

JUDGMENT OF THE COURT (First Chamber)

18 November 2010\*

In Case C-458/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 October 2008,

**European Commission**, represented by E. Traversa and P. Guerra e Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

**Republic of Poland**, represented by M. Dowgielewicz, acting as Agent,

intervener,

\* Language of the case: Portuguese.

v

**Portuguese Republic**, represented by L. Inez Fernandes and F. Nunes dos Santos,  
acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič (Rapporteur), E. Levits,  
M. Safjan and M. Berger, Judges,

Advocate General: J. Mazák,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 June 2010,

having decided, after hearing the Advocate General, to proceed to judgment without  
an Opinion,

gives the following

## **Judgment**

- 1 By its application, the European Commission requests the Court to declare that, by imposing in respect of the provision of building services in Portugal the same requirements as in respect of establishment, the Portuguese Republic has failed to fulfil its obligations under Article 49 EC.

### **Legal context**

#### *European Union law*

- 2 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications is to recognise professional qualifications obtained in one or more other Member States and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

3 Recitals 4, 6 and 27 in the preamble to Directive 2005/36 are worded as follows:

‘(4) In order to facilitate the free provision of services, there should be specific rules aimed at extending the possibility of pursuing professional activities under the original professional title. ...

...

(6) The facilitation of service provision has to be ensured in the context of strict respect for public health and safety and consumer protection. Therefore, specific provisions should be envisaged for regulated professions having public health or safety implications, which provide cross-frontier services on a temporary or occasional basis.

...

(27) Architectural design, the quality of buildings, their harmonious incorporation into their surroundings, respect for natural and urban landscapes and for the public and private heritage are a matter of public interest. Mutual recognition of qualifications should therefore be based on qualitative and quantitative criteria which ensure that the holders of recognised qualifications are in a position to understand and translate the needs of individuals, social groups and authorities as regards spatial planning, the design, organisation and realisation of structures, conservation and the exploitation of the architectural heritage, and protection of natural balances.’

- 4 Title II of Directive 2005/36 contains provisions relating to the free provision of services. Article 5(1) states in that regard:

‘Without prejudice to specific provisions of Community law, as well as to Articles 6 and 7 of this Directive, Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State:

- (a) if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (hereinafter referred to as the Member State of establishment), and
- (b) where the service provider moves, if he has pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when the profession is not regulated in that Member State. The condition requiring two years’ pursuit shall not apply when either the profession or the education and training leading to the profession is regulated.’

- 5 Article 7 of Directive 2005/36, concerning the declaration to be made in advance if the service provider moves, provides:

‘1. Member States may require that, where the service provider first moves from one Member State to another in order to provide services, he shall inform the competent authority in the host Member State in a written declaration to be made in advance including the details of any insurance cover or other means of personal or collective protection with regard to professional liability. Such declaration shall be renewed once a year if the service provider intends to provide temporary or occasional services

in that Member State during that year. The service provider may supply the declaration by any means.

2. Moreover, for the first provision of services or if there is a material change in the situation substantiated by the documents, Member States may require that the declaration be accompanied by the following documents:

- (a) proof of the nationality of the service provider;
- (b) an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation;
- (c) evidence of professional qualifications;
- (d) for cases referred to in Article 5(1)(b), any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years;
- (e) for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.

3. The service shall be provided under the professional title of the Member State of establishment, in so far as such a title exists in that Member State for the professional activity in question. ...

4. For the first provision of services, in the case of regulated professions having public health or safety implications, which do not benefit from automatic recognition under Title III Chapter III, the competent authority of the host Member State may check the professional qualifications of the service provider prior to the first provision of services. Such a prior check shall be possible only where the purpose of the check is to avoid serious damage to the health or safety of the service recipient due to a lack of professional qualification of the service provider and where this does not go beyond what is necessary for that purpose.

...

Where there is a substantial difference between the professional qualifications of the service provider and the training required in the host Member State, to the extent that that difference is such as to be harmful to public health or safety, the host Member State shall give the service provider the opportunity to show, in particular by means of an aptitude test, that he has acquired the knowledge or competence lacking. ...

...

In cases where qualifications have been verified under this paragraph, the service shall be provided under the professional title of the host Member State.

- 6 According to Article 8 of Directive 2005/36, which relates to administrative cooperation, the competent authorities of the host Member State may ask the competent authorities of the Member State of establishment, for each provision of services, to provide any information relevant to the legality of the service provider's establishment and his good conduct, as well as the absence of any disciplinary or criminal sanctions of a professional nature. Under the same article, the competent authorities are to ensure the exchange of all information necessary for complaints by a recipient of a service against a service provider to be correctly pursued.
  
- 7 Article 9 of Directive 2005/36, headed 'Information to be given to the recipients of the service', provides:

'In cases where the service is provided under the professional title of the Member State of establishment or under the formal qualification of the service provider, in addition to the other requirements relating to information contained in Community law, the competent authorities of the host Member State may require the service provider to furnish the recipient of the service with any or all of the following information:

- (a) if the service provider is registered in a commercial register or similar public register, the register in which he is registered, his registration number, or equivalent means of identification contained in that register;
  
- (b) if the activity is subject to authorisation in the Member State of establishment, the name and address of the competent supervisory authority;



- (c) any professional association or similar body with which the service provider is registered;
  
  - (d) the professional title or, where no such title exists, the formal qualification of the service provider and the Member State in which it was awarded;
  
  - (e) if the service provider performs an activity which is subject to VAT, the VAT identification number ...;
  
  - (f) details of any insurance cover or other means of personal or collective protection with regard to professional liability<sup>8</sup>.
- <sup>8</sup> Under Title III relating to the freedom of establishment, Directive 2005/36 lays down rules for the recognition of evidence of training and professional experience. The industrial, craft and commercial activities listed in Annex IV to that directive are covered by automatic recognition of qualifications attested by professional experience as referred to in Title III Chapter II. Article 16 provides, in particular, that if a Member State makes access to or pursuit of such an activity contingent upon possession of general, commercial or professional knowledge and aptitudes, it must recognise previous pursuit of the activity in another Member State as sufficient proof of such knowledge and aptitudes. In that regard, the activities listed in list I of Annex IV to Directive 2005/36 — which include, under major group 40, activities in the construction sector, in particular demolition, construction of dwellings or other buildings, building of roads, bridges, railways — must have been pursued in accordance with Article 17 of that directive. Title III Chapter III lays down rules for the automatic

recognition of evidence of formal qualifications for certain professions, such as doctors, pharmacists and architects, on the basis of coordination of minimum training conditions.

- 9 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which was required to be transposed by no later than 28 December 2009 and which does not apply to the present infringement proceedings, establishes general provisions to facilitate the exercise of the freedom of establishment for service providers and the free movement of services.
- 10 Article 16 of Directive 2006/123, headed ‘Freedom to provide services’, states:

‘1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

- (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
  
- (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

- (a) an obligation on the provider to have an establishment in their territory;
  
- (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

...

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. ...

...

- 11 Under Article 17(6) of Directive 2006/123, Article 16 is not to apply to matters covered by Title II of Directive 2005/36, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession.

*National law*

- 12 Under Article 4(1) of Decree-Law No 12/2004 of 9 January 2004 (*Diário da República* I, Series A, No 7, of 9 January 2004), the exercise of construction activity is subject to the grant of a licence by the Institute of Public and Private Works Contracts and Housing, which is part of the State administration and which was succeeded, under Decree-Law No 144/2007 of 27 April 2007 (*Diário da República* I, Series A, No 82, of 27 April 2007), by the Institute of Construction and Housing.
- 13 According to Article 6 of Decree-Law No 12/2004, for certain minor works the value of which does not exceed a certain threshold, a registration certificate is required instead of a licence.
- 14 The licence and the registration certificate are essential, in the sense that it is not possible to engage in construction activity before such authorisation has been issued. The licence and the registration certificate permit the execution of the works corresponding to those for which the undertaking concerned has authorisation.

- 15 Under Articles 4(3) and 6(3) of Decree-Law No 12/2004, any individual trader and any commercial company whose personal law is that of Portugal or whose seat is in one of the States of the European Economic Area may apply for a licence or registration certificate.
- 16 However, it is apparent from Article 4(3) of Decree Law No 12/2004, in conjunction with Article 3(a) thereof, that no undertaking may carry on in Portugal building, rebuilding, extension, alteration, repair, conservation, cleaning, restoration or demolition work or, in general terms, any work whatsoever related to construction without prior classification of that undertaking by the Portuguese authorities.
- 17 Classification of an undertaking, that is to say, the process by which the Portuguese authorities check its authorisations for the purposes of access to a sub-category, category and group, is carried out in accordance with the procedure set out in Chapter III of Decree-Law No 12/2004 and in Decree No 18/2004 of the Minister for Public Works, Transport and Housing of 10 January 2004 (*Diário da República* I, Series B, No 8, of 10 January 2004).
- 18 According to Article 3(c), (d) and (g) of Decree-Law No 12/2004, sub-categories designate a specialist work or works within a category, and the group represents the value of the works which, in relation to each type of works, undertakings are authorised to carry out.
- 19 Under Article 22 of Decree-Law No 12/2004, following the submission of an application for a licence or a registration certificate, the authorities may, within a period of 30 days, invite the applicant to provide them with information or to produce evidence. The applicant, in turn, has a period of 22 days within which to produce that information or evidence. If the authorities consider the file to be complete, they must send the

applicant a draft decision within a period of 66 days. They must take a final decision within a period of 10 days.

- 20 It is apparent from Articles 7 and 11 of Decree-Law No 12/2004 that, in order to be classified and to obtain a licence, undertakings must prove to the authorities that they satisfy requirements relating to commercial aptitude, technical capacity and economic and financial capacity. Under Article 1 of Decree No 14/2004 of the Minister for Public Works, Transport and Housing of 10 January 2004 (*Diário da República* I, Series B, No 8, of 10 January 2004), in order to obtain a registration certificate, undertakings must demonstrate their commercial aptitude and suitability for the proposed works.
- 21 According to Article 8 of Decree-Law No 12/2004 and Article 1(2) of Decree No 18/2004, commercial aptitude encompasses the commercial aptitude of the undertaking and that of the operator or of the legal representatives of the undertaking. It is, in particular, demonstrated by extracts from police records.
- 22 In accordance with Article 9 of Decree-Law No 12/2004 and Article 1 of Decree No 16/2004 of the Minister for Public Works, Transport and Housing of 10 January 2004 (*Diário da República* I, Series B, No 8, of 10 January 2004), technical capacity is considered on the basis of (i) the organisational structure of the undertaking, that is its organigram and its experience of carrying out works, (ii) an assessment of its human resources, that is the number of technical and professional staff, foremen and workers, and their levels of knowledge, specialisation and professional experience, (iii) an assessment of technical resources, namely equipment, and (iv) actual experience of the activity, that is works carried out and works in progress.

- 23 Under Article 10 of Decree-Law No 12/2004, economic and financial capacity is considered by assessing capital, total turnover and turnover attributable to works, and by a financial stability appraisal on the basis of general liquidity and financial autonomy indicators.
- 24 Under Article 5 of Decree-Law No 12/2004, a licence is valid for no more than one year. Under Article 6(4), a registration certificate is valid for five years.
- 25 It is apparent from Articles 18(1) and 19(1) of Decree-Law No 12/2004 that, in order to renew a licence, licensed undertakings must satisfy certain 'minimum permanence requirements', that is to say, they must maintain a technical staff, maintain the value of payroll costs at a minimum of 7% of the threshold of the preceding group, maintain an equity value at a minimum of 10% of the threshold of the main group, maintain works turnover of 50% or more of the threshold of the preceding group and maintain certain levels of general liquidity and financial autonomy.
- 26 Under Article 19(8), (9) and (11) of Decree-Law No 12/2004, if an undertaking fails to satisfy those requirements, its authorisations are cancelled, in which case a new application for classification has to be made before 1 August of the following year. The effect of full or partial cancellation of authorisations is that the undertaking concerned is prohibited from completing works that are in progress, resulting in the immediate termination of any contract relating to such works on account of performance becoming impossible by virtue of that undertaking's own default.

- 27 Under Articles 37, 38 and 48 of Decree-Law No 12/2004, infringements of the rules applicable under that decree-law are punishable by a fine. Any construction activity carried out without a licence or registration certificate is regarded as a very serious infringement punishable by a fine of up to EUR 44 800. In addition, ancillary penalties apply, depending on the seriousness of the infringement. These include a prohibition on carrying on the activity, suspension of the registration certificate or licence and a bar on participation in negotiations or in calls for tender for the award of public works and services contracts. Failure to comply with an ancillary penalty gives rise to criminal liability.

### **The pre-litigation procedure and the proceedings before the Court**

- 28 By letter of formal notice of 18 October 2006, the Commission notified the Portuguese Republic that it regarded the Portuguese Republic's rules on access to and pursuit of construction activity in Portugal as incompatible with Article 49 EC, in that those rules impose the same requirements in respect of the provision of services of a temporary nature as in respect of the establishment of providers of building services. The Commission stated, in particular, that the fact that the review of professional aptitude on which the grant of a licence or registration certificate depends makes no distinction between service providers whose competences and professional, technical and economic capacity have been checked in the Member State of establishment, and service providers who have not been subject to such checks, is an obstacle to the freedom to provide services of providers established in other Member States in which they satisfy the conditions necessary for establishment and where they provide the same or similar services.



- 29 The Portuguese Republic replied by letter of 24 January 2007 that construction activity is, in Portugal, an activity expressly reserved to undertakings and individuals who satisfy certain requirements. Construction activity cannot and should not be exercised freely, as that would jeopardise the architectural heritage and the safety of users. The requirements for access to that activity laid down by Portuguese law are thus designed to protect the public interest and, in particular, to protect consumers, ensure safety, combat fraud and protect the environment. Consequently, the restrictions of the freedom to provide services arising from those requirements are justified by overriding reasons in the public interest.
- 30 The Commission did not share that view and, by letter of 29 June 2007, sent a reasoned opinion to the Portuguese Republic, requesting it to adopt within two months the measures necessary for compliance.
- 31 By letters of 17 August and 10 October 2007, the Portuguese Republic replied to that opinion, further explaining why, in its view, the relevant provisions of national legislation are compatible with Article 49 EC.
- 32 Not being satisfied with that reply, the Commission brought the present action.
- 33 By order of 23 April 2009, the President of the Court granted the Republic of Poland leave to intervene in support of the form of order sought by the Commission.

## **The action**

### *Admissibility*

#### Arguments of the parties

- <sup>34</sup> The Portuguese Republic raises three pleas of inadmissibility.
- <sup>35</sup> First, it submits that virtually all the pleas in law relied on in the application are new and were not set out in the reasoned opinion or at an earlier stage of the infringement proceedings. Nor could those pleas have been inferred from any analysis of that opinion. Furthermore, they do not relate in an unambiguous and appropriate manner to the matters included in the Portuguese Republic's response to that opinion.
- <sup>36</sup> Second, in its pleas the Commission does not explain clearly which specific requirements and provisions laid down by Decree-Law No 12/2004 affect the freedom to provide services, nor does it specify how that freedom is affected. Furthermore, it does not indicate which rules ought to be amended or the nature of the amendments called for. The application thus contains insufficient reasons for the conclusions which the Commission purports to reach. Moreover, the Commission has not attached any legal texts to the application.

- 37 Third, the Commission has not produced any evidence to substantiate its findings with regard both to the alleged restrictive effect of the requirements laid down by Decree-Law No 12/2004 or to the lack of justification for those requirements. According to settled case-law, it is for the Commission to prove the facts and circumstances which it alleges in an action for failure to fulfil obligations.
- 38 The Commission claims that the Court should reject all those arguments.
- 39 It submits, in particular, that it has not amended the grounds for its action, which are the same as those stated in the letter of formal notice and in the reasoned opinion, namely infringement of Article 49 EC owing to the fact that the system established by Decree-Law No 12/2004 requires, in respect of the provision of building services, compliance with establishment requirements. Furthermore, it has, throughout the whole proceedings, relied on a single argument that was expressed in different ways and which consisted in demonstrating that the whole system is incompatible with the freedom to provide services.
- 40 The Commission explains that it is criticising the Portuguese Republic not for a particular aspect of that system but for its outcome. That being the case, it is not necessary separately to assess every aspect discussed. Accordingly, it is not a question of knowing, specifically, which provisions of national legislation infringe European Union law, but rather of knowing whether the Portuguese Republic does or does not safeguard the freedom to provide building services in its territory. The Commission takes the view that the application sets out perfectly clearly those requirements which impede the freedom to provide services. Such impediment is the product of all the authorisation requirements, that is all the classification, reclassification and permanence requirements in respect of the activity, and thus of the whole system at issue.

- 41 Finally, the Commission takes the view that, given the subject-matter of the infringement proceedings, its application is not required to refer to the particulars of the response of the Member State concerned to the reasoned opinion. Furthermore, given that Decree-Law No 12/2004 is readily accessible, it is not necessary to submit it to the Court, according to the principle *jura novit curia*. In any event, the Commission states that it cited in the application all the national provisions which it regards as incompatible with Article 49 EC.

## Findings of the Court

- 42 As regards the first plea of inadmissibility, it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under European Union law, on the one hand, and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The proper conduct of that procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, in particular, Case C-274/07 *Commission v Lithuania* [2008] ECR I-7117, paragraphs 20 and 21 and the case-law cited).
- 43 It follows that the subject-matter of the proceedings under Article 226 EC is delimited by the pre-litigation procedure provided for in that provision. Accordingly, the application must be based on the same grounds and pleas as the reasoned opinion (see Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 18; Case C-305/03 *Commission v United Kingdom* [2006] ECR I-1213, paragraph 22; and *Commission v Lithuania*, paragraph 22).

- 44 However, that requirement cannot be stretched so far as to mean that in every case the formal statement of objections set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 28; Case C-484/04 *Commission v United Kingdom* [2006] ECR I-7471, paragraph 25; and Case C-171/08 *Commission v Portugal* [2010] ECR I-6817, paragraph 26).
- 45 It must be held that, in the present case, the Commission has neither extended nor altered the subject-matter of the proceedings as defined in the reasoned opinion.
- 46 As the Portuguese Republic itself confirms in paragraph 46 of its defence, the Commission stated clearly both in the wording of its reasoned opinion and in the form of order sought in the application that it objected to the Portuguese Republic's failure to fulfil its obligations under Article 49 EC on the ground that the Portuguese Republic imposes in respect of the provision of building services in Portugal the same requirements as in respect of establishment, particularly by means of the system established under Decree-Law No 12/2004.
- 47 Therefore, the fact that, in its application, the Commission set out in detail the arguments supporting its conclusion as to the alleged failure to fulfil obligations, arguments which had already been put forward in more general terms in the letter of formal notice and the reasoned opinion, and merely explained further why it takes the view that that scheme is incompatible with the freedom to provide services, did not alter the subject of that infringement and has thus had no effect on the scope of the proceedings (see, to that effect, Case C-185/00 *Commission v Finland* [2003] ECR I-14189, paragraphs 84 to 87, and *Commission v Portugal*, paragraph 29).

- 48 In those circumstances, and since, contrary to what the Portuguese Republic appears to be suggesting, there is no requirement that the Commission's arguments should, at the application stage, specifically relate to the details of responses given by the Portuguese Republic during the pre-litigation procedure, which the Commission has, moreover, largely reproduced in its application, the first plea of inadmissibility must be rejected.
- 49 As regards the second plea of inadmissibility, it should be recalled that Article 38(1)(c) of the Rules of Procedure of the Court provides that any application initiating proceedings must contain, in particular, the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. It is therefore the task of the Commission, in any application made pursuant to Article 226 EC, to indicate the complaints being made in a sufficiently precise and coherent manner, so as to enable the Member State to prepare its defence and the Court to verify the existence of the failure to fulfil obligations which is being claimed (see, in particular, Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, paragraph 18, and Case C-540/07 *Commission v Italy* [2009] ECR I-10983, paragraph 17).
- 50 In the present case, it is apparent in a sufficiently clear and precise manner from the statement of reasons and from the form of order sought in the Commission's application that the action concerns the compatibility with the principle of the freedom to provide services of the scheme established on the basis of Decree-Law No 12/2004 as a whole. It is, moreover, obvious that the Portuguese Republic understood that the Commission's complaint concerns the Portuguese Republic's failure to observe that principle, in that all exercise of building activity in its territory is made subject to the requirements laid down by that scheme, and, in particular, construction undertakings already established in another Member State are required to obtain authorisation in advance from the Portuguese authorities in accordance with the same requirements as those laid down in respect of undertakings wishing to be established in Portugal. In those circumstances, the Portuguese Republic was indeed in a position to avail itself of its right to defend itself.

- 51 Inasmuch as the Portuguese Republic criticises the Commission for failing to indicate how that scheme ought, in its opinion, to be changed, suffice it to note that, according to settled case-law, the Commission cannot be required to indicate in the reasoned opinion or in the application submitted to the Court what steps should be taken to eliminate the impugned conduct (see Case C-247/89 *Commission v Portugal* [1991] ECR I-3659, paragraph 22, and in Case C-559/07 *Commission v Greece* [2009] ECR I-47, paragraph 23).
- 52 Finally, while the Commission did not annex to its application the full text of the relevant national legislation, the fact remains that, both in the application and in the reasoned opinion annexed to it, the Commission reproduced and explained the content of the provisions of the legislation on which its action for failure to fulfil obligations was based. Furthermore, the Portuguese Republic has not contested the existence of those provisions but merely challenged the Commission's conceptual interpretation of them, and offered such clarification as it considered necessary to enable the Court properly to assess the content of those provisions. Moreover, it must be pointed out that, since the legislation was published in *Diário da República* and is, therefore, publicly available, the Court is in a position to check the veracity of the Commission's assertions with regard to the content of the provisions concerned.
- 53 Consequently, the second plea of inadmissibility put forward by the Portuguese Republic must also be rejected.
- 54 As to the third plea of inadmissibility, it should be borne in mind that, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission, which is responsible for proving the existence of the alleged infringement, to provide the Court with the information necessary for it to determine whether that infringement is made out, and the Commission may not rely on any presumption for that purpose (see, in particular, Case C-434/01 *Commission v United Kingdom* [2003] ECR

I-13239, paragraph 21, and Case C-342/05 *Commission v Finland* [2007] ECR I-4713, paragraph 23).

55 In that regard, it must be observed that, in the present case, the Commission did not in any way rely on mere presumptions without providing the evidence necessary to enable the Court to assess the alleged infringement by the Portuguese Republic. As has already been stated in paragraph 52 of the present judgment, the Commission reproduced and explained in its application the content of the national provisions, the application of which, in its view, gives rise to the alleged infringement. Moreover, it developed detailed legal arguments to show that the scheme established on the basis of Decree-Law No 12/2004 involves a restriction of the freedom to provide services, and that that restriction is not justified by the overriding reasons in the public interest invoked by the Portuguese Republic. In any case, it explained at the hearing that it had initiated the present proceedings following complaints by construction undertakings established in other Member States which had been refused authorisation to provide building services in Portugal.

56 As to whether the Commission has in fact thereby demonstrated to the requisite legal standard the existence of the alleged infringement, that is a matter that goes to the substance of the action, not admissibility.

57 Since the third plea of inadmissibility put forward by the Portuguese Republic must, therefore, also be rejected, the Commission's action must be declared admissible.



*Substance*

## Arguments of the parties

- 58 The Commission states that the Portuguese system, in particular Decree-Law No 12/2004, is based on the rule that, to be able to provide building services in Portugal, any construction undertaking must first obtain access to construction activity in Portugal, and it is the Portuguese authorities which must grant that access to it. However, such a rule is incompatible with Article 49 EC. Construction undertakings established in other Member States have already obtained access to that activity and their authorisations have already been subject to checks in the Member State of establishment. In those circumstances, the Portuguese Republic cannot claim to be entitled to authorise, for a second time, the access to construction activity of an undertaking established in another Member State, by substituting its own rules for those of that other Member State.
- 59 The Commission states that it objects specifically to the Portuguese Republic's failure to take account of the checks and safeguards to which service providers are already subject in the Member State of establishment. It submits in that connection that the Portuguese Republic does not check whether the level of protection in the Member State of establishment is similar to that in Portugal, or whether the activity pursued by the service provider in other Member States is equivalent to that which it intends to pursue in Portugal.
- 60 The Commission states that the requirements for access to construction activity laid down under the Portuguese system are the conditions necessary for establishment. The system, in particular, makes no distinction between establishment and the provision of temporary services. The Commission takes the view that the obligation on

undertakings already established in another Member State to prove to the Portuguese authorities that they comply with all the conditions necessary for establishment under Portuguese law so as to have access to construction activity excludes from the Portuguese market any provision of building services by undertakings which are established in other Member States but not in Portugal. It refers in that regard, in particular, to Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 13, according to which a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the EC Treaty whose very object is to guarantee the freedom to provide services.

<sup>61</sup> The Commission claims, moreover, that there is a considerable lack of legal certainty in the construction industry in Portugal. It explains that, in order to have access to construction activity in Portugal, the undertaking concerned has to prove that its managers and administrators have already carried out works to the value and on the scale of those which the undertaking intends to carry out, and to demonstrate that it has already carried out works corresponding to the type of works to which it wishes to have access. Those requirements are contradictory since, if an undertaking has already carried out works corresponding to that type of works, it is because it already has access to the construction activity. Furthermore, Portuguese law does not set criteria for the assessment of actual experience. In those circumstances, it is very difficult for service providers established in other Member States to provide building services in Portugal.

<sup>62</sup> The Commission also regards as incompatible with Article 49 EC the fact that, under Article 19 of Decree-Law No 12/2004, undertakings which provide building services are obliged not only to gain access to the activity but also to satisfy the requisite conditions in order to be able to continue to exercise it. The Commission states, in that context, that authorisation to carry on construction activity is given to the undertaking concerned for a very short period, and the undertaking must, therefore, regularly renew its authorisation if it wishes to continue to provide building services, which

means that it has to satisfy the requirements for access to construction activity on a permanent basis. However, the provision of temporary services, by its very definition, means that the activity will not be ongoing.

63 The Commission accepts that the Portuguese Republic is entitled to regulate construction activity. It observes, however, that the system at issue does not constitute regulation of construction activity but the regulation of access to that activity. Moreover, it takes the view that that system could be replaced by other, less restrictive forms of regulation and, in particular, by better checks on the exercise of construction activity. It submits in that context that compliance with the technical standards and legal rules to which the construction of buildings is subject, as referred to by the Portuguese Republic, could be safeguarded under planning law and under private law relating to construction. Likewise, the protection and exploitation of the architectural heritage could be safeguarded under the law relating to planning and improvement of the built environment, and the quality of buildings under environmental law. In any event, the Portuguese Republic cannot, according to the Commission, either authorise or accredit an undertaking in accordance with Portuguese law while disregarding altogether the qualifications and aptitudes acquired by that undertaking in the Member State in which it is established.

64 The Commission refers, finally, to Directive 2005/36 which, in Title II, introduced a special scheme in respect of the freedom to provide services, under which the Portuguese Republic retains the possibility of making the provision of building services subject to a single requirement of a simple annual declaration to be made in advance if a service provider moves to its territory. Accordingly, any obligation over and above that of the annual declaration to be made in advance as provided for by that directive amounts to an unjustified restriction of the freedom to provide services. In its reply the Commission explains that, in its application, it did not assert that the measures to be taken by the Portuguese Republic would be satisfied if provision were made for a simple annual declaration to be made in advance, but that it merely drew the attention of the Portuguese Republic to the provisions of Directive 2005/36. Although that directive is aimed at regulated professions and not regulated economic activities, the requirements in respect of access to construction activity laid down by the Portuguese legislation at issue and, in particular, the technical capacity requirement, encompass requirements which cover not only the undertaking but also its managers,

administrators, technical and professional staff, foremen and workers. Furthermore, the rules in Directive 2005/36 affect individual undertakings whenever the economically relevant activity may be attributed to a person whose profession is that of the activity concerned.

<sup>65</sup> The Portuguese Republic explains that Decree-Law No 12/2004 establishes a legal scheme governing the exercise of construction activity which, by providing for access to that activity to be subject to the grant of a licence, corresponds to a legal scheme governing a regulated economic activity. It maintains that that scheme cannot, however, be regarded as an obstacle to the freedom to provide services since the provisions at issue are justified for reasons of public policy, particularly the need to ensure the soundness and safety of buildings, and the need to protect, on the one hand, the environment and the urban heritage and, on the other, the rights of consumers and of users of buildings in general, rights which would otherwise be irremediably prejudiced.

<sup>66</sup> The Portuguese Republic takes the view, in particular, that the conditions laid down by that scheme are justified by the special situation as regards construction activity, which is characterised by the harmful practices evident in the ordinary activities of undertakings in that industry. It refers in that regard, *inter alia*, to the fact that construction activity and the proper conduct of such activity are essential to ensure the safety and quality of life of the population, that it is a particularly complex and highly dangerous activity characterised by the widespread use of unskilled labour and marked by endemic breaches of legal obligations and fraudulent behaviour. The ease with which construction undertakings can be created leads to a widespread

practice whereby undertakings take the profits of completed projects and then disappear without paying workers' wages or suppliers' bills and avoiding the obligation to guarantee the works carried out.

67 The Portuguese Republic takes the view that, taking those features of construction activity in Portugal into account, and having regard to the fact that purely repressive measures are inadequate for preventing irreparable damage and harm, it is essential that that activity should be regulated. Since buildings are long-term assets which have a significant impact on town and country planning and on the lives of citizens, construction activity cannot and should not be exercised freely, as that could jeopardise the quality of the architectural heritage and, consequently, the safety of its users. It is necessary, therefore, to lay down minimum requirements for access to that activity in order to ensure that all construction undertakings have adequate qualifications and capacity. Furthermore, the Portuguese Republic is required under its Constitution to ensure adequate protection for the rights and safeguards enjoyed by citizens and consumers under the Constitution.

68 The Portuguese Republic contends that it has to ensure a minimum of consistency between the obligations imposed on the Member States under Article 49 EC and the other provisions of European Union law. It refers in that context, in particular, to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which essentially lay down the same rules on access to the activities concerned as are provided for by the legislation at issue. Furthermore, in relation to private works, final consumers are in a weaker position than public bodies. The system at issue is designed precisely for the protection of consumers and private bodies acting in their capacity as owner/

contracting authority who find themselves in a weak position. The defence of consumers is a fundamental policy of the European Union which finds expression, *inter alia*, in Article 153 EC.

- 69 The Portuguese Republic takes the view that the interests sought to be protected by Decree-Law No 12/2004 are, in part, a matter of public policy and otherwise constitute overriding reasons in the public interest. The conditions imposed under that decree-law in respect of the grant of authorisation to carry out construction activity satisfy all the requirements established by the Court in order to be regarded as justified. They apply, in particular, in a non-discriminatory manner and are necessary and proportionate in relation to the objectives pursued.
- 70 The Portuguese Republic explains in that context that the commercial aptitude requirement is designed particularly to ensure the probity of the undertaking and its readiness for engaging in construction activity, having regard to the numerous legal, contractual and ethical rules involved, and to ensure that its conduct remains lawful and commercially honest. The technical capacity requirement is designed to ensure that construction undertakings are equipped with adequately qualified human resources, particularly technical staff and personnel, with regard to the works they propose to carry out. The economic and financial capacity requirement is designed, in particular, to ensure that undertakings are solvent and capable of honouring their commitments and that they manage the assets and interests entrusted to them properly and honestly, and also to prevent projects from being abandoned and any criminal activity from arising while construction is being carried out.
- 71 The Portuguese Republic maintains that, given the underlying reasons for the rules laid down by Decree-Law No 12/2004 and the fact that construction is, by nature, a permanent and protracted economic activity, it is impossible to imagine an undertaking being exempt from compliance with those rules without risking the collapse of the system established by that decree-law and jeopardising the objectives it seeks to attain. In particular, it is essential for consumer protection that undertakings be subject to a uniform set of rules irrespective of the amount of activity carried out by economic operators, whether they be domestic or from another Member State, as the

burden of being faced with a multitude of legal orders whose legislation is unfamiliar would otherwise be passed to the consumer.

<sup>72</sup> Furthermore, it cannot be concluded that Decree-Law No 12/2004 infringes Article 49 EC merely because it makes no distinction between service provision and establishment. Any such interpretation would be blatantly at odds with the second paragraph of Article 50 EC and cannot be inferred from the case-law of the Court or, in particular, from the judgment in *Säger* referred to by the Commission.

<sup>73</sup> The Portuguese Republic denies that its national legislation makes no distinction between the establishment of a construction undertaking and the provision of services by that undertaking. It explains in that regard that, according to the Portuguese Code on commercial companies, a commercial company wishing to carry on construction activity for a period of more than one year has to establish a representation and appoint a representative. Construction undertakings which provide occasional services for a period not exceeding one year are not obliged to have a representation but are required only to obtain authorisation to carry on construction activity. Efforts have thus been made to provide in the national legislation a means of adapting and facilitating compliance with the requirements in respect of access to construction activity by undertakings established in other Member States.

<sup>74</sup> Furthermore, in so far as it is open to a service provider to decide not to renew his authorisation to carry on construction activity or even to have it cancelled, which would mean that that provider would no longer be required to comply with the requirements imposed by Decree-Law No 12/2004, there is in fact a distinction between the provision of services and establishment.

- 75 Moreover, where a service provider is subject to the same requirements in the Member State in which he is established as those provided for under Portuguese legislation, he would be able to produce evidence of this for the purposes of obtaining authorisation to carry on construction activity in Portugal. In such cases, he would obtain that authorisation almost automatically, provided he fulfilled all the requisite conditions.
- 76 However, given the diversity of legal orders in the European Union, it cannot be concluded that the mere existence of authorisation in a Member State is sufficient to allow services to be provided unconditionally in other Member States. Similarly, having regard to the multiplicity of those legal orders, the Portuguese authorities cannot be required to check the level of protection granted in another Member State, since such checks are extremely difficult to make. Furthermore, some Member States do not have legislation relating to access to construction activity in respect of private works.
- 77 The Portuguese Republic regards the Commission's reference to Directive 2005/36 as irrelevant. That directive is not applicable to the present proceedings, which involve the exercise of a regulated economic activity that, for overriding reasons in the public interest, is subject to a legal access scheme and not a 'profession' within the meaning of that directive. Professional qualification is only one of a number of other conditions to which construction undertakings are subject.
- 78 In the same context, the Portuguese Republic contends that there was no harmonisation at European Union level of regulation of the exercise of construction activity until the adoption of Directive 2006/123. It takes the view that, given the obligations established by that directive, which was required to be transposed only by 28 December 2009, it cannot be asserted that the same obligations flow directly from the Treaty. Finally, owing to the transposition of that directive, all relevant Portuguese legislation



relating to almost one hundred regulated economic activities, including construction activity, is currently being assessed. Given that an entire range of Portuguese legislation is thus about to be amended, the present infringement proceedings will have little practical effect and should be stayed.

<sup>79</sup> The Republic of Poland submits that a system of prior authorisation for the provision of services by providers of other Member States can be justified only exceptionally where it is demonstrated that checks carried out while the activity is underway or after the event are not sufficiently effective. The Portuguese Republic has not established that its system of authorisation actually contributes to improved safety in the construction sector or demonstrated that that system is necessary for the attainment of the objectives pursued. Those objectives could be attained by measures designed to make specific construction works subject to authorisation rather than construction activity itself. Such measures, in conjunction with supervision of the construction process, would be considerably more effective for the purposes of safeguarding the quality, durability and safety of structures, as well as ensuring compliance with national legal rules and technical standards.

<sup>80</sup> According to the Republic of Poland it is, moreover, apparent from the case-law of the Court that the authorities of the host Member State must take into account the requirements which economic operators or their staff already fulfil in their Member State of origin. However, by applying the same provisions with regard to domestic undertakings and undertakings established in other Member States, the Portuguese Republic fails to take account of requirements already fulfilled by service providers in the Member State of establishment. Furthermore, the Portuguese Republic cannot plead ignorance of the provisions of other Member States or the diversity of legislation in force in order to justify the restriction of the free movement of services.

## Findings of the Court

- 81 As a preliminary point, it must be borne in mind that it is apparent from settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot therefore take account of any subsequent changes (see, in particular, Case C-433/03 *Commission v Germany*, paragraph 32, and in Case C-13/09 *Commission v Italy* [2009] ECR I-201, paragraph 9). Furthermore, according to equally settled case-law, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State on the basis of which those proceedings should be brought (see, in particular, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, paragraph 39, and Case C-199/07 *Commission v Greece* [2009] ECR I-10669, paragraph 23).
- 82 It follows from this that the Court must reject the argument of the Portuguese Republic that the present infringement proceedings will have little practical effect and should be stayed owing to the fact that a whole range of Portuguese legislation is about to be amended in order to transpose Directive 2006/123.
- 83 As regards the compatibility with Article 49 EC of the national scheme at issue, it has consistently been held that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, 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, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 78 and the case-law cited).

- 84 The Court has thus repeatedly held that national legislation which makes the provision of certain services on national territory, by an undertaking established in another Member State, subject to the issue of an administrative authorisation constitutes a restriction of the freedom to provide services (see, in particular, *Säger*, paragraph 14; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 35; and Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 60).
- 85 Furthermore, the fact, highlighted by the Portuguese Republic, that the provision of construction services generally takes some time and that it may, as a result, prove difficult to make a distinction between those services and the situation in which the provider is actually established in the host Member State, does not in any way have the effect of automatically precluding those services from being covered by Article 49 EC. Thus, the Court has already held that Article 49 EC may also include services which are provided over an extended period, even over several years, giving, in particular, the example of services supplied in connection with the construction of a large building (see Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraph 30).
- 86 It follows unequivocally from the case-law cited above that the scheme established by Decree-Law No 12/2004 — under which even undertakings which are already legally established in another Member State must, before being able to provide temporary construction services in Portugal, be authorised by the Portuguese authorities to provide the type of services which they wish to carry out — constitutes a restriction of the freedom to provide services.
- 87 As regards the argument put forward by the Portuguese Republic to the effect that the provisions relating to the freedom to provide services laid down by Directive 2006/123 do not yet apply to the present proceedings, suffice it to note that, even in the absence of measures of harmonisation, a restriction of Article 49 EC can be justified only by legislation which is based on overriding reasons in the public interest and applicable

to all individuals and undertakings carrying on business in the territory of the host State, to the extent that that interest is not safeguarded by the rules to which such a service provider is subject in the Member State in which it is established and provided that that legislation is suitable for attaining the objective pursued, and does not go beyond what is necessary to attain it (see, to that effect, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 35; Case C-433/04 *Commission v Belgium* [2006] ECR I-10653, paragraph 33; and Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 64 and the case-law cited).

<sup>88</sup> In addition, it must be noted that, in particular, the general obligation set out in Article 16(1) of Directive 2006/123, according to which the Member States are to ensure access to and exercise of a service activity within their territory by making that access or exercise subject only to non-discriminatory and objectively justified requirements, stems directly from Article 49 EC.

<sup>89</sup> As to whether there is any objective justification for overriding reasons in the public interest for the restriction of the freedom to provide services that arises from the national scheme at issue, which applies without distinction to any construction undertaking operating within Portuguese territory, it must be observed, first of all, that the reasons put forward by the Portuguese Republic in that regard, namely the requirement to ensure the soundness and safety of buildings and to protect the environment, the architectural heritage as well as consumers and users of buildings, indeed constitute such reasons (see also *Corsten*, paragraph 38, and *Schnitzer*, paragraph 35), and it is not necessary to determine for the purposes of the present case whether some of those reasons are, as the Portuguese Republic maintains, a matter of public policy.

- 90 However, as is apparent in particular from recitals 6 and 27 to Directive 2005/36, in adopting that directive, the Union legislature has already taken those requirements into account, and they are accordingly reflected in the provisions of the directive.
- 91 Under Article 5(1) of Directive 2005/36, Member States are not to restrict, for any reason relating to professional qualifications, the free provision of services if the service provider is legally established in a Member State in which the profession is regulated. Such a service provider may, therefore, provide his services in another Member State under his original professional title, without being required to ask for recognition of his qualifications. If the profession at issue is not regulated in the Member State of establishment, the provider must show that he has two years' professional experience.
- 92 According to Article 7(1) and (2) of Directive 2005/36, the host Member State may require the service provider to make a declaration in advance of the first provision of services within its territory, attaching thereto, inter alia, details of any professional liability insurance cover and other documents, such as proof of his nationality, legal establishment and professional qualifications. However, evidence of no criminal convictions may be required only for professions in the security sector and in so far as such evidence is required of nationals of the host Member State.
- 93 Article 7(4) of Directive 2005/36 provides for a limited exception to those principles for regulated professions having public health or safety implications, which do not benefit from automatic recognition under Title III Chapter III of that directive. In respect of those professions only, the competent authority of the host Member State may check the professional qualifications of the service provider if the purpose of that

check is to avoid serious damage to the health or safety of the service recipient and where this is proportionate to that purpose.

- <sup>94</sup> In addition, Directive 2005/36 introduced, in Article 8, administrative cooperation by which the competent authorities of the host Member State may ask the competent authorities of the Member State of establishment, for each provision of services, to provide any information relevant to the legality of the service provider's establishment and his good conduct, as well as the absence of any disciplinary or criminal sanctions of a professional nature. Finally, to protect the interests of service recipients further, Article 9 allows the host Member State to require the service provider to furnish the recipient of the service with certain information including, in particular, details of any professional liability insurance cover.
- <sup>95</sup> The Portuguese Republic does not deny that the requirements of the scheme established by Decree-Law No 12/2004 go beyond the provisions of Title II of Directive 2005/36. However, it challenges the applicability of that directive to the scheme because the scheme relates not to a regulated profession but to a regulated economic activity.
- <sup>96</sup> In that regard, it must be observed, first of all, that there is a direct relationship, even a certain overlap, between the exercise of an activity in the construction sector and the exercise of professions associated with that sector, and that regulation of those professions may be regarded as being part of the regulation of that activity.
- <sup>97</sup> Next, it must be noted that, under the national scheme at issue, a construction undertaking wishing to provide its services in Portugal must, in order to be classified and to be granted a licence, satisfy requirements which relate not only to the undertaking itself but also to its managers and to its staff in general. Thus, the technical capacity of an undertaking is assessed not only on the basis of its organisational structure, number of staff, possession of the necessary technical resources and of its own experience,

but also on the basis of the level of knowledge, specialisation and experience of its staff. In addition, the commercial aptitude of the undertaking must be demonstrated, inter alia, by extracts from the police records of the trader and of the company's legal representatives.

<sup>98</sup> Finally, it must be observed that Articles 16 and 17 of Directive 2005/36, in conjunction with list I of Annex IV thereto and, in particular, major group 40 which is included in that list, refer to 'activities' in the construction sector.

<sup>99</sup> However, although it is not necessary for the purposes of the present infringement proceedings to determine to what extent Directive 2005/36 applies to the national scheme at issue and whether that scheme is compatible with that directive, since the Commission has not pleaded any incompatibility in that regard, it must be held that, in any event, the scheme goes beyond what is necessary to attain the objectives pursued.

<sup>100</sup> As recalled in paragraph 87 of the present judgment, a restriction of Article 49 EC can be justified only to the extent that the public interest sought to be protected by national legislation is not safeguarded by the rules to which the service provider is subject in the Member State of establishment. The Court has thus held, in particular, that a national authorisation scheme goes beyond what is necessary where the requirements to which the issue of authorisation is subject duplicate the equivalent evidence and safeguards required in the Member State of establishment, inferring in particular an obligation on the part of the host Member State to take account of controls and verifications already carried out in the Member State of establishment (see, to that effect, Case 279/80 *Webb* [1981] ECR 3305, paragraph 20; Case 205/84 *Commission*

v *Germany* [1986] ECR 3755, paragraph 47; Case C-355/98 *Commission v Belgium*, paragraph 38; and Case C-171/02 *Commission v Portugal*, paragraphs 60 and 66).

- 101 By requiring construction undertakings established in another Member State to satisfy all the requirements imposed by the national scheme and, in particular, by Decree-Law No 12/2004, in order to obtain authorisation to exercise, in Portugal, an activity in the construction sector, the scheme precludes the possibility of account being duly taken of equivalent obligations to which such an undertaking is subject in the Member State of establishment or of the verifications already carried out in that regard by the authorities of that Member State.
- 102 That finding is not affected by the fact that the Portuguese Code on commercial companies imposes an obligation to establish a representation and to appoint a representative only on commercial companies wishing to pursue their activities in Portugal for more than one year. That obligation is merely supplementary to the obligation to obtain authorisation in advance in accordance with all the requirements laid down by Decree-Law No 12/2004, and exemption from that obligation does not in any way therefore mean that account is taken, for the purposes of the grant of authorisation, of equivalent obligations required and verified by the Member State of establishment.
- 103 Similarly, it is irrelevant that, as the Portuguese Republic also argued, it is open to a service provider not to renew his licence or registration certificate or to have them cancelled, thereby relieving him of the obligation to comply with the requirements imposed by that decree-law. While it is obviously always possible for a service provider to stop his activities in Portugal, to interpret Article 49 EC as meaning that the mere existence of that option is sufficient to enable an obstacle to the freedom to provide services to be regarded as proportionate would be to deprive that provision of all practical effect.



<sup>104</sup> In so far as the Portuguese Republic contends that, in practice, it carries out a limited assessment of the authorisations which an undertaking has obtained in other Member States, it must be observed, first of all, that it is apparent from the explanations given by the Portuguese Republic in its written pleadings and at the hearing that evidence already verified by the Member State of establishment is accepted as proof by the Portuguese Republic only where its authorities conclude, following a thorough check of such evidence, that the undertaking fully satisfies the requirements laid down by Decree-Law No 12/2004. By proceeding in this way, the Portuguese Republic fails to take account of the equivalent evidence and safeguards required in the Member State of establishment and verified by that State, and instead merely gives undertakings the option, when applying for a licence or registration certificate, of re-submitting evidence that has already been presented to the authorities of the Member State of establishment.

<sup>105</sup> Next, it must be noted that, at the hearing, the Portuguese Republic — referring to the difficulties encountered by its administrative authorities in checking the details of certificates and licences issued by other Member States owing to the multiplicity and variety of schemes in the various Member States — expressly declared that it accepted only evidence capable of demonstrating experience and technical capacity in specific works. It follows, however, from the case-law referred to in paragraph 100 of the present judgment, that those difficulties, which exist to some extent in all activity sectors in respect of which conditions of access have not been harmonised at European Union level, cannot exempt a Member State from the obligation to avoid making the issue of authorisation to a service provider already established in another Member State subject to requirements which duplicate the equivalent evidence and safeguards required in the Member State of establishment.

<sup>106</sup> Finally, in reply to the question put by the Court at the hearing as to whether the practice of carrying out a limited assessment of certificates and authorisations obtained in other Member States, such as that carried out by the Portuguese authorities, is enshrined in legislation, the Portuguese Republic explained that Decree-Law

No 12/2004 does not contain specific provisions in that regard, but that the Portuguese Code on administrative procedure lays down rules requiring the administration to follow a certain number of steps and to assess all the information and evidence submitted by an applicant.

<sup>107</sup> In that regard, it must be borne in mind that, according to settled case-law, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion (see, in particular, *Case C-169/07 Hartlauer* [2009] ECR I-1721, paragraph 64 and the case-law cited). In the particular context of the procedure for the issue of a licence or registration certificate, which depends on the assessment of a number of very specific criteria involving value judgments and for which Decree-Law No 12/2004, moreover, lays down special provisions, a rule as generalised as that to which the Portuguese Republic refers is not such as adequately to circumscribe the exercise of the national authorities' discretion.

<sup>108</sup> In view of all the foregoing considerations, it must be held that, by requiring providers of building services established in another Member State to satisfy all the requirements imposed by the national scheme at issue, and in particular by Decree-Law No 12/2004, in order to obtain authorisation to exercise, in Portugal, an activity in the construction sector, thereby precluding the possibility of account being duly taken of equivalent obligations to which such providers are subject in the Member State in which they are established, or of the verifications already carried out in that regard by the authorities of that Member State, the Portuguese Republic has failed to fulfil its obligations under Article 49 EC.

**Costs**

- 109 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the Portuguese Republic and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.
- 110 In accordance with Article 69(4) of the Rules of Procedure, the Republic of Poland is to bear its own costs.

On those grounds, the Court (First Chamber) hereby

1. **Declares that, by requiring providers of building services established in another Member State to satisfy all the requirements imposed by the national scheme at issue, and in particular by Decree-Law No 12/2004 of 9 January 2004, in order to obtain authorisation to exercise, in Portugal, an activity in the construction sector, thereby precluding the possibility of account being duly taken of equivalent obligations to which such providers are subject in the Member State in which they are established, or of the verifications already carried out in that regard by the authorities of that Member State, the Portuguese Republic has failed to fulfil its obligations under Article 49 EC;**
2. **Orders the Portuguese Republic to pay the costs;**
3. **Orders the Republic of Poland to bear its own costs.**

[Signatures]