

JUDGMENT OF THE COURT (Grand Chamber)

24 May 2011 \*

In Case C-52/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 February 2008,

**European Commission**, represented by H. Støvlbæk and P. Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

**United Kingdom of Great Britain and Northern Ireland**, represented by S. Osowski, acting as Agent, and by K. Smith, barrister,

intervener,

\* Language of the case: Portuguese.

v

**Portuguese Republic**, represented by L. Inez Fernandes and F. S. Gaspar Rosa, acting as Agents,

defendant,

supported by:

**Czech Republic**, represented by M. Smolek, acting as Agent,

**Republic of Lithuania**, represented by D. Kriaučiūnas and E. Matulionytė, acting as Agents,

**Republic of Slovenia**, represented by V. Klemenc and Ž. Cilenšek Bončina, acting as Agents,

**Slovak Republic**, represented by J. Čorba, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J. N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.-J. Kasel, Presidents of Chambers, R. Silva de Lapuerta, E. Juhász, G. Arestis, M. Ilešić, C. Toader and M. Safjan, Judges,

Advocate General: P. Cruz Villalón,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 April 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

### **Judgment**

- <sup>1</sup> By its application the Commission of the European Communities asks the Court to declare that, by not adopting the laws, regulations and administrative provisions necessary to comply with Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), the Portuguese Republic has failed to fulfil its obligations under that directive.

## Legal context

### *European Union law*

- 2 Recital 9 of the preamble to Directive 2005/36 states that '[w]hile maintaining, for the freedom of establishment, the principles and safeguards underlying the different systems for recognition in force, the rules of such systems should be improved in the light of experience'.
  
- 3 In accordance with recital 14 of the preamble to that directive, '[t]he mechanism of recognition established by [Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (O) 1989, L 19, p. 16)] remains unchanged'.
  
- 4 Recital 41 of the preamble to Directive 2005/36 states that it 'is without prejudice to the application of Articles 39(4)[EC] and 45 [EC] concerning notably notaries'.
  
- 5 Article 2(3) of Directive 2005/36 is worded as follows:

'Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provisions of this Directive shall not apply'.

- 6 The profession of notary is not subject to any separate instrument of European Union law of the kind specified in Article 2(3).
- 7 Directive 2005/36 repealed Directive 89/48 with effect from 20 October 2007, pursuant to Article 62 of Directive 2005/36.

### *National legislation*

- 8 Civil-law notaries carry out their duties, within the Portuguese legal system, as members of a liberal profession. The organisation of that profession is regulated by Decree-Law No 26/2004 of 4 February 2004 on the adoption of the Statute of Notaries (*Diário da República* I, Series-A, No 29 of 4 February 2004, ‘the Statute of Notaries’).
- 9 Article 1(1) and 2 of the Statute of Notaries provide:

- ‘1. A notary is a lawyer whose written documents, drawn up in the course of his duties, possess authenticity.
2. A notary is simultaneously a public official who authenticates documents and is responsible for their safekeeping and a member of a liberal profession who acts independently and impartially and is freely chosen by the parties concerned.’

- <sup>10</sup> Article 4(1) of that Statute states that ‘it is generally the duty of a notary to draft a public document in accordance with the intentions of the interested parties, which intentions he must ascertain and translate in legally valid form, informing the interested parties of its force and consequences’.
- <sup>11</sup> Article 4(2) of that Statute states that a notary has *inter alia* the power to draw up wills and other public documents, authenticate or verify the validity of writs or signatures, issue certificates, certify translations, issue extracts or authenticated copies, draw up minutes of meetings and preserve documents.
- <sup>12</sup> Pursuant to Article 25 of the Statute of Notaries, access to the profession of notary is subject to all the following conditions:
- there must be no impediment to the pursuit of official duties and no prohibition on carrying out notarial duties;
  - a law degree recognised by the Portuguese legislation must be held;
  - the notarial training period must be completed, and
  - the competition organised by the Council of the notarial profession must be passed.

- 13 Decree-law No 27/2004 of 4 February 2004 (*Diário da República* I, Series-A, No 29 of 4 February 2004), established the notarial professional body. The award of the notarial title is, for its part, governed by Decree No 398/2004 of the Minister of Justice of 21 April 2004.
- 14 Under Article 38 of Decree-law No 76-A/2006 of 29 March 2006 (*Diário da República* I, Series-A, No 63 of 29 March 2006), the powers of authentication, certification and recognition of validity of documents have also been granted to archivists and officials of registration services, to recognised chambers of commerce or trade and to lawyers and ‘solicitadores’. Where a particular document is thereby authenticated, certified or recognised as valid, such a document has the same probative value as it would have had if it had been produced before a notary.
- 15 As explained by the Portuguese Republic at the hearing, the Portuguese legislature has gradually eliminated the need for notarial authentication in respect of almost all the documents for which such authentication was previously required.

### **The pre-litigation procedure**

- 16 The Commission received a complaint concerning a failure to transpose Directive 89/48 in respect of the profession of notary in Portugal. Following consideration of that complaint, the Commission sent a letter of formal notice dated 20 December 2001 to the Portuguese Republic requesting that it submit, within two months, its observations on the failure to transpose that directive.
- 17 In its reply of 17 June 2002 to the letter of formal notice, the Portuguese Republic informed the Commission that reform of the legislation relating to access to the profession of notary was underway.

- 18 On 18 October 2006 the Commission sent to the Portuguese Republic a reasoned opinion in which it concluded that the Portuguese Republic had failed to fulfil its obligations under Directive 89/48. The Commission invited the Portuguese Republic to take the measures necessary to comply with the reasoned opinion within two months from its receipt.
- 19 By letter of 24 January 2007 the Portuguese Republic set out the grounds for its belief that the position adopted by the Commission was unfounded.
- 20 In those circumstances the Commission decided to bring the current action.

## **The action**

### *Arguments of the parties*

- 21 First, the Commission claims that notaries are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC. The Commission states that since that provision is an exception to the freedom of establishment, that provision must be interpreted strictly (Case C-2/74 *Reyners* [1974] ECR 631, paragraph 43).
- 22 The scope of that exception should, moreover, be limited to activities which, taken on their own, constitute a direct and specific connexion with the exercise of official authority (*Reyners*, paragraphs 44 and 45). According to the Commission, the concept of official authority implies the exercise of a decision-making power going beyond



the ordinary law and taking the form of being able to act independently of, or even contrary to, the will of other subjects of law. Official authority manifests itself in particular, according to the Court's case-law, in the exercise of powers of constraint (Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 37).

- <sup>23</sup> Accordingly activities constituting assistance or support to the operation of official authority are outside the scope of the first paragraph of Article 45 EC (see, to that effect, Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22).
- <sup>24</sup> In the opinion of the Commission and the United Kingdom of Great Britain and Northern Ireland, activities connected with the exercise of official authority should be distinguished from those carried out in the public interest. Various professions can be regarded as possessing particular powers in the public interest without thereby being connected with the exercise of official authority.
- <sup>25</sup> Since the Portuguese legislation does not confer decision-making powers on notaries, they are therefore not connected with the exercise of official authority.
- <sup>26</sup> Secondly, the Commission considers, in the light of the requirements of Directive 2005/36, the conditions governing access to the notarial profession in Portugal.
- <sup>27</sup> Like the United Kingdom, the Commission considers that Recital 41 of that directive does not exclude the profession of notary from the scope of that directive. That recital should be interpreted as meaning that the first paragraph of Article 45 EC is

applicable to the profession of notary in so far as that profession is connected with the exercise of official authority. Since, in the Portuguese legal system, notaries are not connected with the exercise of official authority, Directive 2005/36 is applicable to them.

- 28 In that regard, the Commission observes that the pursuit of the profession of notary in Portugal is subject to five conditions. First, applicants must hold a law degree issued by a Portuguese university or an equivalent university qualification in accordance with the Portuguese legislation. Second, applicants must pass a competition to obtain the title of notary. Third, they must undergo a period of training, at the end of which a qualified notary gives his opinion on the trainee's aptitude for pursuit of the profession. Fourth, after completion of that training period, applicants must pass a second competition to enable them to pursue the profession. Fifth, applicants are to take up their duties by taking an oath before the Minister of Justice and the President of the professional body of notaries.

- 29 The Commission considers that the first three conditions mentioned in the preceding paragraph are not compatible with the requirements of Directive 2005/36. The first condition is contrary to Articles 13(1) and 14(3) of that directive since it excludes from practising as notaries in Portugal the holders of law degrees obtained from universities of other Member States or the holders of university qualification which are not considered equivalent to law degrees. The second condition is contrary, in particular, to Article 14(3) of that directive since the competition whereby the title of notary can be obtained covers a broad spectrum of subjects but does not take into account subjects already covered by the candidate's degree or qualification. As regards the third condition, the training period concerned constitutes not only an adaptation period but also and simultaneously an aptitude test, although Article 14(3) of Directive 2005/36 prohibits the combination of both an adaptation period and an aptitude test.

- 30 First, the Portuguese Republic, supported by the Republic of Lithuania, the Republic of Slovenia and the Slovak Republic, contends that in accordance with European Union legislation and the Court's case-law a notary has a connection with the exercise of official authority, within the meaning of the first paragraph of Article 45 EC.
- 31 The Court confirmed, in Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, paragraph 42, that the activities of a notary in relation to the execution of wills constitute participation in the exercise of rights under powers conferred by public law.
- 32 The European Parliament also concluded that the first paragraph of Article 45 EC was applicable to the profession of notary in its resolution of 18 January 1994 on the state and organisation of the profession of notary in the twelve Member States of the Community (OJ 1994 C 44, p. 36), and in its resolution of 23 March 2006 on the legal professions and the general interest in the functioning of legal systems (OJ 2006 C 292E, p. 105).
- 33 Likewise, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) and Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), exclude notarial activities from their scope.
- 34 Certain aspects of a notary's status, namely, in particular, his status as a public official, the *numerus clausus* rules to which a notary is subject, the taking of an oath and the disqualification from holding other office as laid down by the legislation, are also evidence of the fact that notaries are connected with the exercise of official authority.

- <sup>35</sup> Second, as regards the alleged failure to transpose Directive 2005/36, the Portuguese Republic, the Republic of Lithuania and the Republic of Slovenia contend that Recital 41 of that directive expressly states that the directive ‘is without prejudice to the application of Articles 39(4)[EC] and 45 [EC] concerning notably notaries’. That reservation confirms that the profession of notary is excluded from the scope of Directive 2005/36. A similar reservation appeared in the twelfth recital of the preamble to Directive 89/48.
- <sup>36</sup> Referring to the legislative history of Directive 2005/36 and, in particular, the European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the recognition of professional qualifications (OJ 2004 C 97E, p. 230) adopted at first reading on 11 February 2004, the Portuguese Republic concludes that the European Union legislature excluded the profession of notary from the scope of that directive.
- <sup>37</sup> The Czech Republic considers that, in so far as the pursuit of the profession of notary requires thorough knowledge of the national law of the host Member State, to require an aptitude test relating to matters of that Member State’s domestic law is compatible with the conditions referred to in Article 3(1)(h) of Directive 2005/36.
- <sup>38</sup> The Republic of Slovenia claims that the Court should reject this action of its own motion because the subject-matter of the pre-litigation procedure was the alleged failure to transpose Directive 89/48, whereas the complaint in this action is that the Portuguese Republic failed to fulfil its obligations under Directive 2005/36.

*Findings of the Court*

## Admissibility of the action

- 39 It is apparent from the Commission's application that the subject of this action is an alleged failure to transpose Directive 2005/36. It must be noted, however, that both the letters of formal notice and the reasoned opinion issued by the Commission relate to Directive 89/48. The Court must therefore examine of its own motion the admissibility of this action.
- 40 In accordance with its case-law, the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (Case C-362/90 *Commission v Italy* [1992] ECR I-2353, paragraph 8, and Case C-417/02 *Commission v Greece* [2004] ECR I-7973, paragraph 16).
- 41 It is settled case-law that, in the context of proceedings under Article 226 EC, the existence of a failure to fulfil obligations must be assessed in the light of the European Union legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion (see, in particular, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 42; Case C-377/03 *Commission v Belgium* [2006] ECR I-9733, paragraph 33, and Case C-416/07 *Commission v Greece* [2009] ECR I-7883, paragraph 27). It is clear that Directive 2005/36 repealed Directive 89/48 from 20 October 2007, in other words after the expiry of the period prescribed in the reasoned opinion.
- 42 However, as the Court has already held, although the claims as stated in the application cannot as a rule be extended beyond the infringements alleged in the operative part of the reasoned opinion and in the letter of formal notice, the fact nevertheless remains that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a European Union measure, subsequently amended or repealed, and which were maintained

in force under the provisions of a new European Union measure. Conversely, the subject-matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings (see, in that regard, Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 36; Case C-363/00 *Commission v Italy* [2003] ECR I-5767, paragraph 22, and Case C-416/07 *Commission v Greece*, cited above, paragraph 28).

<sup>43</sup> Consequently, the claims stated in the Commission's application seeking a declaration that the Portuguese Republic has failed to fulfil its obligations under Directive 2005/36 are, in principle, admissible, on condition that the obligations under that directive are analogous to those arising under Directive 89/48 (see, by analogy, Case C-416/07 *Commission v Greece*, cited above, paragraph 29).

<sup>44</sup> However, as appears from Recital 9 of the preamble to Directive 2005/36, while the aim of that directive is to improve, reorganise and rationalise the existing provisions by standardising the principles applicable, that directive maintains, for freedom of establishment, the principles and safeguards underlying the different systems for recognition in force, such as those established by Directive 89/48.

<sup>45</sup> Similarly, Recital 14 of Directive 2005/36 states that the mechanism of recognition established *inter alia* by Directive 89/48 is to remain unchanged.

<sup>46</sup> In the present case, the Commission's complaint against the Portuguese Republic relates, so far as the profession of notary is concerned, to the failure to transpose not a particular provision of Directive 2005/36 but that directive as a whole.

47 In those circumstances, the alleged obligation to transpose Directive 2005/36 in relation to the profession of notary is analogous to that arising under Directive 89/48 in so far as the principles and safeguards underlying the mechanism of recognition established by the latter directive are maintained in the former and that mechanism remained unchanged after the adoption of Directive 2005/36.

48 Consequently, the action must be held to be admissible.

## Substance

49 The Commission's criticism of the Portuguese Republic is that it did not transpose Directive 2005/36 in respect of the profession of notary. The Court must therefore examine whether that directive is capable of applying to that profession.

50 In that regard, the legislative context of that directive must be taken into account.

51 Thus it must be noted that the legislature expressly stated, in the twelfth recital of the preamble to Directive 89/48, which preceded Directive 2005/36, that the general system for the recognition of higher-education diplomas, established by the former directive, was to be 'entirely without prejudice to the application of ... Article [45 EC]'. The reservation thus expressed reflects the intention of the legislature to leave activities falling under the first paragraph of Article 45 EC outside the scope of Directive 89/48.

- 52 However, when Directive 89/48 was adopted, the Court had not yet had occasion to rule on the question of whether notarial activities do or do not fall under the first paragraph of Article 45 EC.
- 53 Over the years following the adoption of Directive 89/48, the Parliament, in its 1994 and 2006 resolutions mentioned in paragraph 32 of this judgment asserted on the one hand that the first paragraph of Article 45 EC should be fully applied to the profession of notary as such, while expressing the wish on the other hand that the nationality requirement for access to that profession should be removed.
- 54 Moreover, when adopting Directive 2005/36, which replaced Directive 89/48, the European Union legislature was careful to state, in recital 41 in the preamble to Directive 2005/36, that it was without prejudice to the application of Article 45 EC ‘concerning notably notaries’. By expressing that reservation, the European Union legislature did not adopt a position on the applicability of the first paragraph of Article 45 EC, and hence of Directive 2005/36, to the activities of notaries.
- 55 That is demonstrated by the legislative history of the latter directive. The Parliament proposed, in its legislative resolution mentioned in paragraph 36 of this judgment, that it should be expressly stated in the text of Directive 2005/36 that it did not apply to notaries. Although that proposal was not taken up in the amended proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications presented by the Commission on 20 April 2004 [COM(2004) 317 final], or in the Common Position (EC) No 10/2005 of 21 December 2004 adopted by the Council acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the recognition of professional qualifications (OJ 2005 C 58E, p. 1), that is not because the envisaged directive was to apply to the profession of notary, but because, in particular, ‘a derogation from the principles of freedom of establishment and freedom to provide services for activities



that involve direct and specific participation in the exercise of official authority [was] provided for by [the first paragraph of] Article 45 EC.’

56 In view of the particular circumstances which accompanied the legislative procedure and the situation of uncertainty which resulted, as may be seen from the legislative context described above, it does not appear possible to conclude that, at the end of the period prescribed in the reasoned opinion, there existed a sufficiently clear obligation for the Member States to transpose Directive 2005/36 with respect to the profession of notary.

57 The action must therefore be dismissed.

## **Costs**

58 Under Article 69(2) of the Rules of Procedure, an 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 asked that the Commission be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs.

59 Under the first subparagraph of Article 69(4) of those Rules, Member States which intervene in the proceedings are to bear their own costs. Consequently, the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the Slovak Republic and the United Kingdom must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs;**
- 3. Orders the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]