acceptance in more than 50% of the trade circles concerned is required and is to be demonstrated, compatible with that provision?

Do requirements follow from this provision as to the manner in which descriptive character acquired by use is to be ascertained?

(1) First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) (OJ No L 40, 1989, p. 1).

Action brought on 18 March 1997 by the Commission of the European Communities against the Italian Republic

(Case C-112/97)

(97/C 166/08)

An action against the Italian Republic was brought before the Court of Justice of the European Communities on 18 March 1997 by the Commission of the European Communities, represented by Paolo Stancanelli and Hans Stovlbaek, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg.

The applicant claims that the Court should:

— declare that, by establishing and maintaining a system which requires the installation in inhabited areas only of 'shielded' heaters, thus impliedly prohibiting the installation of heaters of any other type which comply with Directive 90/396/EEC (1), the Italian Republic has failed to fulfil its obligations under Community law,

— order the Italian Republic to pay the costs.

Pleas in law and main arguments adduced in support:

Article 5 (10) of Decreto del Presidente della Repubblica (Decree of the President of the Republic) of 26 August 1993 (hereinafter DPR 412/93) provides that in cases of new installations or restructuring of heating systems which involve the installation of individual heaters, except in cases of mere replacement, heaters insulated from the inhabited area may be used or, where installation is external or in suitable industrial premises, appliances of any type may be fitted.

Although Article 5 (10) of DPR 412/93 does not contain a prohibition on the marketing of non-insulated ('open') heaters or a general prohibition on their installation, it is none the less true that that provision does prohibit specifically, albeit impliedly, the fitting of such heaters in inhabited areas when installing anew or restructuring heating systems.

Such a specific prohibition is contrary to Article 4 of Directive 90/396/EEC inasmuch as it constitutes an obstacle to the putting into service of appliances to which the directive applies and which conform to the essential requirements provided for therein.

The argument that Article 5 (10) of DPR 412/93 is compatible with Directive 90/396/EEC on account of the safety requirements on which it is based is unfounded. Indeed, the essential requirements laid down by the directive in respect of the installation and use of appliances burning gaseous fuels — including of the 'open' type — are exhaustive in that they conform to all the relevant safety requirements and are mandatory in nature. In the present case, the national authority is no longer able to maintain in force nor to adopt national provisions which require compliance with additional requirements, otherwise the achievement and the functioning of the internal market would be unlawfully hindered.

The argument that Article 5 (10) of DPR 412/93 should be regarded as a lawful derogation under Article 36 and 100a (4), or Article 129a of the EC Treaty from the principle of the free movement of goods is also unfounded.

(1) OJ No L 196, 26. 7. 1990, p. 15.

Action brought on 19 March 1997 by Commission of the European Communities against Kingdom of Spain

(Case C-114/97)

(97/C 166/09)

An action against the Kingdom of Spain was brought before the Court of Justice of the European Communities on 17 March 1997 by the Commission of the European Communities, represented by A. Caeiro and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg.

The applicant claims that the Court should:

— declare that, by maintaining in force Articles 7, 8 and 10 of Law No 23/1992 of 30 July 1992 (1), in so far as those provisions make the grant of authorization to carry on private security activities in the case of 'security companies' subject to the requirement of being constituted in Spain and the requirement that their directors and managers should reside in Spain and the requirement that the 'security staff' should possess Spanish nationality, the Kingdom of Spain has failed to fulfil its obligations under the EC Treaty, in particular Articles 48, 52 and 59,

— order the defendant to pay the costs.

Pleas in law and main arguments adduced in support:

Freedom of establishment

A condition requiring the directors of a company to reside in the Member State in which the company is established (Article 8 of Law No 23/1992) amounts to discrimination on grounds of nationality.

The requirement that undertakings should be constituted in Spain (Article 7 of Law No 23/1992) is explicitly discriminatory and entails a restriction on the right of undertakings to carry on their activities through a branch or agency as expressly provided for by Article 52 of the EC Treaty.

Where security staff are self-employed, the nationality requirement imposed by Article 10 (3) of Law No 23/1992 infringes Article 52 of the Treaty as well.

Freedom to provide services

The effect of the condition laid down in Article 7 of Law No 23/1992 that the undertaking should be constituted in Spain and the condition of residence for directors laid down in Article 8 is to preclude all private security activity carried out by security firms or personnel not established in Spain. Such requirements constitute a discriminatory barrier to the freedom to provide services.

Article 55 of the EC Treaty

The Commission considers that the mere fact that private undertakings have been entrusted with some security services, which services have thus for the most part been removed from the sphere of the State, excludes the conclusion that 'private security (...) forms a functional part of the security monopoly which is the State's concern'. Furthermore, the actual wording of Law No 23/1992 states that the activities of security companies and staff are additional and ancillary to public security activities, without going so far as to say that they form part of public security.

Whether various activities are connected with the exercise of official authority does not depend on their effects or objective but rather on the powers and courses of action made available to the undertakings or persons carrying on those activities. Crime prevention does not necessarily entail a prerogative of official authority, since in certain circumstances individuals may take action to prevent crime. Moreover, crime prevention in general has not been arrogated to security firms and staff, only the aspects concerned with protection.

Nor can the special duty to assist the *Fuerzas y Cuerpos de Seguridad* (security forces) imposed on security firms and personnel in the exercise of their duties, to collaborate with those forces and follow their orders in relation to the objective of protection support the conclusion that they act in the exercise of public authority. Every citizen has that duty in particular circumstances. Furthermore, the fact of playing an ancillary and preparatory part in the exercise of public authority does not amount to direct and specific involvement in the exercise of that authority within the meaning of Article 55 of the Treaty.

Authority to bear arms, although exceptional, is not a right exclusive to the security forces or other agency of public authority and therefore it cannot be argued that because security personnel are so authorized this necessarily means that they are connected with the exercise of public authority. Thus, the Weapons Regulation, approved by Royal Decree No 137/1993 of 29 January 1993 provides that where the circumstances warrant it gun licences may be issued to individuals, including nationals of another Member State. Clearly, security personnel have to hold a gun licence in order to be able to provide their services, like any other citizen.

Article 56 of the EC Treaty

The Commission considers that it is not obvious why the fact that a detective or a watchman guarding premises (pursuing that activity in a self-employed capacity) is not Spanish but is a national of another Member State should pose a genuine and existing threat serious enough to affect a fundamental social interest.

The exclusion of all undertakings whose directors and managers do not reside in Spain and of all nationals of other Member States would seem to be based essentially on considerations of an administrative character.

Freedom of movement for workers

Since security personnel are not public officials, it does not appear that Article 48 (4) can be applicable.

The grounds of public policy, public security and public health referred to in Article 48 (3) do not permit an entire sector of activity to evade freedom of movement for workers and the right to take up employment.

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(1) Boletín Oficial del Estado (4. 8. 1992).

Reference for a preliminary ruling from the Maaseutuelinkeinojen Valituslautakunta by order of that tribunal of 12 March 1997 in the proceedings brought by Laura Pitkäranta, represented by her legal guardian Anne Pitkäranta

(Case C-118/97)

(97/C 166/10)

Reference has been made to the Court of Justice of the European Communities by an order of the Maaseutuelinkeinojen Valituslautakunta (Rural Industries