

JUDGMENT OF THE COURT (Fourth Chamber)

22 October 2009*

In Case C-438/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 3 October 2008,

Commission of the European Communities, represented by E. Traversa and M. Teles Romão, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and A. Pereira de Miranda, acting as Agents,

defendant,

* Language of the case: Portuguese.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, E. Juhász, G. Arestis, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

- 1 By its application, the Commission of the European Communities claims that the Court should declare that, by imposing restrictions on the freedom of establishment of bodies of other Member States intending to carry on in Portugal the activity of vehicle inspection, in particular, the making of the grant of authorisations subject to the public interest, the requirement of a minimum share capital of EUR 100 000, the limiting of the undertakings' company objects and the imposition of incompatibility rules on their members, managers and directors, the Portuguese Republic has failed to fulfil its obligations under Article 43 EC.

Legal context

Community legislation

- 2 Recital 33 in the preamble to Council Directive 96/96/EC of 20 December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1997 L 46, p. 1) provides:

‘... the Community measures provided for in this Directive are necessary to achieve harmonisation of the rules on roadworthiness tests, to prevent distortion of competition between road hauliers and to guarantee that vehicles are properly checked and maintained; ...’

- 3 Article 1(1) of Directive 96/96 provides:

‘In each Member State, motor vehicles registered in that State and their trailers and semi-trailers shall undergo periodic roadworthiness tests in accordance with this Directive ...’

- 4 Article 2 of that directive is worded as follows:

‘The roadworthiness tests provided for in this Directive shall be carried out by the State, or by a public body entrusted with the task by the State or by bodies or establishments designated and directly supervised by the State, including duly authorised private

bodies. In particular, when establishments designated as vehicle testing centres also perform motor vehicle repairs, Member States shall make every effort to ensure the objectivity and high quality of the vehicle testing.’

National legislation

- 5 Under Article 3 of Decree-Law No 550/99 of 15 December 1999, on the carrying out of roadworthiness inspections for motor vehicles (‘the Decree-Law’):

‘1. The authorisation to carry out vehicle testing shall be granted by the Minister for the Interior on a proposal from the General-Directorate for Road Transport to legal persons, national or foreign, provided, in the latter case, that they are legally established in the national territory.

2. The General-Directorate for Road Transport may present the proposal referred to in the subparagraph above only where the public interest in carrying out the inspection justifies the grant of the authorisation.’

- 6 The General-Directorate for Road Transport having in the meantime ceased to exist, its powers in respect of vehicle inspection were transferred to the Public Institute for Mobility and Transport by Land.

7 Article 6 of the Decree-Law provides:

‘1. Entities which submit a viability study and prove that they have the resources necessary to guarantee the opening and good management of inspection centres shall be considered to possess the necessary technical, economic and financial capacities.

2. The content and structure of the study and of the indicators of financial capacity referred to in the subparagraph above shall be laid down by ministerial order of the Minister for the Interior.’

8 On the basis of Article 6(2) of that Decree-Law, Ministerial Order No 1165/2000 of 9 December 2000 was adopted, approving the rules for the public tender procedure for the installation of vehicle inspection centres (‘the Order’), Article 1 of which provides:

‘The grant of authorisation to carry out the activity of vehicle inspection depends on the verification of the technical, economic and financial capacity provided for in Article 4 and 6 of Decree-Law No 550/99 of 15 December 1999 on the basis of the presentation by the party concerned of the following evidence:

...

(e) Document establishing that the party concerned has a minimum share capital of EUR 100 000 or its equivalent in Portuguese Escudos ...’

9 Article 7 of the Decree-Law provides:

‘Entities in any of the following situations may not be authorised to carry on the activity of vehicle inspection where:

- (a) their object is not limited to carry out the activity of vehicle inspection;

- (b) their members, managers and directors deal with the manufacture, repair, rental, import or marketing of vehicles, their parts or accessories or the carrying out of transport activity.’

Pre-litigation procedure

- 10 Considering that the national legislation imposed conditions for obtaining authorisation to carry on the activity of vehicle inspection which raised problems of compatibility with the principle of freedom of establishment enshrined in Article 43 EC, the Commission decided to initiate the procedure laid down in Article 226 EC and gave formal notice to the Portuguese Republic by letter of 18 October 2005.
- 11 Having obtained an extension of the period in which to reply until 18 February 2006, the Portuguese Republic replied by letter of 25 April 2006. Still considering, following that response, that the legislation concerned did not comply with Article 43 EC, the Commission, on 15 December 2006, issued a reasoned opinion to that Member State requesting it to take the measures necessary to comply with that opinion within two months of its receipt.

- 12 The Portuguese Republic, first, replied to that reasoned opinion by letter of 29 January 2007, indicating that a proposal for legislation amending the Decree-Law has been drawn up for the purpose of abolishing the provisions complained of. By letter of 11 January 2008, it stated that that amendment procedure should end before the end of January 2008, then, in a letter of 19 May 2008, that it was in its finalisation stage. Since it was unable to conclude that all the measures necessary to bring the national legislation into line with Article 43 EC had been taken, the Commission decided to bring the present action.

The action

Arguments of the parties

- 13 The Commission claims, first of all, that the exception in the first paragraph of Article 45 EC, relied on by the Portuguese Republic to establish that its legislation is compatible with Article 43 EC, is not applicable to this case.
- 14 First, an exception based on the exercise of official authority can be relied on only in connection with discriminatory measures, whereas the authorisation system concerned applies expressly to both national and foreign entities. Second, that exception is to be interpreted strictly and its application is limited to activities which, in themselves, constitute a direct and specific connection with the exercise of official authority.
- 15 The Portuguese Republic confirmed in its reply to the letter of formal notice that the inspection of vehicles is an economic activity and that the liability of the inspection establishments for damage caused in the course of or following an inspection falls under private law. The issuing of an inspection report or a badge for display in the vehicle does not constitute evidence of the exercise of official authority. The fact that

penalties may be imposed for failure to comply with the rules on vehicle inspection is not relevant either. The imposition of such penalties falls within the exclusive competence of the police or judicial authorities, inspection undertakings lacking any power of coercion.

- 16 In those circumstances, the Commission claims that the conditions for obtaining authorisation to carry out the activity of vehicle inspection constitutes a restriction on freedom of establishment incompatible with Article 43 EC. First, the subordination to the public interest, laid down in Article 3(2) of the Decree-Law, of the grant of new authorisations results in legal persons of other Member States wishing to carry on that activity in Portugal being subject to the discretionary power of the competent national authorities. Therefore, that legislation does not fulfil the conditions imposed by the case-law of the Court of Justice, according to which, to be justified, a prior administrative authorisation scheme 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.
- 17 The public interest criterion is, moreover, not justified on grounds of road safety, the Commission pointing out, in that regard, that the requirement of proportionality is not fulfilled. The national system concerned is not appropriate to guarantee the attainment of that objective since it fails to take account of the functioning of the inspection centres. In addition, basing the grant of the authorisation on uncertain public interest criteria goes beyond what is necessary to attain the objective of ensuring road safety.
- 18 Second, the Commission claims that the requirement laid down in Article 6(1) of the Decree-Law, read together with Article 1(e) of the Order, of a minimum share capital of EUR 100 000, prevents, according to the judgment in Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 54, a Community operator with a lower share capital establishing itself on Portuguese territory. The Commission states, moreover, that the Portuguese Republic's argument to the effect that that requirement seeks to ensure the financial solvency of the entities authorised is not valid. Less restrictive means exist to protect creditors, such as setting up a guarantee or taking out an insurance contract (*Commission v Portugal*, paragraph 55).

19 Third, according to the Commission, neither is Article 7(a) of the Decree-Law — which limits the company objects of vehicle inspection undertakings to that activity alone — compatible with Article 43 EC. Operators legally providing other services in their home Member State are forced, in order to carry out their activity in Portugal, to amend their company objects and even their internal structure. The objective of road safety cannot be relied on, because the provision concerned is not appropriate to attain that objective and the quality of the inspection can be ensured by means of quality control procedures. With regard, lastly, to the objective of minimising fraudulent inspections, the Commission points out that it cannot simply be assumed that an inspection is fraudulent where linked activities are carried out and that the risk of fraudulent inspections does not exist where activities not linked to vehicle inspection are carried out. Less restrictive measures are, moreover, conceivable.

20 The Commission claims, fourth, that the incompatibility rules imposed on the members, managers and directors of vehicle inspection establishments, pursuant to Article 7(b) of the Decree-Law, are capable of having comparable restrictive effects in that they would oblige operators already legally established in another Member State and carrying on other activities there to alter their internal structure, to expel members or give up the incompatible activities. Moreover, according to the Commission, such rules are not proportionate to the objectives relied on of road safety, the objectivity of inspections and the prevention of fraud. There exist less restrictive solutions, such as the obligation for inspections of vehicles connected with the linked activities of members, managers and directors of the undertaking to be carried out by another undertaking and, conversely, the obligation, after a negative inspection, for repairs to be carried out by an independent establishment, a prohibition on inspections of vehicles of its managers and staff, their family and friends, and making establishments subject to systematic inspections or, lastly, the putting in place of a system of civil or criminal penalties.

21 The Portuguese Republic states that it appears indisputable that the activity of the technical inspection of vehicles comes within the public interest in road safety. It contends, first, that that activity constitutes a responsibility which is inherent in the State, although the State can rely on the cooperation of private bodies, as confirmed by Article 2 of Directive 96/96. In no circumstances, however, does the delegation to such bodies constitute the substantive privatisation of that task which is inherently one to be performed by the State. The adoption of the criteria concerned is justified by the need

for the State to exercise specific control over private operators authorised to carry out that activity by delegation.

- 22 Second, those delegated private bodies carry out acts in the exercise of public power. There are, in theory, two possibilities for effecting the activity concerned. Either the preparatory act of inspection is carried out by private bodies and followed by certification by the public authority, or the inspection and the certification are entrusted to the private body, subject to the control of the public authority. In the Portuguese system, the inspection procedure, which has a purely preparatory role, culminates in the taking of a decision whether or not to certify the vehicles' compliance with the applicable standards without any intervention by the public administrative authority. Those decisions are, by virtue of the effects they have on the legal rights of the owner of the vehicle, connected with the exercise of public power.
- 23 Consequently, the Portuguese Republic is of the view that the activity of vehicle inspection is directly linked to the exercise of public authority. Thus, even if it were possible to conceive a situation in which the rules concerned were incompatible with Article 43 EC, they would be justified under the first paragraph of Article 45 EC.
- 24 In any event, the Portuguese Republic contends that it has initiated a revision procedure for the Decree-Law, aiming essentially to replace the prior authorisation regime with a system of concessions granted on the basis of a competition. With the adoption and promulgation of that new text initially planned for the end of the first quarter of 2009, then for the month of July 2009 according to the rejoinder, the authorisation conditions imposed by the Decree-Law and any restriction on the freedom of establishment would disappear.

Findings of the Court

The existence of a restriction

- 25 The Commission alleges essentially that the Portuguese Republic imposed rules on private operators wishing to carry out in its territory the activity of vehicle inspection rules of access incompatible with Article 43 EC.
- 26 As a preliminary point, it should be noted that Directive 96/96 has the object, according to recital 33 thereof, of achieving harmonisation of the rules on roadworthiness tests, in particular, as indicated in Article 1(2) thereof, by determining the categories of vehicles to be tested, the frequency of those tests and the items which must be tested. That directive does not, however, contain any provision concerning the rules on access to vehicle inspection activities.
- 27 Whilst it is true that, in a sector which has not been subject to full harmonisation at Community level, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers, respect the basic freedoms guaranteed by the EC Treaty (see Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 29, and Case C-404/05 *Commission v Germany* [2007] ECR I-10239, paragraph 31 and the case-law cited).
- 28 In this case, the question arises of the conformity with Article 43 EC of national legislation imposing certain conditions for obtaining authorisation to carry on the activity of vehicle inspection, in particular, by making the grant of administrative authorisations subject to the criterion of the public interest, the requirement that undertakings wishing to establish themselves on that market should hold a minimum share capital of EUR 100 000, the limiting of those undertakings' company objects and the imposition of incompatibility rules on members, managers and directors.

- 29 It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions of that freedom (see, inter alia, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; and Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 30).
- 30 Even though those rules apply in exactly the same way to operators established in Portugal and to those originating in other Member States, they could lead to the prevention of operators not satisfying the criteria defined there from establishing in Portugal for the purpose of carrying on the activity of vehicle inspection. In particular, as the Commission claims, the public interest criterion, to which the grant of the administrative authorisation concerned is subject, may open the way for an arbitrary use of the discretion on the part of the competent authorities, permitting them to refuse that authorisation to certain interested operators, although they fulfil the other conditions laid down by the legislation.
- 31 Consequently, the conditions concerned for access to the activity of vehicle roadworthiness tests imposed by the Portuguese legislation constitutes a restriction on freedom of establishment.

The applicability of the first paragraph of Article 45 EC

- 32 The Portuguese Republic, which does not contest in detail the restrictive nature of the legislation concerned, contends that the activity of vehicle inspection is an activity 'connected with the exercise of public authority' within the meaning of Article 45 EC, and thus falls outside the scope of Article 43 EC. The Commission claims in that regard that it is an economic activity not directly and specifically connected with the exercise of official authority and that Article 45 EC applies solely to discriminatory measures.

- 33 With regard to that last argument, it is clear, as pointed out in paragraph 29 above, that, according to settled case-law, Article 43 EC includes not only a prohibition of discrimination but also a prohibition of all restrictions rendering the exercise of the freedom of establishment less attractive. Article 45 EC containing a general exception clause to the principle of freedom of establishment laid down in Article 43 EC, its application cannot, consequently, be restricted to discriminatory measures alone. Thus, that argument of the Commission cannot be successful.
- 34 On the other hand, it should be borne in mind that, as a derogation from the fundamental rule of freedom of establishment, Article 45 must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect (see, inter alia, Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7; Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 34; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45).
- 35 Similarly, it is not contested that the review of exceptions to the freedom of establishment laid down in Article 45 EC must take into account the Community character of the limits imposed by that article on that freedom (see, to that effect, Case 2/74 *Reyners* [1974] ECR 631, paragraph 50, and *Commission v Greece*, paragraph 8).
- 36 Thus, according to settled case-law, the derogation for which that article provides must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority (see *Reyners*, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20), which excludes from being regarded as ‘connected with the exercise of official authority’, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision (*Thijssen*, paragraph 22; *Commission v Austria*, paragraph 36; and *Commission v Germany*, paragraph 38).

- 37 The Court has defined further the distinction between activities of private bodies constituting simple preparatory tasks and those constituting a direct and specific connection with the exercise of official authority by finding that, even where private bodies exercise the powers of a public authority, drawing the conclusions from the inspections which they carry out, Article 45 EC cannot be relied on where the applicable legislation lays down that those private bodies are to be supervised by the public authority (see, to that effect, *Commission v Austria*, paragraph 41, and *Commission v Germany*, paragraph 43). The Court has found that private bodies carrying out their activities under the active supervision of the competent public authority, responsible, ultimately, for inspections and decisions of those bodies, cannot be considered to be ‘connected directly and specifically with the exercise of official authority’ within the meaning of Article 45 EC (*Commission v Austria*, paragraph 42, and *Commission v Germany*, paragraph 44).
- 38 According to the indications contained in the application and in the defence, the carrying out of roadworthiness tests on vehicles in Portugal falls within the competence of a public establishment, the Public Institute for Mobility and Transport by Land, which can, however, have recourse to private bodies in order to carry out those inspections. The decision whether or not to certify the roadworthiness of vehicles is taken by the private vehicle inspection body without any intervention by the public administrative authority.
- 39 As is moreover apparent from the defence, the activity of vehicle inspection establishments is organised in two stages. The first stage of that activity consists in carrying out technical inspections, that is, in verifying whether the vehicles inspected comply with the technical standards applicable and drawing up a report of the inspection recording the details of the tests carried out and the results obtained. The second stage of that activity includes certification of the inspection carried about by affixing a badge to the vehicle or, conversely, the refusal of such certification.
- 40 The tasks within the first stage are of a technical nature and thus unrelated to the exercise of official authority (see, to that effect, Case C-3/88 *Commission v Italy*

[1989] ECR 4035, paragraph 13). On the other hand, the second stage, involving the certification of roadworthiness, includes the exercise of public authority powers, in that it concerns the drawing of legal conclusions from the roadworthiness test.

41 In that regard, it should, none the less, be pointed out that the decision whether or not to certify roadworthiness, which essentially only records the results of the roadworthiness test, on the one hand, lacks the decision-making independence inherent in the exercise of public authority powers and, on the other hand, is taken in the context of direct State supervision.

42 It follows from Article 2 of Directive 96/96 that, where the Member State entrusts the management of roadworthiness testing establishments to private bodies, it none the less continues to exercise direct supervision over them.

43 It is, in effect, for the Member State, pursuant to the first sentence of that article, to designate competent establishments, to put in place an authorisation procedure and to keep those establishments under direct supervision. Pursuant to the second sentence of Article 2, which mentions the precautions to be taken in the case of conflict of interests between the testing and repair of vehicles, the Member States must, in particular, ensure the objectivity and high quality of the vehicle testing. It follows from the use of the expression '[i]n particular' that Directive 96/96 seeks the strict realisation by the State of those two specific qualitative objectives, namely the objectivity and the high quality of the roadworthiness testing of vehicles, in the case of conflict of interests but, all the more, in the execution of its task of supervising the private vehicle inspection establishments described in the first sentence of Article 2 of Directive 96/96.

44 In addition, as the Commission has pointed out, without being contradicted by the Portuguese Republic, the private vehicle inspection bodies, in connection with their activities, have no power of coercion, the right to impose penalties for failure to comply with the rules on vehicle inspection belonging to the police and judicial authorities.

45 Consequently, the activities of the private vehicle roadworthiness testing bodies concerned in this case do not fall within the exception provided for in Article 45 EC. It is thus necessary to examine whether the regime for access to vehicle inspection implemented by the Portuguese Republic can be justified.

The existence of a justification

46 It is clear from settled case-law that a restriction on freedom of establishment is warranted only if it is justified by overriding reasons of public interest. In that situation, it must also be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain that objective (see, to that effect, judgment of 27 October 2005 in Case C-158/03 *Commission v Spain*, paragraph 35; Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraph 72; and Case C-531/06 *Commission v Italy* [2009] ECR I-4103, paragraph 49).

47 In that regard, it is for the competent national authorities to show, first, that their legislation is necessary in order to attain the objective pursued and, second, that the legislation is in conformity with the principle of proportionality (see, to that effect, Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 39, and Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467, paragraph 76).

48 In the present case, the justification put forward by the Portuguese Republic during the pre-litigation procedure relates to the need to ensure road safety, which, according to settled case-law, constitutes an overriding reason relating to the public interest (see, in particular, *Commission v Netherlands*, paragraph 77, and Case C-110/05 *Commission v Italy* [2009] ECR I-519, paragraph 60).

49 The fact remains that the Portuguese Republic did not defend itself against the Commission's allegations on that point during the procedure before the Court and it has not demonstrated that the measures at issue are necessary or proportional in relation to the objective pursued. Accordingly, the provisions concerned cannot be considered to be justified by reasons relating to the protection of road safety.

50 The Portuguese Republic contends, moreover, that it initiated a procedure for the amendment of the Decree-Law, to be completed in July 2009, for the purpose of redefining the technical and legal framework for the activity of vehicle inspection and removing the restrictions on the freedom of establishment resulting from the system in force.

51 However, it should be pointed out that, according to settled case-law, the amendments introduced by the national legislation are irrelevant for the purpose of ruling on the subject of an action for failure to fulfil obligations, since they were not initiated before the expiry of the period fixed in the reasoned opinion (see, in particular, Case C-173/94 *Commission v Belgium* [1996] ECR I-3265, paragraph 16, and Judgment of 20 November 2008 in Case C-66/06 *Commission v Ireland*, paragraph 91). The Portuguese Republic cannot thus plead the legislative amendments which are to take effect after that date.

52 Accordingly, the action brought by the Commission must be considered to be founded.

53 Having regard to the foregoing, it must be held that, by imposing restrictions on the freedom of establishment of bodies of other Member States intending to carry on in Portugal the activity of vehicle inspection, namely, the making of the grant of authorisations subject to the public interest, the requirement of a minimum share capital of EUR 100 000, the limiting of the undertakings' company objects and the imposition of incompatibility rules on members, managers and directors, has failed to fulfil its obligations under Article 43 EC.

Costs

⁵⁴ 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 Portuguese Republic has been unsuccessful, it must be ordered to pay the costs.

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

- 1. Declares that, by imposing restrictions on the freedom of establishment of bodies of other Member States intending to carry on in Portugal the activity of vehicle inspection, namely, the making of the grant of authorisations subject to the public interest, the requirement of a minimum share capital of EUR 100 000, the limiting of the undertakings' company objects and the imposition of incompatibility rules on members, managers and directors, the Portuguese Republic has failed to fulfil its obligations under Article 43 EC;**
- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]