Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 10 March 2015 [1]

Case C-593/13

Presidenza del Consiglio dei Ministri and Othersv Rina Services SpA, Rina SpA and SOA Rina Organismo di Attestazione SpA

(Request for a preliminary ruling from the Consiglio di Stato, Italy)

(Articles 49 TFEU, 51 TFEU, 52 TFEU and 56 TFEU — Freedom of establishment — Freedom to provide services — Connection with the exercise of official authority — Directive 2006/123/EC — Article 14 — Article 16 — Companies responsible for verifying and certifying that undertakings carrying out public works comply with the requirements laid down by law — National legislation providing that the registered office of such companies must be situated in national territory — Public policy and public security)

1. The present case, which arises from a request for a preliminary ruling from the Italian Consiglio di Stato, affords the Court of Justice the opportunity to interpret and apply, in practice for the first time, the provisions governing freedom of establishment and freedom to provide services laid down in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2] ('the Services Directive'), [3] in the light of the provisions of the Treaty on the Functioning of the European Union which govern those freedoms.

2. In essence, the question raised by the referring court concerns the compatibility with Union law of a provision of national legislation under which companies wishing to provide certain services (in this case, certification services) in a Member State must have their registered office in that Member State. While the Court of Justice has been required over a considerable period of time to consider the requirement for a service provider to have its registered office (or place of residence, in the case of a natural person) in a particular place and has declared such a requirement to be incompatible with

1 — Original language: Spanish.

2 — OJ 2006 L 376, p. 36.

3 — To be precise, in *Duomo Gpa and Others* (C-357/10 to C-359/10, ECR, EU:C:2012:283) the Court did not examine whether the legislation at issue in that case was compatible with the provisions of the Services Directive relating to freedom of establishment and freedom to provide services because it decided that the directive was not applicable *ratione temporis*. The same occurred in *De Clerq and Others* (C-315/13, ECR, EU:C:2014:2408). In *Femarbel* (C-57/12, ECR, EU:C:2013:517) the question of the applicability of Articles 14 to 18 of the Services Directive was not addressed, which was also the case in *Libert and Others* (C-197/11 and C-203/11, ECR, EU:C:2013:288) and *Ottica New Line di Accardi Vincenzo* (C-539/11, ECR, EU:C:2013:591) because the directive was not applicable *ratione materiae*. In *OSA* (C-351/12, ECR, EU:C:2014:110) the Court held that Article 16 of the Services Directive was not applicable to copyright and related rights under Article 17(11) thereof. Finally, in *Société fiduciaire nationale d'expertise comptable* (C-119/09, ECR, EU:C:2011:208) the Court of Justice had the opportunity to interpret Article 24 of the Services Directive, which is the chapter relating to the quality of services, but did not examine Articles 14 to 18 of the directive.

primary law,[4] in the present case the question must be addressed in the light of the Services Directive, which gives concrete expression in secondary law to the settled-case law in this matter. Against that background, the primary difficulty arising in the present case is not that of ascertaining whether, in a situation such as that in the main proceedings, a Member State may make the provision of certification services in its territory subject to the requirement in question, since, as we shall see, the Services Directive is quite clear in that respect, but rather that of establishing the extent to which the obstacle to the exercise of the fundamental freedoms concerned, which that discriminatory requirement represents, may be justified in the present case. As a result, it will be necessary to determine, first of all, which specific provisions of the Services Directive relating to both the right of establishment and the freedom to provide services are applicable to the present case.

I – **Legislative framework**

A – *Union law*

3. The Services Directive, the purpose of which, in accordance with Article 1(1) thereof, is to establish 'general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services', does not apply, pursuant to Article 2(2)(i) thereof, to activities which are connected with the exercise of official authority, as established in what is now Article 51 TFEU.

4. According to Article 3(3) of the directive, entitled 'Relationship with other provisions of Community law':

'Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.'

5. Article 14 of the Services Directive, which is in Chapter III ('Freedom of establishment for providers'), provides as follows:

'Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

(1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, …;

…

(3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

4 — As Advocate General Mayras stated in his Opinion delivered on 13 November 1974 in the first case to deal with that question, *Van Binsbergen* (33/74, ECR, EU:C:1974:121) concerning a rule providing that a professional must reside in the Netherlands in order to be able to provide services as legal adviser, 'such a requirement has the inescapable effect … of preventing an adviser from being able to offer his services to individuals before the Netherlands courts when he himself is established in a State other than the Netherlands. *It is therefore contrary to the freedom to provide services within the Common Market*' (italics added). The Court confirmed that approach in the judgment in *Van Binsbergen*, 33/74, ECR, EU:C:1974:131, in which it held for the first time that *the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable*. See also, *inter alia*, *Commission* v *Italy*, C-439/99, ECR, EU:C:2002:14, paragraph 30, and *Commission* v *Italy*, C-279/00, ECR, EU:C:2002:89, paragraph 17 and the case-law cited.

…’

6. Article 16 of the Services Directive provides:

‘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;

…

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. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

…’

B – *National law*

7. According to Article 64(1) of Decree No 207/2010 of the President of the Republic of 5 October 2010 (‘DPR No 207/2010’):

‘Certification organisations shall be constituted as limited companies whose company name must expressly include the term “certification organisation”; they must have their registered office in the territory of the Republic.’

II – **Main proceedings and questions referred for a preliminary ruling**

8. The request for a preliminary ruling from the Italian Consiglio di Stato arises from three disputes between, on the one hand, the Presidenza del Consiglio dei Ministri and other Italian public authorities and, on the other, Rina Services SpA, Rina SpA and SOA Rina Organismo di Attestazione SpA ('SOA Rina'), respectively (which I shall refer to collectively as the 'Rina group companies'),[5] in connection with the obligation imposed by Italian law requiring 'certification bodies' (Società Organismo di Attestazione; 'SOAs')[6] to have their registered office in Italy. The Presidenza del Consiglio dei Ministri and the other Italian public authorities have appealed to the Consiglio di Stato in each of the three sets of proceedings against the corresponding judgments of the Tribunale Amministrativo Regionale per il Lazio, in which, without ruling definitively on the substance, that court upheld the actions brought by each of the Rina group companies contesting Article 64(1) of DPR No 207/2010 on the basis that it is unlawful.

9. The Consiglio di Stato, which joined the three appeals for the purposes of the request for a preliminary ruling, has referred the following questions:

'(1) Do the TFEU principles of freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU) and the principles laid down in Directive 2006/123/EC preclude the adoption and application of national legislation under which SOAs constituted as limited companies "must have their registered office in the territory of the Republic"?

(2) Must the derogation provided for in Article 51 TFEU be interpreted as covering an activity such as the certification carried out by private-law bodies which, on the one hand, are required to be formed as limited companies and operate in a competitive market and, on the other hand, are connected with the exercise of official authority and, for that reason, are subject to authorisation and rigorous controls by the Supervisory Authorities?'

10. Written observations were lodged in these proceedings by the Rina group companies, the Italian Government, the Swedish Government and the European Commission. The latter and the Polish Government replied in writing to the questions put by the Court under Article 61(1) of the Rules of Procedure. Those having submitted oral observations attended the hearing held on 2 December 2014 and were requested to concentrate in their submissions on the first question referred for a preliminary ruling.

III – **Preliminary observations**

11. By its questions, and irrespective of the observations I will make in relation to the second question, the referring court asks whether the principles laid down in the Treaty (Articles 49 TFEU and 56 TFEU) and the Services Directive relating to freedom of establishment and freedom to provide services preclude national legislation such as that at issue in these proceedings, which imposes on SOAs the requirement for their registered office to be situated in Italy. It is appropriate to set out a few preliminary observations before replying to the first question.

5 — Rina SpA holds 99% of the shares in SOA Rina, while Rina Services SpA holds the remaining 1%.

6 — It should be noted that SOAs are profit-making undertakings responsible for providing certification services. The grant of a certificate by one of these undertakings is a prerequisite for participation by interested parties in public works contracts under Italian law. That law provides, in particular, that the SOAs are to check the technical and financial capacity of the undertakings subject to certification, the content of the declarations, certificates and documents presented by the persons to whom the certificate is issued and continued compliance with the conditions relating to the personal situation of the candidate or tenderer. Undertakings seeking to participate in procedures for the award of public contracts are legally obliged to use the certification services of SOAs. As part of their certification activities, SOAs are required to provide the relevant information to the Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture, which monitors certification activities in order to ensure that they comply with the law. SOAs may be penalised if they infringe their legal obligations.

12. First, the question, as framed by the referring court, suggests that a set of rules is to be applied in assessing the compatibility of the Italian legislation at issue with Union law: on the one hand, the provisions of the Treaty and, on the other, the provisions of the Services Directive. Given that the national court has referred for a preliminary ruling a question of interpretation which does not call into question the validity of any of the provisions of the Services Directive, and in so far as — as will be examined in detail below — the Services Directive carries out a comprehensive harmonisation of the subject matter of the directive in so far as concerns the specific aspect of concern to us here, it will be sufficient, for the purpose of examining the Italian legislation at issue, to interpret the provisions of the Services Directive.[7]

13. Second, in order to establish whether it is appropriate to examine the substance of the questions referred by the national court, it is necessary to address, first of all, the difficulty of the apparent absence of a cross-border element in the present case, since it is apparent from the documents before the Court that all aspects of the case before that court are confined within a single Member State, namely, Italy. The applicants in the main proceedings are three Italian companies whose registered offices are in Italy and which carry out, *inter alia*, certification activities in Italy (and other countries). Those companies have challenged an Italian provision which makes pursuit of the activity of an SOA subject to the condition that the registered office of the SOA must be located in Italy. Since the dispute appears to concern a purely internal situation, it must be established at the outset whether the Court should reply to the questions referred for a preliminary ruling by the Consiglio di Stato.

14. It must be acknowledged that, from the standpoint of the specific facts giving rise to the disputes in main proceedings, there is a somewhat hypothetical element to the — apparently simple — question as formulated by the referring court. SOA Rina, the applicant in one of those disputes, whose shareholders are the other two applicants, has its registered office in Italy and currently provides certification services in Italy. In that connection, the Italian provision at issue does not prevent SOA Rina and its shareholders from pursuing certification activities in Italy and, in principle, nor does it prevent that company from moving its registered office outside Italy and establishing itself in another Member State should it so wish. It is none the less certain that, as soon as it chose to do so, it would no longer be able to provide certification services in Italy as a result of Article 64(1) of DPR No 207/2010.

15. Moreover, as the Commission observed in its submissions at the hearing and as the Court stated in *Attanasio Group*[8] and *SOA Nazionale Costruttori*,[9] it is far from inconceivable that undertakings established in Member States other than Italy are or have been interested in carrying out certification activities in that country. As the Commission stated at the hearing in reply to one of the questions put to it, the situation, framed in those terms, is currently 'hypothetical' as a result of the absolute requirement laid down in the Italian provision at issue, but the possibility cannot be totally ruled out that there are operators established in other Member States which Article 64(1) of DPR No 207/2010 is *de facto* preventing from providing certification services in Italy.

7 — It should be recalled that, according to settled case-law, where a sphere has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of primary law (see, *inter alia*, judgments in *Tedeschi* v *Denkavit*, 5/77, ECR, EU:C:1977:144, paragraph 35; *Parfümerie-Fabrik 4711*, C-150/88, ECR, EU:C:1989:594, paragraph 28; *Vanacker and Lesage*, C-37/92, EU:C:1993:836, paragraph 9; *Hedley Lomas*, C-5/94, EU:C:1996:205, paragraph 18; *Compassion in World Farming*, C-1/96, EU:C:1998:113, paragraph 47; *Commission* v *Italy*, C-112/97, EU:C:1999:168, paragraph 54; *Monsees*, C-350/97, EU:C:1999:242, paragraph 24; *DaimlerChrysler*, C-324/99, EU:C:2001:682, paragraph 32; *National Farmers' Union*, C-241/01, EU:C:2002:604, paragraph 48; *Linhart and Biffl*, C-99/01, EU:C:2002:618, paragraph 18; *Radlberger Getränkegesellschaft and S. Spitz*, C-309/02, EU:C:2004:799, paragraph 53; *Roby Profumi*, C-257/06, EU:C:2008:35, paragraph 14; and *Lidl Magyarország*, C-132/08, ECR, EU:C:2009:281, paragraph 42. See also the Joined Opinion of Advocate General Geelhoed in *Commission* v *Austria*, C-221/00 and *Sterbenz and Haug*, C-421/00, C-426/00 and C-16/01, EU:C:2003:46, point 45, in which the Advocate General draws attention to a certain lack of consistency in the case-law relating to this issue (point 44).

8 — C-384/08, ECR, EU:C:2010:133, paragraph 24.

9 — C-327/12, ECR, EU:C:2013:827, paragraph 48.

16. Therefore, for the reasons stated above, I consider that there is a sufficient connection between the present case and intra-European Union trade. Accordingly, it is my view that it is necessary to examine the substance of the questions referred for a preliminary ruling by the national court.

IV – **Analysis**

A – *The second question*

17. In replying to the two questions referred for a preliminary ruling by the Consiglio di Stato, it is appropriate to begin by putting to one side the second question, concerning the applicability of the derogation provided for in Article 51 TFEU (exercise of official authority) to the activities carried out by SOAs, a derogation which is now also available in Article 2(2)(i) of the Services Directive.

18. This is an issue on which the Court has recently given a ruling in *SOA Nazionale Costruttori*.[10] In that judgment the Court ruled that it cannot be held that SOAs' attestation activities are directly and specifically connected with the exercise of official authority, for the reasons set out therein, to which I refer. I shall therefore move on to the first question referred by the Consiglio di Stato, which is at the heart of the present request for a preliminary ruling.

B – *The first question*

19. By its first question, the referring court essentially seeks to ascertain whether the principles laid down in the Treaty and in the Services Directive relating to freedom of establishment and freedom to provide services preclude a provision, such as the Italian provision at issue (Article 64(1) of DPR No 207/2010), under which, in order to be able to provide certification services, SOAs must have their registered office in Italy. For the reasons set out above (see point 12 of this Opinion), it is appropriate to begin by considering whether the Services Directive is applicable to the case before the national court and, if that is the case, it will not be necessary to answer this question in the light of primary law.

1. The Services Directive as an assessment criterion for the national provision and the harmonising nature of certain of its provisions

20. I consider that the Services Directive is applicable *ratione materiae* to the present case, since the certification services at issue are not excluded from its scope (see Article 2(2) and (3) of the Services Directive). Furthermore, those services are expressly mentioned in the list of examples of activities included in the material scope of the directive, which appears in recital 33 in the preamble thereto.

21. I have already referred, at point 12 of this Opinion, to the settled case-law of the Court, according to which, where a sphere has been the subject of exhaustive harmonisation at EU level, any related national measure must be assessed in the light of the provisions of the harmonising measure, not those of primary law.[11]

22. As a result of its nature as a horizontal instrument covering a wide range of services (all those which are not expressly excluded from its material scope), the Services Directive is not aimed at the general harmonisation of the substantive provisions governing different services at national level but there are particular areas which are *specifically* harmonised in full by the directive, as we shall see below.

10 — C-327/12, ECR, EU:C:2013:827, paragraph 52.

11 — See the case-law cited in footnote 7.

23. Although the Services Directive does not fit very well into the 'classic' model of a European Union harmonising measure, as I observed in my Opinion in *Duomo Gpa and Others*,[12] I consider that, as regards the specific aspects which are harmonised, the question whether the national provision at issue is compatible with Union law must be assessed using the Services Directive as an assessment criterion.[13]

24. In my view, that is the case with regard to Articles 14 and 16 of the Services Directive. I consider that, in those provisions, the Union legislature, relying essentially on the technique of 'negative integration'[14] to ensure that Member States remove from their domestic legal systems unjustified restrictions on the freedom to provide services, effected 'full' harmonisation, which enables those provisions to be used as criteria for the assessment measures such as those at issue in the present case.

2. Determination of the fundamental freedom at issue

25. Now that it has been established that it is necessary to apply the provisions of the Services Directive first and foremost in the present case, as the areas concerned have been fully harmonised, the next question to be addressed is which specific provision or provisions of the Services Directive are applicable. It should be borne in mind that the directive devotes separate chapters to 'Freedom of establishment for providers' (Chapter III) and 'Free movement of services' (Chapter IV). Each of those chapters includes, in greater or lesser detail, a number of conditions relating to the exercise of the freedom to provide services or, specifically, to freedom of establishment, in the form of 'requirements' which Member States may not impose under any circumstances or may impose only under certain specific conditions. Since, logically, those rules are not identical, the question of which provisions of the Services Directive are directly applicable to the present case is obviously important.

26. Those having submitted observations in the present proceedings have sought, first are foremost, to identify the relevant fundamental freedom, which will lead to the application of the provisions of one or other of those chapters. Most of them consider that both freedoms — freedom to provide services and freedom of establishment — are *prima facie* relevant. However, the Italian Republic submits that only freedom of establishment is relevant.

27. There is no doubt that the question under consideration concerns a national provision relating to the location of the registered office of a company seeking to provide services in a particular Member State. From that perspective, and, for reasons that I shall set out below, it is difficult to deny that the central issue in this case is one of 'establishment'.

28. However, at the same time, if account is taken of the effect of the national provision on fundamental freedoms, it is clear that what is precluded by that provision is the provision of services by a company established in another Member State, even though it was not possible to restrict the freedom of that company to set up an establishment in that other Member State.

29. In short, as far as freedom of establishment is concerned, the provision at issue *is a crucial factor*, in abstract terms, in the decision of a company whether or not to set up an establishment in another Member State, depending on its interests. However, it is beyond doubt that that provision does not operate by *precluding* the right to set up an establishment in any Member State.

12 — C-357/10 to C-359/10, ECR, EU:C:2011:283, point 61.

13 — Naturally, that effect occurs solely in relation to the services not excluded from the material scope of the directive concerned.

14 — See, inter alia, Barnard, C., 'Unravelling the Services Directive', *Common Market Law Review* 45, 2008, pp. 382 and 383.

30. On the other hand, as far as the freedom to provide services is concerned, the national provision operates directly as an absolute prohibition: a company established in another Member State may not provide certification services in Italy. [15]

31. Both Chapter III and Chapter IV of the Services Directive contain provisions which might be applicable to the situation under consideration (specifically, Article 14(1) and (3) and Article 16(2)(a) of the directive). It should also be borne in mind that, in this situation, the national legislation must be considered in the light of the provisions of *both* Chapter III *and* Chapter IV.

32. Faced with a national provision which, on the one hand, presents an insurmountable obstacle to one fundamental freedom and, on the other hand, simply places conditions on the exercise of another, I consider that it is appropriate to begin by examining the question from the point of view of the former so that, only if it is justified from that perspective, will it be necessary to examine the question in the light of the latter.

33. Taking all the above considerations into account, I shall now go on to examine — from the perspective of the Services Directive, since, as I stated at point 25 of this Opinion, the relevant provisions have specifically and fully harmonised the area covered — the obligation imposed by the Italian provision at issue in the main proceedings, namely that SOAs must have their registered office in Italy in order to be able to provide certification services in that country.

3. Analysis of the obligation at issue in the light of the 'prohibited requirements' laid down in Article 16 of the Services Directive

34. As the Court held in *Commission* v *Italy*, [16] 'the requirement that undertakings … must have their registered office or a branch office on Italian territory is directly contrary to the freedom to provide services, in so far as it renders impossible, in that Member State, the supply of services by undertakings established in other Member States'.

35. Moreover, with reference to the single market, in order to ensure that its objectives are attained, Union law also precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. [17]

36. That case-law of the Court relating to the freedom to provide services is now given concrete expression in the Services Directive; in Article 16 of that directive, the Union legislature 'codified' the requirements to which Member States may not make subject access to, or the exercise of, a service activity in their territory by providers established in other Member States. In particular, Article 16(2) of the Services Directive includes a list of examples of such requirements which have been examined by the Court in the past in a number of judgments.

15 — To my mind, that conclusion is not altered at all by the Italian Government's argument to the effect that what prevents the exercise of freedom to provide services in this case is another requirement imposed by the Italian provision concerned, which has not been discussed in the main proceedings, under which, in order to be able to operate as an SOA in Italy, a company must be formed as a limited company whose *exclusive* object is to carry out certification activities. The Italian Government considers that it is inconceivable that a company which is required to devote its activities exclusively to that object would provide services in that sphere on an occasional basis in Italy from its place of establishment, even if that place of establishment were outside Italy. Setting aside from the fact that that additional requirement referred to by the Italian Government is not the subject of the question referred by the Consiglio di Stato, it is my view, in any event, that the requirement of 'exclusivity' and the occasional nature of the services which a company established in another Member State may provide in Italy are not necessarily incompatible factors, as Article 25(1)(b) of the Services Directive appears to confirm, since it does not establish an automatic connection between the requirement of exclusivity and only one of the freedoms concerned, to the exclusion of the other.

16 — C-279/00, ECR, EU:C:2002:89, paragraph 17.

17 — See judgments in *Safir*, C-118/96, ECR, EU:C:1998:170, paragraph 23, and *Commission* v *Denmark*, C-150/04, ECR, EU:C:2007:69, paragraph 38.

37. Article 16(2) of the Services Directive provides, *inter alia*, that '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'.

38. Unlike Article 14 of the Services Directive, Article 16(2)(a) thereof does not refer to 'an obligation on the provider to have its [registered office] in their territory' but rather to 'an obligation on the provider to have an establishment in their territory'. However, in part because of the parallel with Article 14,[18] I am minded to construe the reference to 'establishment' in Article 16(2)(a) of the Services Directive as also covering the 'registered office' in the case of legal persons.[19]

39. According to the Handbook on the implementation of the Services Directive[20] (point 7.1.3.4.), 'Article 16(2)(a) concerns requirements which oblige service providers from other Member States to set up an establishment in the Member State into which they wish to provide cross-border services. As stated by the ECJ, such requirements negate the right to provide cross-border services enshrined in [Article 56 TFEU], since they make cross-border service provision impossible by imposing an obligation on the provider to have a stable infrastructure in the receiving Member State.'

40. Article 16 of the Services Directive applies only to service providers established in other Member States who wish to offer their services in the receiving Member State. If that state requires them to set up an establishment in its territory in order to provide services there, that is the very negation of the right to provide services in one Member State while being established in another.[21] I consider that what is in issue here is not only the requirement for the registered office to be situated in the State where the services are provided but also one of the cases included in Article 16(2)(a) of the Services Directive, since it is appropriate to regard it as constituting one of the elements of the 'stable infrastructure' to which the definition of 'establishment' in Article 4(5) of the directive refers.[22] As the Court held in *Commission* v *Italy*,[23] '[a]s regards the requirement … [to] have a permanent national or local headquarters, it must be observed that if the requirement of authorisation constitutes a restriction

18 — As Cornils observes, the parallel exists in so far as the legislative content of Articles 14 and 15 of the Services Directive — at least in so far as concerns the 'prohibited' and 'to be evaluated' requirements set out in those provisions, which are not specific to the freedom of establishment, among which that author includes the nationality and residence requirements in Article 14(1) — extends to service providers whether they are established in a Member State or provide services there temporarily. It is specifically for that reason that Article 14 refers to 'not making access to, or the exercise of, a service activity in their territory subject to' and not to 'not making setting up an establishment in their territory subject to'. As that author states, the requirements which Member States cannot impose on service providers established in their territory cannot be imposed either on service providers which operate in their territory but are established in another Member State (Cornils, M.: 'Artikel 9 — Genehmigungsregelungen', in Schlachter and Ohler (eds.), *Europäische Dienstleistungsrichtlinie*. Nomos, Baden-Baden, 2008, p. 173, paragraph 11, and 'Artikel 14 — Unzulässige Anforderungen', ibid., p. 239, paragraph 2).

19 — See also Schmidt-Kessel, M., 'Artikel 16 — Dienstleistungsfreiheit', in Schlachter and Ohler (eds.), *Europäische Dienstleistungsrichtlinie*, Nomos, Baden-Baden, 2008, p. 274, paragraphs 45 and 48, who, in interpreting Article 16(1)(a) of the Services Directive, identifies, in the case of legal persons, the Member State of establishment (*niedergelassen*) with the Member State in which they have their registered office (*Satzungssitz*). That was also the understanding of the Spanish legislature in Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio (Law 17/2009 of 23 November on free access to, and exercise of, services activities) (BOE No 283 of 24 November 2009), which transposes the Services Directive into Spanish law (see, in particular, Article 5, in conjunction with Article 12(3), of that Law).

20 — The Commission's Handbook on the implementation of the Services Directive (Spanish version at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_es.pdf) is not a legally binding instrument but may assist with interpretation of the provisions of the directive.

21 — See, *inter alia*, judgments in *Parodi*, C-222/95, ECR, EU:C:1997:345, paragraph 31; *Commission* v *Germany*, C-493/99, ECR, EU:C:2001:578, paragraph 19; *Commission* v *Italy*, C-279/00, ECR, EU:C:2002:89, paragraph 17; and *Fidium Finanz*, C-452/04, ECR, EU:C:2006:631, paragraph 46.

22 — See judgment in *Commission* v *France*, C-334/94, ECR, EU:C:1996:90, paragraph 19, which equates 'registered office' with 'principal establishment'.

23 — C-439/99, ECR, EU:C:2002:14, paragraph 30.

on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom. It makes a dead letter of Article [56 TFEU], a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided'. [24]

41. Accordingly, the Italian legislation imposes a manifestly discriminatory requirement, which is one of the requirements expressly prohibited by Article 16(2) of the Services Directive, since it precludes companies established in other Member States from providing certification services in Italy unless they move their registered office to that country. That said, the question which remains to be examined is whether the reasons relied on by the Italian Government to justify the measure at issue in the present case can be accepted.

4. Possible justification of the measure at issue

42. The Italian Government puts forward a number of reasons which, in its opinion, justify the measure at issue. In particular, the Italian Government states that 'a prerequisite for the proper operation and effectiveness of the single qualification system is constant supervision … which is effected by means of wide powers to carry out checks and impose penalties … That system of checks is essential in order to protect public interests, which, as the Court of Justice has previously held, constitute overriding reasons capable of justifying a restriction of fundamental freedoms because they encompass the protection of recipients of services … such as the guarantee that SOAs do not have commercial or financial interests which could give rise to biased or discriminatory conduct on their part. Those checks do not pertain solely to the company's ownership and management structure but also to its directors and employees who, under Italian law, must provide individual guarantees of impartiality … cannot have interests in undertakings which carry out public or private works or, in any event, be in another situation which entails a potential conflict of interest' (points 37 to 39 of the Italian Government's observations).

43. The Italian Government goes on to state that 'not only the substantive rules governing the activities of SOAs but also the effectiveness of the control mechanisms are based on clear overriding reasons in the public interest: the protection of recipients of services, which has already been acknowledged by the Court of Justice and, certainly, the protection of public policy and public security' (point 44 of the observations). According to the Italian Government, the effectiveness of that supervision depends not only on the territorial proximity of the supervising and supervised parties but also on the possibility of using the coercive measures available to the State.

44. At the hearing, the Italian Government stated that, since the public authorities are the indirect recipients of the activities of SOAs, supervision of the latters' activities, in the terms set out in the previous point, also becomes a question of public policy.

24 — See also the Opinion of Advocate General Alber in *Commission* v *Italy*, C-279/00, ECR, EU:C:2001:516. At point 30 of that Opinion, the Advocate General states, referring to the *requirement for a company to maintain its registered office or a branch office on Italian territory in order to operate as an undertaking providing temporary labour, that '[i]rrespective of whether the requirement concerns the registered office or a branch office, it concerns in any event a permanent establishment ... Through the requirement of a permanent establishment in order to take up an economic activity in a Member State, the Treaty provision establishing the principle of freedom to provide services is deprived of all effectiveness, a provision the very purpose of which is to abolish the restrictions on the freedom to provide services for those persons who are not established in that State*'.

45. In short, the Italian Government takes the view that the threat to public security and public policy is derived from the nature of the tasks carried out by SOAs: guaranteeing the independence of such undertakings in relation to the specific interests of their clients and ensuring that SOAs are not connected to the world of crime — both of which are particularly important with regard to the protection of (indirect and direct) recipients of services — call for strict controls. The Italian Government submits that the effectiveness of such controls could not be guaranteed if SOAs did not have their registered office in Italy.

46. Article 16(1) and (3) of the Services Directive lists a number of grounds which, in certain circumstances, may justify measures adopted by a Member State which restrict freedom to provide services by a provider established in another Member State. Those grounds include public policy and public security.

47. In that connection, it is appropriate to refer to the settled case-law of the Court of Justice (established in the context of primary law) pursuant to which a measure which is manifestly discriminatory — such as that at issue in the present case, based on the location of the registered office of the legal person providing services — is compatible with Union law only if it can be justified on grounds of public policy, public security or public health. [25]

48. It is my belief — which, furthermore, appears to be confirmed by Article 3(3) of the Services Directive — that this is how the third subparagraph of Article 16(1) and Article 16(3) of the directive should also be interpreted. The possible justification of the discriminatory measure at issue in the main proceedings (which is expressly prohibited by Article 16(2) of the Services Directive) must therefore be examined in the light of the grounds based on public policy and public security relied on by the Italian Government in its observations and at the hearing.

49. As the Court held in, inter alia, *Commission* v *Spain*, [26] and as the Commission pointed out at the hearing, recourse to public policy and public security (both of which concepts must be interpreted strictly) as a ground of justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. [27]

50. Therefore, in order to be able to justify, on grounds of public policy and public security, a measure of the kind at issue in the present case, which restricts freedom to provide services through recourse to a discriminatory requirement, it is necessary, first, to identify a fundamental interest of Italian society intended to be protected by the adoption of the discriminatory measure and, second, for that interest to face a genuine and serious threat if that measure is not applied.

51. In the present case, the Italian Government invokes as a fundamental interest the protection of which requires that companies providing certification services in Italy must have their registered office in that country the need to protect the recipients of the services provided by SOAs — both direct recipients, which are the undertakings seeking certification in order to be able to participate in public works contracts in accordance with the requirements laid down in Italian legislation, and indirect recipients, which are the contracting authorities.

25 — See, *inter alia*, judgments in *Bond van Adverteerders and Others*, 352/85, ECR, EU:C:1988:196, paragraphs 31 and 32; *Stichting Collectieve Antennevoorziening Gouda*, C-288/89, ECR, EU:C:1991:323, paragraph 11; *Commission* v *Netherlands*, C-353/89, ECR, EU:C:1991:325, paragraph 15; *Federación de Distribuidores Cinematográficos*, C-17/92, ECR, EU:C:1993:172, paragraph 15 et seq.; *Ciola*, C-224/97, ECR, EU:1999:212, paragraph 13 et seq.; *Commission* v *Spain*, C-153/08, ECR, EU:C:2009:618, paragraph 37; and *Blanco and Fabretti*, C-344/13 and C-367/13, ECR, EU:C:2014:2311, paragraph 38.

26 — C-114/97, ECR, EU:C:1998:519, paragraph 46.

27 — On the subject of what must be regarded as a 'fundamental interest of society', see, for example, judgments in *Van Duyn*, 41/74, ECR, EU:C:1974:133, paragraph 17 (membership of an association or organisation representing a risk to public security and public order) and *Calfa*, C-348/96, ECR, EU:C:1999:6, paragraph 22 (use of narcotic drugs). See also recital 41 in the preamble to the Services Directive: 'The concept of "public policy", as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of "public security" includes issues of public safety'.

52. *Even if it were accepted that a Member State, using the discretion granted to it for the purpose of determining the requirements of public policy in the light of its national needs,*[28] is entitled to identify the protection of recipients of certification services as a fundamental interest of its society, enabling it to rely on public policy or public security as a ground of justification, that factor alone is not sufficient for a finding that there is a valid ground of public policy. In any event, the second criterion required by the case-law must also be satisfied, namely that that interest would be genuinely and seriously threatened if the measure concerned were not applied (in the words of recital 41 in the preamble to the Services Directive, that there must be a 'genuine and sufficiently serious threat' affecting that interest).

53. According to the Italian Government, the proper operation of the single certification system necessitates constant supervision in order to protect the interests of recipients of those services; that supervision is effected by means of checks and penalties the effectiveness of which may be guaranteed only if SOAs have their registered office in Italy.

54. In my view, it cannot be argued that, in the circumstances of the present case, the protection of recipients of certification services is genuinely and seriously threatened as a result of the fact that, if the registered office of an SOA were situated in another Member State, it would be impossible for the Italian authorities to monitor effectively the activities of such undertakings and their independence in relation to the particular interests of their clients.

55. *Checks may be carried out and penalties imposed on any undertaking established or providing services in a Member State, whatever the place of its registered office.*[29] As the Commission and the Swedish Government pointed out at the hearing, Article 28 et seq. of the Services Directive contain provisions concerning administrative cooperation and mutual assistance between Member States in order to ensure that providers and the services they provide are monitored. Under those provisions, it is possible for requests to be made between Member States to carry out checks, inspections and investigations (Article 28(3) of the Services Directive).

56. In my opinion, that also demonstrates that, in any event, the measure at issue in the present case is not necessary for the purpose of achieving the objective pursued, since — as the Commission also pointed out in its observations and at the hearing — there are less restrictive means of achieving it, some of which are expressly provided for in the Services Directive itself.

57. In summary, in the light of the foregoing observations, I take the view that a measure such as that at issue in the main proceedings, which requires SOAs to 'have their seat in [Italian] territory', cannot be justified on any ground of public policy or public security.

58. Therefore, I consider that the answer to the first question referred for a preliminary ruling by the referring court should be that Article 16 of the Services Directive must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which requires a company seeking to provide certification services to have its registered office in the territory of the Member State in which the services are to be provided.

28 — See judgment in *Rutili*, 36/75, ECR, EU:C:1975:137, paragraph 26.

29 — See, by analogy, judgment in *Commission* v *Spain*, C-114/97, ECR, EU:C:1998:519, paragraph 47.

V – **Conclusion**

59. In view of the foregoing considerations, I propose that the Court should reply as follows to the Consiglio di Stato:

(1) Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding a national provision such as that at issue in the main proceedings, which requires a company seeking to provide certification services to have its registered office in the territory of the Member State in which the services are to be provided.

(2) The certification activities carried out by 'certification organisations' (SOAs) are not directly and specifically connected with the exercise of official authority.