

OPINION OF ADVOCATE GENERAL
ALBER
delivered on 16 September 2003 ¹

I — Introduction

II — Legislative framework

A — Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC ² (hereinafter ‘Directive 92/51’)

1. The proceedings for failure to fulfil obligations which the Commission has brought against the Portuguese Republic concern the rules governing the activities of private security services engaged in the surveillance of persons and property in Portugal. The Commission claims that the Portuguese legislation is incompatible with the provisions of the Treaty concerning the free movement of workers, the freedom of establishment and the freedom to provide services.

2. The first indent of Article 1(c) of Directive 92/51 defines the term ‘attestation of competence’ as ‘any evidence of qualifications attesting to education and training not forming part of a set constituting a diploma within the meaning of Directive 89/48/EEC or a diploma or certificate within the meaning of this Directive [Directive 92/51] [...]’.

3. In Article 1(f), ‘regulated professional activity’ is defined as ‘a professional activity the taking-up or pursuit of which, or one of its modes of pursuit in a Member State, is

¹ — Original language: German.

² — OJ 1992 L 209, p. 25.

subject, directly or indirectly, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence. [...].

B — *National provisions*

1. Decree-Law No 231/98 of 22 June 1998³ (hereinafter ‘Decree-Law No 231/98’ or ‘the Decree-Law’)

4. Article 1(3)(a) defines activities in the private security services sector as ‘the provision of services by private undertakings lawfully constituted for that purpose which are intended to protect persons and property and to prevent the commission of criminal offences’.

5. Article 3 provides that: ‘Private security activity may be pursued only by lawfully constituted undertakings authorised to do so in accordance with the provisions of this Decree-Law.’

³ — *Diário da República* I, Series A, No 167, of 22 July 1998, p. 3515.

6. Article 7 lays down the conditions under which an individual may pursue activities in the private security services sector. These include, under Article 7(2)(b), ‘the successful completion of tests of knowledge and physical aptitude, the standard content and duration of which are determined by order of the Minister for the Interior, following an initial training course meeting the requirements of Article 8(2)’, and, under Article 8(2), participation in a professional induction course.

7. Article 9(1) and (2) govern the issue of professional certificates:

‘(1) guarding and escort personnel and personal defence and protection personnel must be in possession of a professional certificate which is authenticated by the General Secretary of the Ministry of the Interior, is valid for a period of two years and can be extended for equivalent periods.

(2) authentication of the professional certificate is subject to evidence, to be furnished to the General Secretary of the Ministry of the Interior, that the conditions set out in Article 7 have been fulfilled.’

8. Article 21(1) makes the pursuit of activities in the private security services sector subject to prior authorisation.

(c) PTE 50 000 000, if they perform one of the services provided for in Article 2(1)(e).’

9. Article 22(1) and (2) provide:

‘(1) Undertakings pursuing private security activity within the meaning of Article 1(3) (a) must be constituted in accordance with the legislation of a Member State of the European Union or the European Economic Area, have their head office or a secondary establishment in Portugal and comply with the provisions of Article 4 of the Code of Commercial Companies.

10. Article 24(1) lists the evidence which must accompany an application for authorisation to pursue an activity in the private security services sector. Pursuant to subparagraph d, this includes the provision of evidence to show that the conditions laid down in Article 22 have been fulfilled.

2. Code of Commercial Companies

(2) The capital of the undertakings referred to in the foregoing paragraph must not be less than:

11. Article 4(1) provides: ‘A company which does not have an effective head office in Portugal but wishes to pursue its activity there for more than one year must set up a permanent representation and comply with the provisions of the Portuguese Law on the commercial register.’

(a) PTE 10 000 000, if they perform one of the services provided for in Article 2 (1)(a) and (b);

(b) PTE 25 000 000, if they perform one of the services provided for in Article 2(1)(c) and (d);

III — Pre-litigation procedure

12. By letter of 6 May 1999, the Commission informed the Portuguese authorities that it considered Decree-Law No 231/98 to be incompatible with the provisions of the Treaty concerning the free movement of

workers, the freedom of establishment and the freedom to provide services. It called on the Portuguese Government to send it relevant information to show that the Decree-Law was compatible with Community law. By letter of 10 September 1999, the Portuguese Government sent a number of documents to the Commission.

13. The Commission's examination of those documents failed to convince it of the lawfulness of the Portuguese legislation. On 1 February 2000, it therefore sent the Portuguese Government a letter of formal notice in which it reiterated its complaints. The Portuguese Government replied to that letter on 23 May 2000.

14. That reply from the Portuguese Government likewise failed to convince the Commission that the Portuguese legislation was lawful. Consequently, on 29 December 2000, the Commission served a reasoned opinion on the Portuguese Republic, to which the Portuguese Government responded on 20 March 2001.

15. Having formed the view, after examining that response, that the Portuguese legislation was incompatible with the provisions of the Treaty, the Commission brought this action on 8 May 2002.

IV — Submissions of, and forms of order sought by, the parties

16. In its application, the Commission raises a total of six complaints. It claims that, under the rules governing the authorisation to be issued by the Minister for the Interior, foreign undertakings which wish to pursue, in the private security services sector in Portugal, surveillance activities in respect of persons and property:

- must have their head office or a permanent establishment in Portugal;
- may not rely on evidence or guarantees which they have already presented in the Member State of origin;
- must be constituted as legal persons; and
- must have a specific amount of capital.

It also criticises the fact that:

- the employees of such foreign undertakings must be in possession of a professional certificate issued by the Portuguese authorities;

and that:

- occupations in the private security sector are not subject to the Community rules on the recognition of professional qualifications.

17. The Commission takes the view that the requirement laid down in Article 22(1) of Decree-Law No 231/98 that foreign undertakings must have their head office or a permanent establishment in Portugal also applies to undertakings which pursue surveillance activities in respect of persons and property in the private security services sector in Portugal on only a temporary basis (in accordance with Article 49 EC). That requirement makes the provision of a service impossible in practice, for, if an undertaking has its head office or a secondary establishment in Portugal, it exercises its freedom of establishment and no longer exercises its freedom to provide services, which is characterised by the temporary nature of the service. As the Court held in *Gebhard*, the fact that the provision of services is temporary does not

preclude the creation of some form of infrastructure.⁴ However, exercise of the freedom to provide services may not be made conditional on the existence of such infrastructure.

18. The Commission is unconvinced by the Portuguese Government's reliance on Article 4 of the Code of Commercial Companies in order to limit the scope of Article 22 of Decree-Law No 231/98, as based on Article 4, to entities which provide security services for longer than a year. In the Commission's submission, the reference in Article 22 of the Decree-Law to Article 4 of the Code of Commercial Companies can be understood only as a reference to compliance with the provisions concerning the Commercial Register. For the requirement that providers of services must have their head office or a permanent establishment in Portugal is already apparent from the wording of Article 22(1) of the Decree-Law.

19. It is the Commission's view that the only plausible interpretation of Article 22 of the Decree-Law is that it also requires undertakings providing security services on only a temporary basis to have at least a secondary establishment in Portugal. That, moreover, was the interpretation given by the Portuguese Government on 23 May 2000 in its reply to the letter of formal notice.

4 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 27.

20. Furthermore, the Commission's interpretation is borne out by the conjunction 'and' between the rule that providers of services must have an establishment in Portugal and the rule that they must comply with the provisions contained in Article 4 of the Code of Commercial Companies. Certain security services, such as the operation of an emergency call centre, for example, cannot be provided at all without an establishment in the host State.

21. In any event, however, the Portuguese legislation is not unequivocal and is therefore in breach of the requirement of legal certainty. It is settled case-law that legislation enacted by Member States in areas covered by Community law must be unequivocal and satisfy the requirements of legal certainty.⁵

22. Nor is the restriction complained of justified under Article 46 EC. Private security services must be distinguished from the public forces of law and order and are not intended to maintain public security within the meaning of Article 46 EC.

23. Furthermore, the Commission contends, the Court has consistently held⁶ that administrative considerations, such as the fact that undertakings and their employees are easier to supervise if the undertakings are established in the Member State in question, are not in principle capable of justifying restrictions of a fundamental freedom guaranteed by the Treaty. As regards the contention concerning better enforceability in the event of default, the provision of a security offers an adequate and less restrictive means of achieving that.⁷

24. With regard to the consideration given by the Portuguese authorities to the evidence and guarantees already submitted by foreign undertakings in the Member State where they are established, the Commission takes the view that Article 24 of Decree-Law No 231/98 does not under any circumstances support the conclusion that, when examining applications for authorisation, the Portuguese authorities take into consideration evidence and guarantees which have already been submitted in the Member State of establishment. It is clear from the wording of that provision that it is applicable not only to undertakings which have their principal establishment in Portugal but also to those which are already lawfully established in another Member State and wish merely to provide security services in Portugal. As the Court held in *Commission v Belgium*, the freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding reasons in the public interest and applicable to all persons and undertakings

6 — The Commission refers to Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 54.

7 — In support of its view, the Commission cites Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 23.

5 — In this connection, the Commission cites Case 257/86 *Commission v Italy* [1988] ECR 3249, paragraph 12.

operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of services is subject in the Member State where he is established. By requiring all undertakings to fulfil the same conditions for obtaining prior authorisation or approval, a Member State makes it practically impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is principally established.⁸ In that regard, the Commission contends, the Portuguese legislation goes beyond what is necessary in order to attain the objective sought and is therefore disproportionate, in so far as it requires evidence to be provided which has already been submitted in the Member State in which the provider of services is established.⁹

25. With regard to the requirement that foreign undertakings must have legal personality, the Commission points out that that obligation places self-employed persons or independent economic operators and individuals established in another Member State at a disadvantage. The Court has recognised the right of an individual to work not only in the Member State where he is ordinarily resident but also, temporarily, in another Member State.¹⁰ That case-law is not called into question by the division of powers set out in Title IV of the EC Treaty. The Court has already held that private security services fall within the scope of Articles 39 EC, 43 EC and 49 EC¹¹ and are not to be confused with the

public security services referred to in Articles 64 EC and 68 EC.

26. As regards the requirement that foreign undertakings must have a specific minimum amount of capital, the Commission takes the view that the Portuguese legislation makes the setting-up of a subsidiary or a permanent establishment in Portugal subject to the condition that the foreign parent company should have capital of not less than the amount specified in Article 22(2) of Decree-Law No 231/98. The effect of that condition is that an act by which an individual exercises his right to open a secondary establishment is indirectly treated in the manner stipulated by national law for principal establishments. Such a condition prevents an economic operator with capital which meets the legal requirements of the State where he is principally established but falls below the minimum laid down in Portugal from pursuing his activities throughout Community territory. By reference to the judgment in *Centros*,¹² the Commission takes the view that the requirement of compliance with the Portuguese minimum capital provisions infringes the freedom to provide services more than is necessary to attain the objective sought. A less restrictive measure, it contends, might be the provision of a security, for example. The reference in Article 55 EC to the provisions of Articles 45 to 48 EC means that the principles developed by the Court in relation to the freedom of establishment are applicable to the freedom to provide services.

8 — Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 37 et seq.

9 — The Commission relies on Case 279/80 *Webb* [1981] ECR 3305, paragraph 20.

10 — It refers to Case 143/87 *Stanton v Inasti* [1988] ECR 3877, paragraphs 11 to 13, and Case C-53/95 *Inasti v Kemmler* [1996] ECR I-703, paragraph 10 et seq.

11 — It relies on Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraphs 42 and 48.

12 — Case C-212/97 *Centros* [1999] ECR I-1459, in particular paragraphs 36 to 38.

27. The Commission rejects the Portuguese Government's submissions on the avoidance of discrimination against national undertakings. It does not consider the principles established in *Alpine Investments* and *Peralta*¹³ to be relevant. The activities in other Member States of companies formed under Portuguese law are not adversely affected.

28. The Commission also criticises the obligation imposed on the employees of foreign undertakings to be in possession of a professional licence issued by the Portuguese authorities. It sees in this an obstacle both to the freedom of movement enjoyed by employees and to the freedom to provide services enjoyed by their employer, whose right to send to another Member State employees authorised to work in the Member State where he is established is restricted (Article 49 EC).

29. Portuguese law requires that each employee of a private security undertaking obtain from the Ministry of the Interior authorisation in the form of a professional certificate in order to be able to pursue an activity in Portugal. The contested legislation does not provide for account to be taken of equivalent legal conditions which have already been fulfilled in the Member State where the undertaking for which the employees work has its principal establish-

ment, or of checks and verifications already carried out in that State. This too constitutes a disproportionate restriction of the aforementioned fundamental freedom.¹⁴

30. The Commission considers the time-limit on the validity of the professional certificate to be a further disproportionate restriction of fundamental freedoms. The Portuguese legislation already requires undertakings which provide security services to undergo regular checks. To that extent, the Commission considers periodic checks on the holders of professional certificates to be unnecessary.

31. Finally, the Commission criticises the fact that occupations in the private security sector are not subject to the Community rules on the recognition of professional qualifications. Activities in the private security sector in Portugal can be pursued only by staff employed on surveillance and escort, personal defence and escort duties who have successfully completed a compulsory training course prescribed under Portuguese law (Article 7(2)(b) of Decree-Law No 231/98). The right to take up and pursue such occupational activities is reserved for persons in possession of a professional certificate. This guarantees that its holder fulfils all the legal requirements for pursuit of that occupation, including the successful completion of tests of knowledge and physical capacity the content and duration of which are laid

13 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141, and Case C-379/92 *Peralta* [1994] ECR I-3453.

14 — By way of support for its legal analysis, the Commission again refers to *Commission v Germany* (cited in footnote 6, paragraph 47) and *Commission v Belgium* (cited in footnote 8, paragraph 40).

down by law. It also allows its holder to pursue activities in the private security services sector. In substance, therefore, the professional certificate constitutes an attestation of competence within the meaning of the first indent of Article 1(c) of Directive 92/51. The Commission accordingly takes the view that activities in the private security services sector in Portugal constitute a regulated profession within the meaning of Article 1(e) in conjunction with the first indent of Article 1(c) and Article 1(f) of the directive. However, the Portuguese legislation introduced to transpose Directive 92/51 does not cover occupations in the private security sector. They are not therefore subject in Portugal to the provisions on the recognition of professional qualifications laid down by the aforementioned directive. In *Vlassopoulou*, the Court held that, when examining whether an individual satisfies the conditions governing the grant of authorisation to pursue certain professions, national authorities must recognise evidence which is comparable to that required to exercise the same profession in the country of origin of the person concerned.¹⁵ Under the Portuguese legislation at issue, such consideration is not possible.

32. The Commission seeks a declaration that:

- (1) in view of the fact that, under the system of authorisations issued by

the Minister for the Interior, foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal

- (a) must have their head office or an establishment in Portugal,

- may not rely on evidence and guarantees already presented in their Member State of establishment,

- must be constituted as a legal person,

- must have a specific share capital;

- (b) in view of the fact that the employees of foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal must hold a professional certificate issued by the Portuguese authorities;

¹⁵ — Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraphs 16 and 23.

- (c) in view of the fact that professions in the private security services sector are not subject to the Community system for the recognition of professional qualifications,

the Portuguese Republic has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC and under Council Directive 92/51;

provide security services in Portugal for longer than a year. Because of the one-year threshold laid down by law, those rules do not affect the freedom to provide services but the freedom of establishment. Only services provided on a temporary basis fall within the scope of the freedom to provide services guaranteed by the Treaty, that is to say sporadic events which are limited in time. On the other hand, services provided for a certain period of time and characterised by a degree of frequency, regularity and duration fall within the scope of the freedom of establishment. To that extent, the contested rules cannot restrict the freedom to provide services.

- (2) the Portuguese Republic be ordered to pay the costs of the proceedings.

33. The Portuguese Republic claims that the Court should:

- (1) dismiss the application;
- (2) order the Commission to pay the costs of the proceedings.

35. The Portuguese legislation also satisfies the requirements of legal certainty. Neither economic operators nor the Portuguese Government are in any doubt that Article 22 of the Decree-Law is not applicable to temporary providers of services. Indeed, there are undertakings which are principally established in other Member States and provide security services in Portugal without having a secondary establishment there. The fact that, during the pre-litigation procedure, the Portuguese Government gave what the Commission considers to be contradictory interpretations of the provision in question does not, according to the Portuguese Government, prove that the principle of legal certainty has been infringed.

34. The Portuguese Government takes the view that the scope of Article 22 of Decree-Law No 231/98 in conjunction with Article 4 of the Code of Commercial Companies is confined to companies which do not have their main office in Portugal and wish to

36. The Portuguese Government also takes the view, with regard to the criticism that

documents which have already had to be submitted in the State of origin are not taken into consideration, that the Commission misinterprets the scope of Article 24 of Decree Law No 231/98. Here again, the provision is directed only at undertakings which wish to provide security services in Portugal for longer than a year. Consequently, Article 24 of the Decree-Law can likewise affect only the freedom of establishment of undertakings, but not their freedom to provide services.

37. The same is true of the condition that undertakings should have legal personality. Only if they wish to provide security services for longer than a year are they required to have their principal establishment or a permanent establishment in Portugal. The right to provide security services on a temporary basis in Portugal is not affected by that condition. There is therefore no restriction on the freedom to provide services in this respect either. Moreover, the Commission itself recognises that the pursuit of activities in sensitive areas can quite legitimately be made subject to prior authorisation.

38. In the view of the Portuguese Government, the requirement on undertakings to comply with the provisions on minimum capital likewise affects not the freedom to provide services but the freedom of establishment and, more specifically, the freedom to set up a secondary establishment. In so far as an undertaking exercises only the

freedom to provide services, it is not subject to the minimum capital rule. That rule is, however, applicable to secondary establishments. Accordingly, if an undertaking established in another Member State opens a secondary establishment in Portugal in order to provide security services for longer than a year, the Portuguese provisions on minimum capital are applicable.

39. The Portuguese Government considers this restriction on the freedom to set up a secondary establishment to be justified. The security services sector, it submits, has not been harmonised in Community law. The measure is proportionate, since any other interpretation would lead to discrimination against domestic undertakings. It is true that discrimination at national level is not in principle prohibited by Community law, as it is usually a purely domestic matter. If, however, the requirement of strict compliance with the provisions on minimum capital were dispensed with, undertakings would be able to set up their principal establishment in a Member State with a lower minimum capital requirement and, through the contrivance of setting up a secondary establishment in Portugal, circumvent the Portuguese provisions on minimum capital. This would lead to de facto harmonisation at the lowest level. By reference to the Opinion of Advocate General Vilaça in Case 63/86,¹⁶ the Portuguese Government points out that the freedom of establishment means only that a person may become established under the same conditions as apply to nationals of the Member State concerned. In so far as the field in question has not been harmonised under Community law, the Member State is

16 — Opinion of Advocate General Vilaça in Case 63/86 *Commission v Italy* [1988] ECR 29.

at liberty, provided that it observes the principle of equal treatment, to regulate the conditions governing establishment in its territory.

must be reviewed periodically. That is why authorisation is granted for only two years in Portugal. The requirements laid down are justified by overriding reasons in the public interest, namely the security of the recipients of the services in question.

40. With regard to the alleged failure to recognise evidence which has already had to be furnished in other Member States, the Portuguese Government takes the view that what matters here is not so much that a professional certificate must be issued as the lawfulness of the conditions governing its issue, as laid down in Article 7 of the Decree-Law, and the evidence to show that they have been fulfilled. As the Commission itself concedes, there is nothing to preclude the requirement of prior authorisation. The question of the extent to which the conditions laid down give rise to indirect discrimination was not raised in the reasoned opinion and cannot therefore form part of the subject-matter of these proceedings. Moreover, it submits, there is no discrimination anyway, since the conditions applicable to Portuguese nationals are, if anything, more stringent than those applicable to nationals of other Member States.

41. In the absence of harmonisation, the Commission cannot require Portugal simply to accept another Member State's recognition of the lawfulness of an undertaking's situation. Many of the requirements referred to in Article 7 are not even verified by other States. In the absence of harmonisation, the Portuguese Republic cannot be prevented from imposing those requirements. Moreover, many conditions

42. With regard to the complaint that Directive 92/51 has been infringed, the Portuguese Government submits that that directive is not applicable to security services. Neither the right to take up that occupation nor the right to pursue it is subject to the existence of evidence of education and training. Indeed, evidence of qualifications attesting to education and training within the meaning of Article 1(c) of Directive 92/51 does not exist for these activities.

43. The compulsory professional certificate is valid for only two years. It cannot therefore constitute evidence of education and training. As regards the education and training laid down by Portuguese law, it must be borne in mind that this does not take place until after the taking-up of employment with an employer in the relevant sector. Because of that time interval, even this cannot be regarded as education and training, and the evidence of its completion cannot be regarded as evidence of qualifications attesting to education and training, within the meaning of the directive.

44. Moreover, the time-limit is not a disproportionate measure. After all, condi-

tions which were satisfied at the outset may cease to be so at a later stage, which is why a regular review is necessary. The system of ongoing inspections of entities which provide security services, as referred to by the Commission, does not offer the same guarantees.

45. More generally, the Portuguese Government also points out that the task of guaranteeing security does not fall to the State alone. Private security services supplement the State security forces and are closely connected to them. The conditions governing the right to take up and pursue activities in the security services sector must therefore be imposed with care and rigour.

46. Article 27 of the Portuguese Constitution confers a right to security on all citizens. Private security service providers have a pivotal role to play in enforcing that right.

47. The Portuguese Government submits that the restrictions laid down in Decree-Law No 231/98 must be assessed against that background. The legal assessment of that legislation must take into consideration the objectives which it pursues. These are, on the one hand, the interests and rights of citizens, for whom the Decree-Law repre-

sents a guarantee that security services will be provided only by suitably qualified entities which are subject to close scrutiny and stringent quality standards; on the other, the interests and rights of the State, for which the Decree-Law represents a means of formulating a more effective security policy. And finally there are the interests and rights of undertakings offering security services, and their employees, who also have an interest in the introduction of legislation governing the right to take up and pursue the occupation in question.

48. The determination of security requirements is a quintessentially domestic matter which must be decided by each Member State itself. In this context, the introduction of an obligation to obtain prior authorisation is not open to objection from the point of view of Community law, especially as no harmonisation measures are in place.

49. The Portuguese Government refers to the Court's decisions in what it considers to be less serious cases in which the Court recognised restrictions on the freedom to provide services as lawful.¹⁷ All the more reason, it submits, why the requirements at issue here must be regarded as justified.

17 — It refers to Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, Case C-384/95 *Landboden-Agrardienste* [1997] ECR I-7387, and Case C-275/92 *Schindler* [1994] ECR I-1039.

50. The Portuguese Government considers the decisions concerning security services cited by the Commission to be immaterial.¹⁸ The restrictions which were at issue in those cases are not imposed by the Portuguese legislation in question here.

V — Assessment

51. By this action, the Commission continues the series of infringement proceedings it has brought on grounds of restrictions of the free movement of workers, the freedom of establishment and the freedom to provide services in the field of private security services. The Court has already ruled on circumstances of a similar nature in the proceedings against Spain,¹⁹ Belgium²⁰ and Italy.²¹

A — Requirement to open a permanent establishment

52. In the first four complaints, the parties are in dispute over the delimitation of the

respective fields of application of the freedom of establishment and the freedom to provide services. The Portuguese Government takes the view that a worker who provides services for longer than a year ceases to exercise the freedom to provide services and proceeds to exercise the freedom of establishment. The Commission, on the other hand, assumes that such a worker continues to exercise the freedom to provide services even after a year has elapsed. In the event that the measures in question constitute restrictions on the freedom of establishment, the Portuguese Government considers these to be justified.

53. With regard to the Commission's complaint that the requirement to open a permanent establishment (Article 22 refers to 'delegação' (branch), Article 4 to 'representação permanente' (permanent representation)) in Portugal is incompatible with the freedom to provide services, the Portuguese Government takes the view that the article laying down that requirement, Article 22(1) of the Decree-Law, is applicable only to undertakings ('entidades' (entities)) which provide security services for longer than a year in Portugal. Where that is the case, it submits, the services are no longer performed on a temporary basis, so there can be no infringement of the freedom to provide services. In those circumstances, they are provided on a permanent basis and fall within the scope of the freedom of establishment.

54. I would point out that any restriction of the scope of Article 22(1) of the Decree-Law to providers of services who provide

18 — It refers to Case C-114/97 *Commission v Spain* [1998] ECR I-6717, *Commission v Belgium* (cited in footnote 8), and Case C-283/99 *Commission v Italy* [2001] ECR I-4363.

19 — Cited in footnote 18.

20 — Cited in footnote 8.

21 — Cited in footnote 18.

their security services for longer than a year does not follow from the wording of that provision, at least not directly. It may at most follow from the reference to Article 4 of the Code of Commercial Companies.

55. The parties are in dispute as to whether Article 22 does in fact contain such a reference. For the purposes of examining the lawfulness of the requirement to open a permanent establishment, we shall assume that such a reference does exist and that it meets the requirements of legal certainty and legal clarity. For even if the reference satisfies those requirements, the question arises whether it is lawful for national legislation to limit exercise of the freedom to provide services to a year.

56. In its case-law, the Court has taken into account the period for which a service is provided as an indicator in distinguishing between exercise of the freedom of establishment and exercise of the freedom to provide services. Thus, the fact that a Community national participates on a stable and continuous basis in the economic life of a Member State other than his State of origin is an indication that he is exercising the rights accruing to him by virtue of the freedom of establishment. On the other hand, the fact that an activity is pursued only temporarily in another Member State is in principle an indication that the freedom to provide services is being exercised.²²

57. However, the duration of the provision of services has been taken into account by the Court in its decisions to date as only one of several factors to be considered when classifying a particular activity. In its consideration of the activity in question, the Court has always undertaken a general assessment of all the circumstances in which the service was provided. As well as duration, the Court has had regard in this connection to the regularity, periodicity or continuity of the provision.²³ It has also held that even the establishment of some form of infrastructure, such as the opening of an office or chambers, does not in itself preclude exercise of the freedom to provide services.²⁴ In his Opinion in *Gebhard*, Advocate General Léger suggested that, in addition to duration, account should also be taken of where the provider of services has the centre of his activity. If it is situated in a Member State other than that where the service is performed, he exercises the freedom to provide services.²⁵

58. It follows from the case-law cited that delimitation based solely on the duration of the provision of services is not sufficient to be able to place an activity squarely in one or other of the categories of freedom of establishment or freedom to provide services. Consequently, if Article 22(1) of the Decree-Law excludes from its scope only security service providers who perform their services for a period of no more than a year, without taking into consideration the other circumstances in which the services are performed and without providing for the possibility of submitting evi-

23 — *Gebhard* (cited in footnote 4, paragraph 27).

24 — *Gebhard* (cited in footnote 4, paragraph 27).

25 — Opinion of Advocate General Léger in *Gebhard* (cited in footnote 4, point 37).

22 — See *Gebhard* (cited in footnote 4, paragraph 25 et seq.).

dence to show that some services are not permanent and continuous even though provided for longer than that period, that article restricts the freedom to provide services of all those who wish to provide security services in Portugal for longer than a year without intending to participate on a stable and continuous basis in the economic life of that State and without wishing to make it the centre of their activities.

held that such a requirement is an absolute negation of the freedom to provide services and that it is therefore contrary to Article 49 EC.²⁷ It must therefore be concluded that, in circumstances where a provider of services wishes to provide security services in Portugal for longer than a year, the requirement to open a permanent establishment there is incompatible with Article 49 EC.

59. Like the Italian legislation at issue in *Gebhard*, Article 22(1) of the Decree-Law in conjunction with Article 4 of the Code of Commercial Companies is based on an irrebuttable presumption that undertakings providing security services for longer than a year exercise the freedom of establishment.²⁶ There is no reason for such compulsion to exercise the freedom of establishment.

61. An examination of the objection that the legislation infringes the principle of legal certainty is therefore unnecessary. For even if it is assumed, as it is here, that the reference to Article 4 of the Code of Commercial Companies is sufficiently clear and unambiguous, the fact none the less remains that the legislation at issue is a negation of the freedom to provide services, as has been established, and is therefore contrary to Community law.

60. More specifically, such a compulsion to exercise a particular fundamental freedom must not affect the permissible restrictions on the exercise of the other fundamental freedoms. That, however, is precisely the effect of the rules contained in Article 22(1) in conjunction in some cases with Article 4 of the Code of Commercial Companies. The compulsion to open a permanent establishment in Portugal makes it more expensive, and therefore not simply more difficult, to exercise the freedom to provide services. Indeed, the Court has consistently

62. Strictly speaking, the question whether or not that restriction is justified does not therefore arise either. If the requirement to open a permanent establishment entirely negates the freedom to provide services, that restriction is in any event a disproportionate measure.

26 — See in this connection the Opinion of Advocate General Léger (cited in footnote 25, point 84).

27 — Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; *Commission v Germany* (cited in footnote 6, paragraph 52); and *Commission v Belgium* (cited in footnote 8, paragraph 27).

63. In the event that the Court does not share that view, consideration should be given briefly to the grounds of justification put forward by the Portuguese Government.

64. By way of justification for the restrictions arising from the Decree-Law, the Portuguese Government refers first and foremost to the particular importance of ensuring that private security services are provided in a proper manner. In its submission, they support the public security forces and enable the State to formulate an effective security policy.

65. In the infringement proceedings against Spain, Belgium and Italy, in each of which judgment has already been given, the Court clearly stated that the grounds of justification provided for in Articles 55 EC and 46 EC are not applicable to restrictions on private security services,²⁸ as these do not involve the exercise of official authority. Moreover, reliance on Article 46 EC is precluded by the fact that the right of Member States to restrict the free move-

ment of persons and services on grounds of public policy, public security and public health is not intended to exclude entire economic sectors such as the private security sector from the application of that principle.²⁹

66. Reliance on imperative requirements in the public interest, in particular the guarantee for citizens that security services will be provided to them only by suitably qualified entities subject to close scrutiny and stringent quality standards, the possibility for the State to have a means of formulating a more effective security policy, and the introduction of legislation for undertakings and their employees concerning the right to take up and pursue the occupation in question, is likewise incapable of justifying the restriction established as resulting from the requirement to open a permanent establishment. It is settled case-law that national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.³⁰

28 — *Commission v Spain* (cited in footnote 18, paragraphs 35 to 39); *Commission v Belgium* (cited in footnote 8, paragraphs 24 to 26); and *Commission v Italy* (cited in footnote 18, paragraphs 20 and 22).

29 — *Commission v Belgium* (cited in footnote 8, paragraph 29). See also in this connection the Opinion of Advocate General Jacobs in *Commission v Italy* (cited in footnote 18, point 47).

30 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and *Gebhard* (cited in footnote 4, paragraph 37).

67. As I have already said, the requirement to open an establishment entirely negates the freedom to provide services. In any event, therefore, that restriction goes beyond what is necessary in order to attain the aforementioned objectives. These can be achieved by more moderate means, such as, for example, the provision of securities, the taking-out of special insurance or the requirement of evidence of a specific professional qualification. The restriction cannot therefore be justified on grounds of imperative requirements in the public interest either.

68. It must therefore be stated by way of conclusion to the examination of the requirement of a permanent establishment that that rule is incompatible with the freedom to provide services guaranteed by Article 49 EC.

B — Consideration of evidence furnished in the Member State of origin

69. In its examination of the lawfulness of Article 24 of Decree-Law No 231/98, which lists the evidence which must be submitted with the application for authorisation to take up an activity in the security services sector, the Portuguese Government merely points out that Article 24 is likewise applicable only to undertakings which provide their services for longer than a year. In accordance with my findings on the requirement to open an establishment, the

view taken by the Portuguese Government must be rejected. In principle, Article 24 of Decree-Law No 231/98 also affects the freedom to provide services.

70. As the Commission rightly points out, the Court has already held, in its judgment in *Commission v Belgium*, that the freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established. National provisions which require all undertakings to fulfil the same conditions for obtaining prior authorisation or approval make it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established.³¹

71. Article 24 of the Decree-Law requires all applicants to submit with the application for authorisation to pursue activities in the security services sector the evidence listed in paragraph 1(a) to (g). The wording of the provision does not make it possible for consideration to be given to comparable evidence already furnished by the provider of services in the Member State in which he

³¹ — *Commission v Belgium* (cited in footnote 8, paragraph 37 et seq.).

is established. Moreover, the Portuguese Government has not said anything to indicate that other precautions have been taken to ensure that consideration is given to evidence submitted in other Member States, as recognised by Community law. It must therefore be concluded that Article 24 of the Decree-Law is also incompatible with Article 49 EC.

C — Requirement of formation as a legal person

72. Again in the context of its explanation of the requirement of formation as a legal person, the Portuguese Government takes refuge behind the view that the freedom to provide services is not affected, since the requirement is directed only at activities pursued for more than a year. For the reasons given above, this argument must be rejected.

73. The condition of formation as a legal person is not immediately apparent from the wording of Article 22(1) of Decree-Law No 231/98. That provision refers only to entities ('entidades'). That neutral term can in principle be taken to mean both legal and natural persons or associations of persons.

74. It must be borne in mind, however, that Article 22(1) requires that the entities in question be constituted ('devem ser constituídas') in accordance with Portuguese law or with the law of one of the Member States of the European Union or the European Economic Area, and the only entities which are constituted or formed are legal persons, not natural persons. It is therefore reasonable to assume that Article 22(1) of the Decree-Law does make the pursuit of activities in the security services sector subject to the condition that the provider of services should be formed as a legal person. The pursuit of activities by a self-employed person is thus in principle precluded.

75. Support for this interpretation can be found in Article 22(2) of the Decree-Law, which requires the raising of a specific minimum amount of capital. This provision will be looked at in greater detail in the next section. In this connection, it is sufficient to say that the raising of capital is required only in relation to legal persons. This too lends weight to the assumption that the pursuit of activities in the security services sector in Portugal is reserved for legal persons.

76. Finally, reference must also be made to Article 3 of the Decree-Law. This provision reserves the pursuit of activities in the security services sector for entities constituted in accordance with the law ('... só pode ser exercida por entidades legalmente constituídas ...'), and the only entities which are constituted in accordance with provisions laid down by law or regulation are legal persons.

77. Moreover, that interpretation of the provisions of the Decree-Law was confirmed by the Portuguese Government in the pre-litigation procedure. In its answer to the letter of formal notice, the Portuguese Government stated that the legislature's choice of a legal person as the required form of organisation was based on the assumption that that structure offered the greatest security and credibility. Past experience, it said, had shown that the security and creditworthiness of companies were considerably greater than those of sole traders with personal liability.³² It is true that the Portuguese Government did not refer to that clarification either in the defence or in the rejoinder. On the other hand, those pleadings do not contain any other plausible explanation for the wording of Article 22(1) in conjunction with Article 3 of the Decree-Law. Instead, the Portuguese Government confines itself to the argument that Article 22 is not applicable to services. As I have already said, however, that view is untenable.

78. In conclusion, it must therefore be assumed that providers of services who wish to provide security services in Portugal must be formed as a legal person. Natural persons, that is to say self-employed persons, are thus precluded from providing such services. To that extent, there is a restriction on the freedom to provide services.

32 — '... a opção do legislador pela forma societária resulta do facto de aquela ser, no seu entender, a que se reveste de uma maior segurança e credibilidade. Os ensinamentos da história recente demonstram que a credibilidade das sociedades, no nosso ordenamento interno, é muito superior à que goza por exemplo, o estabelecimento individual de responsabilidade limitada ...' page 17 et seq. of the reply of 23 May 2000 to the letter of formal notice of 1 February 2000.

79. As the Portuguese Government does not put forward any grounds of justification for that restriction, it must be concluded that Article 22(1) of the Decree-Law infringes Article 49 EC in so far as it requires those who wish to pursue activities in the security services sector to be formed as legal persons.

D — Compliance with the Portuguese provisions on minimum capital

80. The Commission also criticises the condition, laid down in Article 22(2) of Decree-Law No 231/98, concerning the maintenance of a specific minimum amount of capital. That provision requires undertakings which wish to provide the security services governed by Article 2 of the Decree-Law not to allow their capital to fall below certain minimum amounts.

81. Provisions on minimum capital affect only providers of services who are formed as companies limited by shares. Self-employed persons are not in principle subject to any provisions making it compulsory to raise capital. The very fact that that provision implicitly excludes the activ-

ities of self-employed persons means that it infringes the freedom to provide services.

82. It must also be pointed out, with regard to services performed by companies limited by shares, that provisions making it compulsory to raise a minimum amount of capital constitute an unjustified restriction of the freedom to provide services. As far as concerns exercise of the freedom of establishment, the Court held in *Centros* that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary. That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the EC Treaty.³³

83. In my Opinion in the *Inspire Art* case, I expressed the view that the requirement to comply with the host State's provisions on minimum capital also constitutes a restriction on the freedom of establishment because it precludes the recognition of companies duly formed in accordance with the law of another Member State, as required by Community law.³⁴ That case-law is applicable to the freedom to provide services. Where a self-employed person or an undertaking is lawfully established in a Member State and provides security services there, the requirement to comply with the provisions on minimum capital has the effect of precluding recognition of lawful formation in the State of origin. This again leads ultimately to a denial of the right to provide services enjoyed by undertakings lawfully established in another Member State.

84. The justification on grounds of potential discrimination at national level, as put forward by the Portuguese Government, is therefore invalid. After all, the only argument advanced under the heading of discrimination at national level, which, as both parties agree, is in principle irrelevant from the point of view of Community law, concerns the need to combat circumvention of the Portuguese provisions on minimum capital. The Portuguese Government refers expressly to the danger that an undertaking may become established in a Member State with a lower minimum capital requirement and, through the contrivance of setting up a

33 — *Centros* (cited in footnote 12, paragraph 26 et seq.).

34 — Opinion in Case C-167/01 *Kamer van Koophandel v Inspire Art* [2003] ECR I-10159, points 97 to 100.

secondary establishment in Portugal, circumvent the Portuguese provisions on minimum capital. However, as is clear from the aforementioned judgment in *Centros*, a *general* danger of circumvention is not sufficient to justify a restriction of the fundamental freedoms guaranteed by the Treaty. Moreover, there are less restrictive means of ensuring equally effective protection for creditors, such as the provision of securities or the taking-out of insurance. Quite apart from that, it is by no means certain that the raising of a certain minimum amount of capital upon formation of a company or, in this case, on the taking-up of activities in the services sector in Portugal, can actually provide the protection for creditors it seeks to ensure in the first place.³⁵

85. It must therefore be concluded that the rule in Article 22(2) of the Decree Law laying down the requirement to maintain a minimum amount of capital is likewise incompatible with Article 49 EC.

E — *Requirement of a professional certificate*

86. The Commission regards the requirement to be in possession of a professional

certificate as both a restriction of the free movement of workers enjoyed by employees (Article 39 EC) and a restriction of the freedom to provide services enjoyed by their employer, inasmuch as it is more difficult for him to send to Portugal employees authorised to work in the Member State where he is established (Article 49 EC). The Portuguese Government argues in its defence that it is in principle permissible to make the pursuit of certain sensitive activities subject to prior authorisation, and that, when issuing the certificate, the competent authorities verify compliance with the requirements laid down in Article 7 of Decree-Law No 231/98, which were imposed for overriding reasons in the public interest.

87. In its judgment in *Commission v Belgium*, the Court held that the requirement of the issue of an identity card represented a restriction of the freedom to provide services because the formalities involved in issuing such an identity card might make the provision of services across frontiers more expensive. Moreover, such a restriction was considered to be disproportionate in so far as the identity card was intended to establish the identity of the provider of services when that could be established in the same way by an identity card or passport which the provider of services brought with him.³⁶ Pursuant to that judgment, it is appropriate to proceed on the assumption that Article 9 of the Decree-Law restricts the freedom to provide services and the free movement of workers.

35 — See, in this respect, the fundamental findings contained in my Opinion in *Inspire Art* (cited in footnote 34, points 141 to 146).

36 — *Commission v Belgium* (cited in footnote 8, paragraph 39 et seq.).

88. Unlike in *Commission v Belgium*, the justification for the Portuguese legislation is not the possibility of establishing the identity of the provider of services but verification of compliance with the conditions for pursuit of an activity laid down in Article 7 of the Decree-Law. It is therefore concerned with the personal characteristics and abilities of the provider of services. To that extent, such verification should probably be regarded as a suitable means of ensuring the quality of the security service provided.

89. The question is, however, whether the measure goes beyond what is necessary in that it precludes the consideration of equivalent evidence which has already been furnished by the provider of services in his State of origin. Like Article 22(1) of the Decree-Law examined above, Article 9(2) of the Decree-Law does not make it possible, during the verification of evidence of compliance with the conditions for pursuit of an activity, for consideration to be given to equivalent evidence which is already required in the State of origin for the purposes of taking up activities in the security services sector. In accordance with the Court's case-law, however, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification is required to take into consideration the diplomas, certificates and other evidence of formal qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialised knowledge certified by those diplomas and the knowledge and qualifications required by national law.³⁷ In view of the similarity of interests

involved, that principle, which has been developed in relation to the freedom of establishment, is applicable to the free movement of workers and the freedom to provide services. To that extent, it must be concluded that Article 9 of the Decree-Law restricts the free movement of workers and the freedom to provide services more than is necessary.

F — *Applicability of Directive 92/51*

90. Finally, the Commission criticises the non-application of Directive 92/51 to employees in the security services sector. In this respect, the parties are in dispute, in particular, as to whether the professional certificate referred to in the previous paragraph essentially constitutes an attestation of competence within the meaning of the first indent of Article 1(c) of Directive 92/51.

91. According to Article 1(f) of Directive 92/51, a regulated profession is a professional activity the taking-up or pursuit of which is directly or indirectly, by virtue of laws, regulations or administrative provisions, regulated by law. The taking-up or pursuit of a profession is accordingly to be regarded as directly governed by law where the laws, regulations or administrative provisions of the host Member State contain rules by virtue of which the professional activity in question is expressly reserved to persons who fulfil certain

³⁷ — Case C-340/89 (cited in footnote 15, paragraph 16).

conditions, while the pursuit of that activity is denied to those who do not fulfil those conditions.³⁸ Articles 7 and 9 of the Decree-Law make the pursuit of activities in the security services sector subject to the fulfilment of certain personal conditions. They are to that extent concerned with the pursuit of a regulated profession within the meaning of Directive 92/51.

92. The term 'attestation of competence' is defined in the first indent of Article 1(c) of Directive 92/51 as any evidence of qualifications attesting to education and training not forming part of a set constituting a diploma within the meaning of Directive 89/48/EEC or a diploma or certificate within the meaning of Directive 92/51. Since there is no diploma in security services, we are concerned here only with evidence of the completion of education or training.

93. The Commission considers the professional certificate discussed in the previous paragraph to be such an attestation of competence. In its submission, the professional certificate certifies, *inter alia*, that the tests of knowledge and physical capacity — the content and duration of which are governed by law — required under Article 7(2)(b) of the Decree-Law have been successfully completed and allows its holder to pursue activities in the security services sector.

94. It must be borne in mind, however, that the period of validity of the professional certificate is limited to two years, as the Portuguese Government points out. Evidence of a particular type of training, on the other hand, is acquired once and is valid indefinitely. An authorisation to pursue a particular profession requiring specific training, the validity of which may quite legitimately be limited in time in order to ensure that certain checks can be carried out, is entirely different. The very fact that there is a temporal restriction on its period of validity means that the professional certificate cannot be regarded as permanent evidence of completion of training.

95. It must also be pointed out that the professional certificate does more than attest to completion of a particular course of training and the successful sitting of the test at the end of it. Pursuant to Article 9 of the Decree-Law, the professional certificate is issued only after compliance with all of the conditions laid down in Article 7 of the Decree-Law has been verified. Attestation of completion of a particular course of training is only one of the functions of the employer's identity card. For example, it also serves to verify the nationality of, and the existence of any convictions against, the person concerned. This too argues against the assumption that the professional certificate is an attestation of competence within the meaning of Directive 92/51.

96. That being the case, no infringement can be established against Directive 92/51.

38 — Case C-164/94 *Aranitis* [1996] ECR I-135, paragraph 18 et seq., and Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 16 et seq.

VI — Costs

97. Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with the first paragraph of Article 69(3), however, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional,

the Court may order that the costs be shared or that the parties bear their own costs. Only one infringement against Directive 92/51 could not be established. However, that fact is not so significant in relation to the other Treaty infringements which have been established as to make it appropriate for the costs to be shared. Since the Commission made an application to that effect in its submissions, Portugal, which has been unsuccessful on all other heads of its claim that the application be dismissed, must be ordered to pay the costs of the proceedings.

VII — Conclusion

98. In the light of the foregoing considerations, I propose that the Court should rule as follows:

- (1) The Portuguese Republic has infringed its obligations under Article 39 EC, 43 EC and 49 EC by requiring:
 - (a) that under the rules governing the authorisation to be issued by the Minister for the Interior, foreign undertakings wishing to pursue, in the private security services sector in Portugal, surveillance activities in respect of persons and property

- must have their head office or be established in Portugal,
- may not rely on the evidence and guarantees which they have already submitted in the Member State where they are established,
- must be constituted as legal persons, and
- must have a specific amount of capital;

(b) that employees of foreign undertakings which wish to pursue, in the private security services in Portugal, surveillance activities in respect of persons and property must be in possession of a professional certificate issued by the Portuguese authorities.

(2) The application is otherwise dismissed.

(3) The Portuguese Republic is to bear the costs of the proceedings.