

JUDGMENT OF THE COURT (Second Chamber)
21 April 2005^{*}

In Case C-140/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 March 2003,

Commission of the European Communities, represented by M. Patakia, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by E. Skandalou, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, C. Gulmann (Rapporteur), P. Kūris and G. Arestis, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 September 2004,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2004,

gives the following

Judgment

¹ By its application, the Commission of the European Communities asks the Court of Justice to declare that:

— by enacting and maintaining in force Law No 971/79 on the exercise of the profession of optician and on opticians' shops (FEK A' 223, hereinafter referred

to as 'Law No 971/79'), which does not permit a qualified optician as a natural person to operate more than one optician's shop, the Hellenic Republic has restricted the conditions of establishment of natural persons working as opticians, in breach of Article 43 EC, and

- by enacting and maintaining in force Law No 971/79 and Law No 2646/98 on the development of a national social welfare system and other provisions (FEK A' 236, p. 3455, hereinafter 'Law No 2646/98') under which the establishment by a legal person of an optician's shop in Greece is subject to the following conditions:
 - authorisation for the establishment and operation of the optician's shop must have been granted to a recognised optician who is a natural person, the person holding the authorisation to operate the shop must hold at least 50% of the company's share capital and must participate at least to that extent in the profits and losses of the company, and the company must be in the form of a collective or limited partnership, and
 - the optician in question may participate at most in one other company owning an optician's shop, subject to the condition that the authorisation for the establishment and operation of that shop is in the name of another authorised optician,

the Hellenic Republic has restricted the conditions of establishment of legal persons operating as opticians in Greece in a manner inconsistent with Article

43 EC and has infringed Article 48 EC in conjunction with Article 43 EC by imposing on legal persons conditions not applicable to natural persons.

The national legal framework

2 Article 6(6) of Law No 971/79 provides:

‘Subject to the provisions of paragraph 3 of this article (establishment in pharmacies) and of paragraph 2 of Article 8 (transfer to family members), opticians’ shops shall be personally managed by the person to whom authorisation for their operation has been granted. Each optician may manage only one optician’s shop ...’

3 Article 7(1) of the same law states:

‘Opticians’ shops may only be established by persons holding an optician’s licence and their operation is subject to the grant of authorisation by the competent public authorities.’

4 Article 8(1) stipulates that:

‘Authorisation for the operation of an optician’s shop is personal and non-transferable.’

5 Article 27(4) of Law No 2646/98 provides:

‘Only qualified opticians may form a collective or limited partnership in order to operate an optician’s shop, provided that the person holding the authorisation to operate the shop holds at least 50% of the share capital. An optician may participate at most in one other company but the authorisation to establish and operate that shop must be in the name of another qualified optician.’

Pre-litigation procedure

6 Following a complaint lodged by two limited companies (one of which is registered in a Member State other than the Hellenic Republic) which, on the basis of Law No 971/79, had been refused authorisation to open an optician’s shop, the Commission, by letter of 27 January 1998, drew the attention of the Greek Government to the incompatibility of the legislation with Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and with Article 58 of the EC Treaty (now Article 48 EC).

7 On 27 April 1998, the Greek Government replied that Law No 971/79 was being amended.

8 On 6 November 1998, the Commission sent the Hellenic Republic a letter of formal notice, emphasising that Law No 971/79 did not comply with the Treaty provisions referred to in its previous letter of 27 January 1998. The Commission invited the Hellenic Republic to submit its observations in that respect within two months.

- 9 On 13 January 1999, the Greek Government replied, informing the Commission of Law No 2646/98, which supplements Law No 971/79.
- 10 On 3 August 1999, the Commission sent a further letter of formal notice to the Greek Government, in which it argued that Law No 2646/98 did not dispose of the complaint set out in the first formal notice, as that law itself conflicted with Articles 43 EC and 48 EC. On 26 January 2000, the Commission sent a second supplementary letter of formal notice, reiterating the complaints against the Hellenic Republic.
- 11 On 17 May 2000, the Greek Government replied that, in the absence of harmonisation at Community level, each Member State remains free to regulate the exercise of professions within its territory. It claimed that the alleged restrictions were essential in order to guarantee a high level of protection of health. It maintained that the disputed legislation was neither discriminatory nor disproportionate in relation to its objective.
- 12 On 24 January 2001, the Commission sent the Hellenic Republic a reasoned opinion rejecting those arguments, setting out its complaints concerning infringement of Articles 43 EC and 48 EC, and inviting the Member State to whom the opinion was addressed to take the necessary steps to comply within two months.
- 13 On 2 May 2001, the Greek Government replied that its position remained the same. On 9 December 2002, it informed the Commission of its intention to amend the legislation to allow opticians from within the Community and, subject to certain conditions, commercial undertakings, irrespective of their legal form (collective or

limited partnership, private limited company or public limited company) to establish and operate opticians' shops.

- 14 The Commission brought this action on 27 March 2003.

The action

- 15 The following matters must be considered in turn:

- the effect on the present action of Law No 3204/03, amending and supplementing the legislation relating to the national health system and regulating other matters within the remit of the Minister for Health and Welfare (FEK A' 296, p. 4997), which was pleaded by the Hellenic Republic at the oral hearing;

- the existence of restrictions on the freedom of establishment of natural and legal persons;

- the possible justification for such restrictions.

The effect of Law No 3204/03, pleaded by the Hellenic Republic

Arguments of the parties

- 16 During the oral proceedings, the Hellenic Republic claimed that Law No 3204/03, of which the Commission had recently been notified, had disposed of the alleged infringements of Articles 43 EC and 48 EC.
- 17 Under that law, opticians who are natural persons are now authorised to operate more than one optician's shop, provided that each shop is managed by a qualified optician.
- 18 As regards legal persons, Law No 3204/03 currently allows companies, whatever their legal form, to establish opticians' shops.
- 19 However, that law requires:
- in relation to collective partnerships, that the majority of partners and the manager, or the majority of managers, should be opticians;

- in relation to private limited companies, that more than half of the shareholders representing more than half of the share capital should be opticians;

- in relation to public limited companies, that at least 51% of the share capital should be held by opticians.

20 The Commission observes that the current proceedings relate to the legal framework provided by Laws Nos 971/79 and 2646/98, and that, in any event, a preliminary analysis of Law No 3204/03 shows that certain restrictions on the freedom of establishment concerned in the action continue to exist.

Findings of the Court

21 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that account cannot be taken of any subsequent changes (see, in particular, Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 23, and Case C-97/01 *Commission v Luxembourg* [2003] ECR I-5797, paragraph 30).

22 That being the case, Law No 3204/03, which was adopted after the end of the period laid down in the reasoned opinion addressed to the Hellenic Republic in this case, cannot be taken into account in the consideration of the merits of this action for failure to fulfil obligations.

The existence of restrictions on the freedom of establishment of natural and legal persons

Arguments of the parties

- 23 The Commission claims that Law No 971/79, in so far as it does not permit an optician who is a natural person to operate an optician's shop, constitutes a restriction on the freedom of establishment provided for in Article 43 EC.
- 24 As regards legal persons, the Commission maintains that Law No 2646/98 also restricts the freedom of establishment, contrary to Article 48 EC, in that it makes the establishment of an optician's shop subject to the conditions set out in Article 27(4) of that law.
- 25 The Hellenic Republic considers that Article 6(6) of Law No 971/79 does not give rise to any direct or indirect discrimination as between national and foreign professionals. Therefore, that provision does not infringe Article 43 EC.
- 26 As regards natural persons, the Hellenic Republic does not deny that Greek law imposes restrictions upon them.

Findings of the Court

- 27 According to settled case-law, Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is

liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment that is guaranteed by the Treaty (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761, paragraph 15).

28 In this case, it should be noted that the measure prohibiting qualified opticians from operating more than one optician's shop effectively amounts to a restriction on the freedom of establishment of natural persons within the meaning of Article 43 EC, notwithstanding the alleged absence of discrimination on grounds of the nationality of the professionals concerned.

29 As far as legal persons are concerned, it must also be noted that, as the Hellenic Republic has moreover acknowledged, their freedom of establishment is restricted by the conditions laid down in Article 27(4) of Law No 2646/98 and, in exercising that freedom, legal persons are treated in the same way as natural persons under Article 48 EC.

Justification for the restrictions on the freedom of establishment found to exist

Arguments of the parties

30 The Commission considers that the restrictions on the freedom of establishment in this case are either inadequate for the attainment of the claimed objective of

protecting public health, or are disproportionate in relation to that objective. Public health could be protected by guaranteeing that certain actions will be carried out by qualified, salaried opticians or under their supervision. As far as the question of liability is concerned, it would be possible to lay down less restrictive legal provisions to protect the interests of the customers who might be the victims of opticians' professional activities.

- 31 The Hellenic Republic claims that the prohibition of the operation of more than one shop by any natural person was enacted for overriding reasons of general interest in relation to the protection of public health. The Greek legislature wished to safeguard the personal relationship of trust within the optician's shop, as well as, in case of fault, the absolute and unlimited liability of the optician who operates or owns the shop. Only an optician, a qualified specialist, who participates directly in the running of his shop without expending physical and mental energy on running other shops can guarantee the desired result.
- 32 According to the Greek Government, the objectives pursued could not have been attained by measures less restrictive of the freedom of establishment.
- 33 As regards legal persons, the high level of participation of opticians in the share capital that is required by Law No 2646/98 reduces the risk of the complete commercialisation of opticians' shops. The principle of proportionality must be reconciled with the need to protect public health. To achieve such protection, the Hellenic Republic will continue to try to preserve personal contact between opticians and their customers, and to require absolute and unlimited liability on the part of opticians.

Findings of the Court

34 A national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty may be justified by overriding reasons of general interest, provided that the measure in question is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose (see, in particular, *Kraus*, cited above, paragraph 32).

35 In this case, it is sufficient to note that the objective of protecting public health upon which the Hellenic Republic relies may be achieved by measures which are less restrictive of the freedom of establishment both for natural and legal persons, for example by requiring the presence of qualified, salaried opticians or associates in each optician's shop, rules concerning civil liability for the actions of others, and rules requiring professional indemnity insurance.

36 It is thus clear that the disputed restrictions go beyond what is required in order to achieve the objective pursued. There is therefore no justification for them.

37 It follows that the complaints which the Commission has put forward are well founded.

38 That being the case, it should be declared that,

- by enacting and maintaining in force Law No 971/79, which does not permit a qualified optician as a natural person to operate more than one optician's shop, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC, and that,

- by enacting and maintaining in force Law No 971/79 and Law No 2646/98, under which the establishment by a legal person of an optician's shop in Greece is subject to the following conditions:
 - authorisation for the establishment and operation of the optician's shop must have been granted to a recognised optician who is a natural person, the person holding the authorisation to operate the shop must hold at least 50% of the company's share capital and must participate at least to that extent in the profits and losses of the company, and the company must be in the form of a collective or limited partnership, and

 - the optician in question may participate at most in one other company owning an optician's shop, subject to the condition that the authorisation for the establishment and operation of that shop is in the name of another authorised optician,

the Hellenic Republic has failed to fulfil its obligations under Articles 43 EC and 48 EC.

Costs

39 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. Since the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that by enacting and maintaining in force Law No 971/79 on the exercise of the profession of optician and on shops for the sale of optical articles, which does not permit a qualified optician as a natural person to operate more than one optician's shop, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC;**

2. **Declares that by enacting and maintaining in force Law No 971/79 and Law No 2646/98 on the development of a national social security system and other provisions, under which the establishment by a legal person of an optician's shop in Greece is subject to the following conditions:**
 - **authorisation for the establishment and operation of the optician's shop must have been granted to a recognised optician who is a natural person, the person holding the authorisation to operate the shop must hold at least 50% of the company's share capital and must participate at least to that extent in the profits and losses of the company, and the company must be in the form of a collective or limited partnership, and**

- **the optician in question may participate at most in one other company owning an optician's shop, subject to the condition that the authorisation for the establishment and operation of that shop is in the name of another authorised optician,**

the Hellenic Republic has failed to fulfil its obligations under Articles 43 EC and 48 EC;

3. Orders the Hellenic Republic to pay the costs.

[Signatures]