order to receive the service provided.

46. In this situation, therefore, the guide may rely on his freedom to provide services as against the Greek State.

47. Secondly, it is necessary once again to take into account the service supplied by the tour company to the tourists, which is restricted by the fact that the company cannot choose freely whether to engage guides on the basis of a contract of employment or a contract for the provision of services.

48. In this case likewise I cannot see any inconvenience to the tourists. If, for reasons arising in Greece which are unknown to the Court, there were any question of this, it would be a matter for the national court.

49. Therefore it must be concluded that there are a number of situations and circumstances in which Article 37 imposes a restriction on the freedom of tourist guides or tour companies to provide services.

50. The plaintiff also claims infringement of Article 48. In its opinion, the fact that occasional activities must of necessity be carried out on the basis of a contract of employment means that social security contributions also have to be paid. If, however, work in Greece is only occasional, the guide resides in some other Member State where he has his main occupation. This means that he is also covered by the social security system of that Member State. The contributions paid in Greece do not therefore afford him additional social security protection and are thus incompatible with Article 48. On this point the plaintiff relies on the judgment in the *Kemmler* case,<sup>27</sup> adding that its argument is strengthened by the fact that the employer

26 — See the judgment in the *Alpine Investments* case, cited in footnote 13, paragraph 30, with further references.

27 — See the judgment in Case C-53/95 *Kemmler* [1996] ECR I-703.

must also pay contributions. Without them, the employer would be able to pay the guide a higher salary, which would be necessary in order to enable a foreign guide, who would have to move to Greece in order to work there, to do so.

51. The problem here is not that the guide may have to pay contributions twice, but that his legal relationship is mandatorily classified as an employment relationship. No doubt there are also guides working in Greece voluntarily. Under certain circumstances they also have the problem of paying double social security contributions. However, the problem is not caused by Article 37, because it not only arises in relation to the limited activities of tourist guides, which are regulated by Article 37, but affects every worker who is liable to pay social security contributions in one Member State and is working temporarily in another. Rather, the problem of double contributions is due to other provisions which regulate such payments (and it is questionable whether any such provision exists here). The plaintiff proceeds on the assumption that Article 37 necessarily leads to a case of double payment but, as I have said, that is not so.

52. The plaintiff also claims that freedom of trade and — as appears from the judgments cited<sup>28</sup> — freedom to pursue an occupation

are being infringed. These are fundamental Community rights which are binding not only on the Community institutions but also on the Member States when they implement Community law, that is to say, particularly in transposing framework directives into national law or in the administrative application of regulations.<sup>29</sup> However, the present case concerns national legislation enacted by a Member State, but not intended to implement Community law. For that reason, it cannot be claimed that fundamental Community rights have been infringed here.

53. As we have reached the conclusion that Article 59 et seq. of the Treaty must be interpreted as precluding a provision such as Article 37, the next question is whether an infringement of that kind may be justified. This is the problem raised by the second part of the question submitted by the national court.

54. The Court has consistently held that, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by compelling reasons relating to the public interest

28 — See the judgments in Case 44/79 *Hauer* [1979] ECR 3727, paragraph 31 et seq., and Case 240/83 *ADBHU* [1985] ECR 531, paragraph 9 et seq.

29 — See the judgments in Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraph 8 et seq., and Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

and which apply to all persons and undertakings pursuing an activity in the State of destination. In particular, the restrictions must be objectively necessary to protect the public interest and must not exceed what is necessary to attain that objective.<sup>30</sup>

55. All the parties to the present proceedings refer to that case-law, but reach different conclusions when applying the abovementioned criteria. The national court itself observes that Article 37 is necessary and justified on grounds of public interest in order to ensure industrial peace in the sensitive area of the provision of services in the form of organized tours, which are directly linked to the vital importance of tourism for the Greek economy. The interveners and the Greek Government are of the same opinion, pointing out that Article 37 was introduced to maintain industrial peace and security in the sensitive area of tourist services, which is crucial to the Greek economy. According to the interveners, security relates to the social security of those working in the tourist industry. Similarly, in the oral procedure the Greek Government stated that Article 37 brings tourist guides within the protection of Greek labour law.

56. On the other hand, the Commission and the plaintiffs have reached the conclusion that there is no question of an overriding public interest in the present case.

57. The Court has previously held<sup>31</sup> that compelling grounds of public interest include, for example, the protection of workers,<sup>32</sup> the protection of consumers,<sup>33</sup> the maintenance of the national historical and cultural heritage,<sup>34</sup> the proper appreciation of the artistic, historical and archaeological heritage and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country.<sup>35</sup>

58. The last-mentioned grounds were referred to by the Greek Government in the previous action. Here it also relied on those grounds in the oral procedure, stressing the country's great cultural heritage, but only to explain that for such countries tourism is very important to the national economy. In its written observations it also refers to the

30 — See the judgments in the *Säger* case, cited in footnote 11, paragraph 15; Case C-288/89 *Gouda* [1991] ECR I-4007, paragraph 13 et seq.; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32.

31 — See the judgment in the *Gouda* case, cited in footnote 30, paragraph 14.

32 — See the judgments in Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.

33 — See the judgments in Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 20; and Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 30.

34 — See the judgment in Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 20.

35 — See the judgments in Case C-154/89 *Commission v France* [1991] ECR I-659, paragraph 17, and in the *Commission v Greece* case, cited in footnote 1, paragraph 21.

consequences which the collective labour dispute, which had been smouldering for years, has had for this important branch of the economy.

that the Greek Government has a perfectly justified interest in the functioning of its own economy. However, this objective must not be pursued to the detriment of competitors from other Member States, which would be contrary to the Treaty.

59. The preamble to the contested Law merely stresses the unfavourable effects of the dispute on tourism in Greece and on the public interest.

60. The Court has no jurisdiction to interpret national law. However, it is clear from the foregoing that Article 37 was enacted to settle a long-standing labour dispute and thereby to prevent further negative repercussions for tourism and for the Greek economy. The Greek Government itself stated in the oral procedure that the measure was taken to ensure the proper functioning of the economy. However, as the plaintiff correctly observes, the Court has consistently held that national economic objectives cannot constitute grounds of public order and of public interest which justify the restriction of a fundamental freedom protected by the Treaty.<sup>36</sup> This is not to deny

61. With regard to the argument put forward by the Greek Government and the interveners that Article 37 was necessary in order to maintain industrial peace, the Commission contends that the maintenance of industrial peace cannot be a matter of public interest when it relates to the settlement of a collective labour dispute. There are no further submissions on this point.

62. In my opinion, the maintenance of industrial peace may indeed be acknowledged to be a matter of public interest. However, in view of what has been said, it seems clear that industrial peace here was aimed at as a means to an end, and the true purpose of the measure was to ensure the proper functioning of tourism as a sector of the economy. Whether this is sufficient to find that there are compelling grounds of public interest for restricting the freedom to provide services seems to me to be extremely doubtful in view of the fact that national economic interests alone are not enough to justify any such power, and it remains to be seen whether the means used by the Greek Government to attain its objective are lawful.

36 — See the judgments in the *Gouda* case, cited in footnote 30, paragraphs 11 and 27 to 29, and Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraphs 45 to 48, with regard to compelling grounds of public interest justifying a restriction on the freedom to provide services; Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 and 33, and Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraphs 15 and 20 to 22, regarding grounds of public policy within the meaning of Article 56 of the EC Treaty, justifying discrimination in relation to the freedom to provide services.



63. Although the Greek Government states that it wishes tourist guides to enjoy protection under Greek labour law, such protection cannot be regarded as a compelling ground of public interest. Firstly, it is not explained to what extent Greek labour law offers tourist guides special protection. Secondly, it is not a question of protecting employees, but of restricting the freedom of individuals to provide services in that they are regarded for legal purposes as employees, whatever the circumstances.

64. The preamble to the relevant Greek Law states that its object is to resolve the doubts which undermine the employment status of wage earners, but no further details are given. This reason does not justify interfering with the freedom to provide services which is guaranteed by the Treaty.

65. Finally, during the oral procedure the Greek Government stated that it had adopted the measure in question in order to ensure the high quality of services to consumers. However, it says that its primary aim was the proper functioning of the economy. It may be that the poor functioning of the tourist industry adversely affects the quality of services provided by tourist guides, but on the other hand poor guide services have an adverse effect on the economy. Because of this interplay and of the absence of further

details on the subject of consumer protection, it seems to me that the economic issue is once again the main concern. I therefore conclude that any justification based on compelling grounds of public interest must be rejected.

66. Although no justification based on such grounds can be found for impeding the freedom to provide services, I should still like to consider whether the Greek Government was entitled to take the measure in question in order to attain its objective. One criterion in this connection is whether the measure is suitable for attaining the objectives pursued. This does not seem to me to be the case for several reasons. Firstly, none of the parties contends that, in order to settle the collective labour dispute, it is necessary to restrict work by tourist guides from other Member States either on a freelance basis or for tour companies from other Member States in the sector of organized tours. Not once has it been claimed that such an activity has any effect whatever on that dispute. For that reason alone, a restriction on work by tourist guides from other Member States either on a freelance basis or for tour companies from other Member States cannot be suitable for attaining the objective pursued.

67. Secondly, it appears from the submissions of — amongst others — the Greek Government during the oral procedure that the labour dispute has still not been settled to this day. This means that Article 37 has not attained its objective and therefore cannot be regarded as a suitable measure justifying a restriction of the freedom to provide services. Nor, it is clear from the plaintiff's submissions during the oral procedure, has Article 37 been capable of securing the status of persons working in the tourist sector because, as is clear from those submissions, which have not been contested, it has not yet been possible even to guarantee a regular monthly salary in the framework of mandatory employment contracts. Finally, no details have been given on the extent to which Article 37 is capable of protecting the interests of consumers by safeguarding the quality of services provided by tourist guides. Quality assurance is served primarily by the requisite training of tourist guides, not by the type of legal relationship in the context of which they provide their services. I therefore conclude that Article 37 was not suited to attaining the desired objective which, as I have said, is not justified on grounds of public interest.

68. It follows automatically that Article 37 likewise cannot constitute a measure which

is necessary for attaining the objective pursued.

69. It also follows that an unsuitable measure is at the same time a disproportionate measure in the strict sense. The Greek Government could take a less restrictive approach: it could expressly exclude tourist guides and tour companies from other Member States from the scope of Article 37, particularly since — according to the Government itself — only a few foreign guides are affected.

70. In the light of the foregoing, therefore, Article 37 infringes the principle of proportionality, and any justification of the infringement by that article of the freedom to provide services must be rejected for that reason as well.

71. On those grounds I conclude that Article 59 et seq. of the EC Treaty must be interpreted as precluding a provision such as Article 37. That provision is also unjustified on grounds of public interest and is, moreover, disproportionate.

## C — Conclusion

72. I therefore propose that the Court answer the question submitted by the national court for a preliminary ruling as follows:

Article 59 et seq. of the EC Treaty must be interpreted as precluding a provision such as Article 37 of Law No 1545/1985 which, subject to fulfilment of the conditions set out therein, prescribes a mandatory legal form of employment relationship between the parties concerned. The abolition of the freedom to provide services resulting from that provision is not a permissible means for ensuring industrial peace in connection with the provision of tourist services, an area which is important for a country dependent on tourism.