

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 14 December 2006¹

1. This action, brought under Article 226 EC, seeks a declaration that, by virtue of the conditions to which it subjects the activity of extrajudicial debt recovery, including where that activity is carried on by undertakings established in other Member States, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

— pursuit of the activity of extrajudicial debt recovery is subject to the issue of a licence by the Questore, the local police authority;

— the licence is valid exclusively for the premises which are specified in it;

— the authorised activity is restricted to the province in which the licence was issued;

I — Legal framework and pre-litigation procedure

2. The Italian Law on public security, adopted by means of Royal Decree No 773 of 18 June 1931 (Ordinary Supplement to GURI No 146 of 26 June 1931), as interpreted and supplemented by a circular of the Ministry of the Interior of 2 July 1976 ('the Italian rules'), provides essentially that:

— the Questore may make the grant of the licence subject to requirements additional to those laid down by the aforementioned law in order to maintain public confidence;

— a licence holder must at all times visibly display in his premises the table of services which he provides and the scale

¹ — Original language: Portuguese.

of charges applicable to them, and cannot supply services other than those listed in that table;

tion to that effect. However, since neither the draft legislation nor the timetable for its adoption was communicated to it, the Commission issued a reasoned opinion on 7 July 2004. The letter having yielded no results, the Commission brought this action before the Court on 22 March 2005.

- objective and uniform parameters must be laid down so as to ensure that the prices charged in a single province are not too diverse;

- extrajudicial debt recovery agencies cannot provide the financial services governed by Legislative Decree No 385/93 of 1 September 1993 relating to banking and credit services (Ordinary Supplement to GURI No 92 of 30 September 1993), which are reserved exclusively for financial intermediaries entered in the appropriate register of the Ministry of the Treasury.

3. Taking the view that most of those provisions were incompatible with Articles 43 EC and 49 EC, the Commission of the European Communities sent a letter of formal notice to the Italian Republic on 21 March 2002. Although they disputed the existence of an infringement of the rules of the EC Treaty, the Italian authorities replied that they had set up a working group to consider the possibility of revising the rules at issue and sent the Commission a letter announcing the preparation of draft legisla-

II — Assessment

4. Extrajudicial debt recovery may be defined as ‘any act or practice which is intended to encourage a debtor to settle an unpaid debt, with the exception of any recovery on the basis of an enforcement order’.² The pursuit of that activity is regulated by various provisions of the Italian rules. According to the Commission, those rules are incompatible with Articles 43 EC and 49 EC in several respects. More specifically, the Commission raises eight complaints against them; however, some of the complaints appear to be so closely connected that, for the sake of clarity of analysis, the Commission’s arguments may be combined under five headings.

2 — See, by way of example, Article 2(1)(1) of the Belgium Law of 20 December 2002 on the amicable recovery of consumer debts (*Moniteur belge* of 29 January 2003, p. 3644).

5. By its application, the Commission once again asks the Court to clarify the margin of discretion available to the Member States in regulating the pursuit of an economic activity which has not yet been the subject of Community legislation.

but also any national measure resulting in the treatment of transnational situations less favourably than purely national ones.⁴ In other words, in accordance with the logic of the internal market, they serve to ensure that discrimination which obstructs the exercise of the freedom of movement will be challenged by legal action. The influence which the freedoms of movement thus have in turn compels the States to take into account the impact which measures to regulate their national economies have on the position of Community nationals wishing to exercise their right to freedom of movement.

6. In that regard, it should be pointed out at the outset that, according to the case-law of the Court, 'in the absence of harmonisation of a profession, Member States remain, in principle, competent to define the exercise of that profession but must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty'.⁵ It is true that the freedoms of movement, such as the rights to freedom of establishment and freedom to provide services, are not intended to liberalise national economies by precluding any legislation by the State which might affect economic and commercial freedom; if they were, they would sound the death knell for the powers of the Member States to legislate in economic matters. They do serve, however, to promote the decompartmentalisation of national markets by making it easier for operators to carry on their activity at a transnational level. To that end, they are intended to cover all transnational situations and to prohibit not only any direct or indirect discrimination on grounds of nationality introduced by the Member States,

7. More specifically, the less favourable treatment of transnational situations which the principle of freedom of movement prohibits may take different forms. It may, of course, be the effect of discrimination advantageous to its own nationals. It may also arise from a restriction on market access, be it that the national rules have the effect of protecting the positions acquired by economic operators established in the national market⁵ or that they make the pursuit of a transnational activity⁶ or trade between Member States more difficult.

3 — As the Court has repeatedly pointed out: see, for example, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31; Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 26; and Case C-496/01 *Commission v France* [2004] ECR I-2351, paragraph 55.

4 — For a more detailed account of what, aside from the wording it uses, seems to me to be the line taken by the Court in its case-law, see my Opinions in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, points 25 to 40; in joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135, points 35 to 51; and in joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, points 55 to 59.

5 — See, in particular, the judgment in Case C-422/02 *CaixaBank France* [2004] ECR I-8961.

6 — For an illustration relating to the freedom to provide services, see Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, paragraphs 25 to 27.

8. It is in the light of this analytical framework that the relevance of the complaints raised by the Commission should be assessed.

9. As the following analysis will make apparent, those complaints are well founded. This does not mean that a Member State cannot regulate the activity of extrajudicial debt recovery. Indeed, it is no doubt desirable that it should be regulated. However, the conditions which the Italian Republic has attached to the pursuit of that activity are far too restrictive of the freedom of establishment and the freedom to provide services.

A — The requirement of a licence and the additional conditions governing the award of licences

10. The Commission first calls into question the condition, which the Italian rules attach to pursuit of the activity of extrajudicial debt recovery, that prior administrative authorisation must be obtained from the local police authority, the Questore. In so far as that requirement is also imposed on providers of services established in another Member State, without regard to whether they have complied with any obligations laid down by the rules of the country in which they are established for the purpose of protecting the

public interest with which the Italian rules are concerned, those rules infringe the freedom to provide services. This is particularly true given that the Italian rules give the Questore the power to impose requirements additional to those which they expressly lay down in order to ensure public confidence.

11. That complaint and the supporting arguments raised by the Commission are, in my view, entirely well founded.

12. In their defence, the Italian authorities contend, first of all, that the prior authorisation scheme constitutes neither direct nor indirect discrimination against cross-border service providers, since the licence requirement also applies to Italian operators and/or operators established in Italy. However, it is common knowledge that, in keeping with the approach originally adopted with regard to the free movement of goods, the principle of the freedom to provide services has gradually come to be interpreted as prohibiting not only directly or indirectly discriminatory restrictions, but also obstacles applicable without distinction. According to a form of words used since *Säger*,⁷ 'Article 59 of the Treaty [now, after amendment, Article 49

⁷ — Case C-76/90 [1991] ECR I-4221, paragraph 12. See also Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 29; Case C-514/03 *Commission v Spain* [2006] ECR I-963, paragraph 24; Case C-255/04 *Commission v France* [2006] ECR I-5251, paragraph 37; Case C-168/04 *Commission v Austria* [2006] ECR I-9041, paragraph 36; and Case C-433/04 *Commission v Belgium* [2006] ECR I-10653, paragraph 28.

EC] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'. It is settled case-law that prior administrative authorisation is liable to impede or render less attractive the provision of services and therefore constitutes a restriction on the freedom of movement of the provider of those services.⁸ It constitutes a restriction on access by a cross-border service provider to the market of the host State.

13. Secondly, the Italian authorities rely on reasons relating to public policy and public security, such as the need to combat criminal infiltration, combating usury and the protection of debtors, to justify the introduction of the *ex ante* control which the licence requirement represents. Its purpose is, in particular, to ensure that the activity of extrajudicial debt recovery is not carried on

by individuals who may commit serious offences against the person and property of debtors.

14. Such interests unquestionably constitute overriding reasons in the general interest capable in principle of justifying indistinctly applicable obstacles to the freedom to provide services.

15. However, the measure which creates such an obstacle must still comply with the principle of proportionality, that is to say that it must be appropriate for securing the attainment of the legitimate objective pursued and not go beyond what is necessary in order to attain it.⁹

16. I concur with the Commission's analysis that the authorisation requirement goes beyond what is necessary to achieve the objective sought, that is to ensure close supervision of the activity of extrajudicial debt recovery for public policy purposes. After all, the same prior authorisation requirement is applied indiscriminately to cross-border service providers and operators established in Italy, whatever their nationality. However, while an undertaking estab-

8 — See, in particular, Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 28; *Säger*, paragraph 14; *Vander Elst*, paragraph 15; *Analir and Others*, paragraph 22; Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 26; and *Commission v Austria*, paragraph 40. See also, with regard to the case-law relating to private security activities, Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 35; Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 60; and Case C-189/03 *Commission v Netherlands* [2004] ECR I-9289, paragraph 17.

9 — For a summary of this requirement, see, for example, *Analir and Others*, paragraph 25; Case C-390/99 *Canal Satellite Digital* [2002] ECR I-607, paragraph 33; Case C-496/01 *Commission v France*, paragraph 39; Case C-255/04 *Commission v France*, paragraph 44; and *Commission v Austria*, paragraph 37.

lished in another Member State is in principle subject to the law of the host country, which may impose on that undertaking the same requirements and controls that it applies to its own nationals, the same cannot be required of a service provider who only occasionally carries on his business in another Member State and who remains subject to the rules and controls in force in his country of origin. Such a situation would render the freedom to provide services entirely ineffective by making it subject to all the conditions required for establishment.¹⁰ It would also place cross-border service providers at a disadvantage in relation to service providers who are established in the territory of the host State.¹¹ The Court has long inferred from this that it is in principle incompatible with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established.¹² The host Member State must therefore take into consideration such rules and the controls governing compliance therewith to which the service provider has been subject in his country of establishment. It follows that a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls pursuing the same objective which have already been carried out in other Member States.¹³ In other words, the necessity test inherent in the principle of proportionality requires the Member State of destination to ascertain whether requirements pursuing the

same objective in the public interest are also imposed in the Member State of origin and, if so, to assess whether they are equivalent for the purpose of fulfilling that objective; if the answer is in the affirmative, the Member State of destination has an obligation to recognise that an equivalent requirement has already been fulfilled in the Member State of establishment.

17. In order to reject the applicability in this case of that obligation of mutual recognition, the Italian authorities cannot reasonably argue that the rules relating to extrajudicial debt recovery have not been harmonised through the introduction of a system of mutual recognition. It need hardly be repeated that, although, in the absence of harmonisation of a profession, Member States remain, in principle, competent to define the exercise of that profession, they must, none the less, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty.¹⁴ Accordingly, the Court has held that, notwithstanding the fact that directives harmonising the conditions of access to a lawyer's activities and the mutual recognition of diplomas giving access to that profession, which are expressly provided for in Article 57 of the EEC Treaty (now Article 47 EC), had not yet taken effect, the principle of the freedom of establishment requires that a Member State seised of an application for authorisation to practise a profession access to which, under national law, depends on possession of a diploma or professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to practise that profession in another

10 — See, to that effect, *Säger*, paragraph 13, and *Vander Elst*, paragraph 17.

11 — See, to that effect, *Vander Elst*, paragraph 15.

12 — See, for example, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 34; and *Canal Satellite Digital*, paragraph 38.

13 — See, to that effect, *Canal Satellite Digital*, paragraph 36.

14 — See the references cited in footnote 3.

Member State, by comparing the specialised knowledge and abilities certified by those diplomas with the knowledge and qualifications required by the national rules; if that comparative examination of diplomas results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions.¹⁵

18. As the Commission points out, it is that necessity test which the licence requirement laid down in the Italian rules fails to pass. For that requirement is imposed generally on all operators who wish to carry on an extra-judicial debt recovery activity in Italy and the grant of the licence to do so is subject to the same conditions, as the Italian Republic acknowledged in its defence.

19. The same conditions therefore apply even to those service providers whose activity has already, in the Member State of establishment, been granted authorisation under conditions which, if not identical, at least ensure the same level of protection of public order as the Italian rules. Other Member States, such as the Federal Republic of Germany and the Republic of Finland, also make pursuit of the activity of extrajudicial debt recovery subject to an authorisation intended to ensure, inter alia, the integrity of

the operator by means of an investigation of his previous convictions. The fact that the Italian authorities require that a licence be obtained even in those cases therefore constitutes a duplication of supervision censured by the case-law of the Court. In 1979, the Court thus held that the requirement for a licence to carry on the business of an employment agency, in the context of the freedom to provide services, is not objectively justified when the service provider is established in another Member State and in that State holds a licence issued under conditions comparable to those required by the Member State in which the service is provided.¹⁶

20. The fact that, as the defendant asserted at the hearing, the authorisation application form is short, that there are virtually no supporting documents to be produced and that the period for processing the application is limited to 30 days is not such as to render the above principles inapplicable. The case-law of the Court has laid down no *de minimis* rule in the field of the freedoms of movement. The form to be completed is not a simple declaration allowing the operator to pursue his activity as soon as the form has been submitted. It is an application for prior authorisation the discretionary response to which, which may take up to 30 days, determines whether the operator can pursue

15 — See the judgment in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357. For a summary, in the context of the freedom to provide services, of the principle of mutual recognition in the absence of common rules, regard may also be had to the Opinion of Advocate General Kokott in *Commission v Spain*, points 43 to 45.

16 — See Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraph 30.

the activity. Moreover, the requirement for a second authorisation is capable, albeit only slightly, of unnecessarily delaying the exercise of the freedom to provide services and of increasing its cost¹⁷ and thus constitutes a disproportionate restriction.

21. As regards authorisations the issue of which is not subject in the Member State of establishment to conditions that are as protective of public order, it is true that, in such cases, the Italian authorities are justified in maintaining the requirement of a licence. In awarding it, however, they must have regard to the obligations with which the provider of services has already had to comply in the Member State in which he is established.¹⁸

22. The Court has thus held that the conditions for granting the authorisation required to carry on an insurance business 'may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment'.¹⁹ It is also clear from the judgment in

*Cura Anlagen*²⁰ that the legislation of a Member State cannot make the registration of a vehicle leased from a company established in another Member State subject to the requirement of roadworthiness testing where the vehicle has already undergone a roadworthiness test in the Member State of establishment of the leasing company, except where that requirement is intended to ascertain whether the vehicle satisfies the conditions imposed on vehicles registered in the Member State of use which are not covered by the tests carried out in the Member State of establishment of the leasing company. Likewise, the Kingdom of Belgium was held to have failed to fulfil its obligations under the freedom to provide services on the ground that, by requiring all security undertakings to fulfil the same conditions in order to obtain prior approval or authorisation, the Belgian legislation took no account of the obligations to which the service provider was already subject in the Member State in which he was established.²¹ The same ruling was given in relation to the Portuguese legislation on the same subject-matter.²² Moreover, although, in its judgment in *Webb*, the Court accepted that, for the purposes of maintaining good relations on the labour market and protecting the interests of workers, the host Member State may require service-providing undertakings supplying manpower to obtain authorisation, even where the latter already hold licences issued by their State of establishment, it did so after emphasising that the assessment criteria applicable to that kind of business vary extensively from one Member State to the next, and on the express reservation that the host Member State must

17 — See, to that effect, the judgment in *Corsten*, paragraphs 46 to 48, and the Opinion of Advocate General Kokott in *Commission v Netherlands*, point 38.

18 — See Case C-439/99 *Commission v Italy*, paragraph 28.

19 — *Commission v Germany*, paragraph 47.

20 — Case C-451/99 [2002] ECR I-3193, paragraphs 57 to 64.

21 — Case C-355/98 *Commission v Belgium*, paragraphs 35 to 38.

22 — Case C-171/02 *Commission v Portugal*, paragraphs 58 to 61.

take into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.

23. In this case, however, the Italian rules do not take into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established. Issue of the licence is subject in all cases to the same conditions. The assertion by the Italian authorities that, in order to assess whether or not the authorisation may be granted, the national authorities must take account of the obligations to which cross-border service providers are subject in their country of origin is irrelevant in this regard. What matters is that the Italian rules themselves contain no specific provision expressly requiring account to be taken of equivalent requirements laid down in the Member State of establishment. It is, after all, the settled case-law of the Court that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty.²³ To that extent also, the Italian rules therefore infringe the principle of proportionality.

24. The licence requirement is all the more disproportionate to the legitimate objective pursued in that the Italian rules confer on the Questore the power to make the grant of authorisation subject to further requirements intended to maintain public confidence. According to the settled case-law of the Court, a prior administrative authorisation scheme is compatible with the rules of the Treaty only if it is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to prevent the arbitrary exercise of the national authorities' discretion, which would negate the effectiveness of provisions of Community law relating to a fundamental freedom.²⁴ However, the Italian rules do not in any way define the substance of the conditions which may be added. The legal uncertainty as to the criteria to be fulfilled which this creates for operators is such as to deter them from providing their services.²⁵

25. In the light of the foregoing considerations, I therefore propose that the Court should uphold the complaint alleging that Article 49 EC has been infringed by virtue of the fact that the activity of extrajudicial debt recovery is made subject to the grant of a licence.

23 — See, in particular, Case C-358/98 *Commission v Italy* [2000] ECR I-1255, paragraph 17. The Court held likewise in relation to Netherlands legislation making the carrying-on, within the context of the freedom to provide services, of the business of private security subject to authorisation (see *Commission v Netherlands*, paragraphs 16 to 20).

24 — See *Analir and Others*, paragraph 38, and *Canal Satélite Digital*, paragraph 35.

25 — See *Canal Satélite Digital*, paragraph 41.

B — The territorial delimitation of the licence

26. The Commission takes the view that limiting the validity of the licence to the territory of the province in which the Questore that granted it has authority, unless an authorised representative is awarded a contract of agency to pursue the activity in a province for which the operator does not have a licence, constitutes an unjustified restriction on both the freedom to provide services and the freedom of establishment.

27. Since Italy is divided into 103 provinces, that geographical delimitation of the scope of the licence indisputably constitutes a restriction on the exercise of those two fundamental freedoms. An operator who wishes to extend his business throughout much of Italy with a view to operating there on an occasional or stable and continuous basis must submit as many licence applications as there are provinces in the area which he intends to cover, and 103 applications if he intends to carry on his business throughout the Italian territory.

28. Contrary to the Italian Government's submission, it is in this regard also irrelevant that the same requirement is imposed on operators established in Italy because, in any event, indistinctly applicable obstacles to the freedom of establishment are prohibited in the same way as those to the freedom to

provide services.²⁶ Moreover, there is no need here to repeat the debate, which has already taken place before the Court,²⁷ on the question whether the prohibition on obstacles to the freedom of establishment which are applicable without distinction concerns only national measures which directly restrict access to an activity or also covers those which make its exercise more difficult, since the limitation of the territorial scope of the licence affects not only the conditions under which the activity of extrajudicial debt recovery is carried on, but the very means of access to that activity which it is intended to regulate.

29. It remains to be determined whether that restriction is appropriate and necessary on the legitimate public security grounds put forward by the defendant, namely to ward off the risk of infiltration by organised crime. In the defendant's view, it is, since the province is the most appropriate territorial level for assessing the impact on public order of the activities of an additional extrajudicial debt recovery operator and supervising existing operators.

26 — See, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; *CaixaBank France*, paragraph 11; and Case C-65/05 *Commission v Greece* [2006] ECR I-10341, paragraph 48.

27 — See, in particular, the Opinion of Advocate General Tizzano in *CaixaBank France* and my Opinion in *Marks & Spencer*, points 25 to 40. See also, Mischo, J., 'Les restrictions à la liberté d'établissement: la nécessité d'une clarification', *Mélanges en hommage à F. Schockweiler*, Nomos Verlagsgesellschaft Baden-Baden, 1999, p. 445.

30. I am not persuaded by that defence.

31. In my view, the limitation of the territorial scope of the licence is, first of all, an unjustified restriction on the freedom to provide services. If, as I suggested earlier, the general and absolute requirement of a licence infringes the principle of the freedom to provide services, then the same is particularly true of a system under which the number of applications for authorisation which a cross-border service provider must make increases with the size of the geographical area he wishes to cover in the host Member State. Moreover, the Court has already called into question the obligation on an architect to enrol on the professional register of each province in which he plans to provide his services, on the ground that such a delimitation of the territorial scope of registration 'further complicates' the exercise of the freedom to provide services, which is already restricted by that obligation in itself.²⁸

32. The Italian system of territorial licences also constitutes a disproportionate restriction on the freedom of establishment. In order to be permissible under Community law, a measure partitioning the Italian market into provinces must genuinely be the only one capable of ensuring the effective

supervision of extrajudicial debt recovery agencies. However, I must say that I do not really see why an authorisation issued at the national level would not be appropriate and sufficient for that purpose. It need hardly be reiterated that it is for the Member States seeking to justify the restriction of a fundamental freedom introduced by them to prove that it pursues a legitimate aim and is appropriate and necessary to attain that end.²⁹ The link made by the Italian authorities between the need for ex post supervision, at the local level, of the pursuit of debt recovery activities and the ex ante supervision ensured by authorisation does not in any way furnish such proof. Even if supervision of the pursuit of such activities must be carried out by the provincial police authorities rather than by the national police authority, I do not see, and the defendant has not convincingly demonstrated, how the effectiveness of such supervision would be compromised if the licence were issued by the central authority and had national application. The argument based on better monitoring, better 'traceability' one might say, does not stand up, since central coordination of local police checks on the activities of operators holding a national licence seems sufficient for that purpose and far less restrictive of the freedom of establishment. This is particularly true given that the police authority forms part of the Ministry of the Interior in Italy. There is even a case for arguing, on the contrary, that the disclosure of unlawful conduct during a local inspection and the subsequent withdrawal of the licence would have the effect of prohibiting the operator from carrying on his activity throughout the national territory if the licence had national application, whereas

28 — See Case C-298/99 *Commission v Italy* [2002] ECR I-3129, paragraph 64.

29 — See, for a summary of this burden of proof, *Analir and Others*, paragraph 35; Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25; and Case C-496/01 *Commission v France*, paragraph 73. See also, with regard to the free movement of goods, Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 22.

it would not prevent him from pursuing his activity in the other provinces for which he has a licence if the licence had local application.

33. The fact that, in the Italian Government's view, the prohibition on carrying on business outside the province is relative, it being possible to use an agent with a licence valid for the province in which the operator intends to carry on his business, does not correct the disproportionality of the restriction. For that possibility forces the operator to turn to an agency with which he actually intends to compete and therefore serves merely to consolidate the partitioning of the Italian market into provinces and to preserve the competitive situation.

34. I therefore propose that the Court should find that, by limiting the validity of the licence to the provincial jurisdiction of the police authority which granted it, and by requiring the operator to award a contract of agency to an authorised representative in order to pursue his activity in a province for which he does not have a licence, the Italian Republic has failed to fulfil its obligations under the principles of the freedom of establishment and the freedom to provide services.

C — Making pursuit of the activity subject to the possession of premises by the operator

35. According to the Commission, the contested Italian rules show that there is an obligation to possess premises in which the debt recovery activity is to be carried out, which obligation applies to each province for which the operator has a licence. It argues that such a requirement infringes both the freedom of establishment and the freedom to provide services.

36. In fact, several national provisions have the effect of requiring a debt recovery agency to have premises in each province for which it has a licence. Thus, Article 115 of the Law on public security states that 'the licence shall be valid exclusively for the premises which are specified in it'. Article 16 of that legislation provides that law-enforcement officers 'shall have the power to enter at any time premises intended for the exercise of activities subject to police authorisations'. Article 120 requires the operators of debt recovery agencies to display 'visibly and at all times in the premises of the agency a table setting out all the services which they provide', and the 1976 circular of the Ministry of the Interior states that, where necessary, debt recovery activities may be 'carried on exclusively at the premises specified in the licence, with the result that the other places of business must in any event be authorised'. Furthermore, the

defendant concedes that this constitutes an obligation on authorised operators to give the name of a place in the province where they keep their documents, so that police inspections may be carried out.

Member States to provide services in the Member State of destination.³⁰ Such a restriction on the freedom to provide services may therefore be accepted only where it is shown that it constitutes a condition which is indispensable for attaining the legitimate objective pursued.³¹

37. As regards the alleged infringement of Article 43 EC which follows from the foregoing, what the Commission calls into question is not the requirement to have premises, which is to some extent inherent in the exercise of the freedom of establishment, but the obligation on an operator wishing to establish himself in Italy to have premises in each province for which he has obtained a licence. This obligation is therefore closely linked to limiting the validity of the authorisation to the territory of one province: the territorial limitation of the establishment makes it necessary to have multiple establishments. I have already set out the reasons why such a limitation of the geographical scope of the licence infringes the freedom of establishment.

39. However, in its case-law, the Court has only very exceptionally recognised this as being the case. Almost the only example which can be cited is the provision of services by lawyers representing a client before the courts. In that situation, before such matters were harmonised at Community level, the requirement of a permanent professional establishment within the jurisdiction seised was, in *Van Binsbergen*,³² held to be compatible with the provisions on the freedom to provide services where such a restriction was objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with

38. With regard to the complaint alleging infringement of Article 49 EC, the Court has repeatedly held that the requirement of a permanent establishment or a place of business constitutes the very negation of the freedom to provide services, inasmuch as that requirement makes it impossible for undertakings which are established in other

30 — See, in particular, *Commission v Germany*, paragraph 52; Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31; Case C-355/98 *Commission v Belgium*, paragraph 27; Case C-439/99 *Commission v Italy*, paragraph 30; Case C-171/02 *Commission v Portugal*, paragraph 33; and C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46.

31 — See *Commission v Germany*, paragraph 52; *Parodi*, paragraph 31; and *Fidium Finanz*, paragraph 46.

32 — Case 33/74 [1974] ECR 1299, paragraph 14. Subsequently, Article 4(1) of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) provided that 'activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State'.

respect for professional ethics. In the same judgment,³³ however, the Court also held that, if the exercise of a professional activity is unrestricted within the territory of a Member State and not subject to any qualification or professional regulation, the requirement of residence within that State constitutes a restriction which is incompatible with the freedom to provide services, if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service.

40. At the hearing, the Italian Government relied, in support of the defence, on that very decision relating to the address for service of lawyers providing services. In order to justify its application by analogy, it argued that it was not possible to treat the requirement of premises in this case in the same way as a permanent establishment. The Italian rules must rather be understood, it submitted, as requiring the specification of a place where the documentation relating to the pursuit of the activity within the context of the freedom to provide services is kept, so that the police authority may have easy access to that documentation for the purposes of carrying out the necessary inspections; to satisfy that requirement, the operator providing services may simply give the address of an agency already established in Italy.

41. Even if the Italian rules were indeed to be interpreted in that way, it is no less true that the fact not of permitting but of systematically requiring the indication, albeit minimal, of a territorial location constitutes a restriction on the freedom to provide services. Those rules make the provision of such services more difficult than that of purely internal services, in so far as national service providers, by definition, already have one set of premises at the very least. Whether or not the Italian rules are permissible therefore depends on whether they are proportionate to the legitimate aim pursued. According to the Italian authorities, the answer is in no doubt, since a lack of premises may put the relevant documentation out of reach and therefore prevent effective ex post checks on how the activity is being conducted.

42. I do not concur with that analysis. I take the view that the Court's decision on the provision of an address for service for lawyers is not readily transposable to this case, in so far as the requirement of an address for service at the offices of a lawyer established in the host Member State is necessitated by specific requirements relating to the proper administration of justice, that is to say the giving of an address at which process from the court seised may properly be served. As I see it, the concern in this case to ensure effective ex post supervision can itself be properly taken into account by less restrictive measures. An obligation periodically to produce the documents relating to the services provided, or copies of them, would be sufficient for that purpose, particularly given the development of electronic means of communication. The possession of premises in order to display there the services which may be provided to

33 — Paragraphs 15 and 16. See to the same effect, including as regards the representation of a client in legal proceedings following the harmonisation of such matters, the judgment in Case C-294/89 *Commission v France* [1991] ECR I-3591.

customers is also disproportionate, since a debt recovery undertaking may pass information to a customer by other means, for example via an internet website.

carried out by the competent authorities of the Member State in which they have their place of business are no less strict than those applicable in France and monitor compliance with provisions which safeguard at least the same level of health protection as the French rules'.³⁵

43. This is also the direction taken by the Court in its case-law. Thus, it is possible to mention two cases which did concern the requirement of a permanent establishment for supervisory purposes, but the grounds of the judgments in which show that even the requirement simply to have premises was disproportionate. In the insurance services case, the Court held that 'such supervision may be effected on the basis of copies of balance sheets, accounts and commercial documents, including the conditions of insurance and schemes of operation, sent from the State of establishment and duly certified by the authorities of that Member State'.³⁴ Similarly, according to the Court, the requirement of a place of business which was imposed on medical analysis laboratories intending to provide services in France went beyond what was necessary, on the ground that, '[e]ven though the competent French authorities cannot be expected to carry out on-the-spot checks in other Member States, particularly inspections designed to ensure compliance with the operating conditions by the laboratories, it is nevertheless possible to require laboratories established in another Member State to prove to the satisfaction of the French authorities that the controls

44. I therefore propose that the Court should find that, by requiring operators to possess premises in each province for which they have obtained a licence, the Italian Republic has infringed Articles 43 EC and 49 EC, and that, by requiring operators to display in their premises the services which may be provided to customers, it has infringed Article 49 EC.

D — Limitation of the freedom to fix scales of charges

45. The Commission also criticises the Italian Republic for having restricted the freedom of establishment and the freedom to provide services without justification by recommending, in the 1976 circular of the Ministry of the Interior, that the Questori control scales of charges by setting objective and uniform parameters, in order to ensure that the prices charged within a single province do not vary too greatly.

34 — *Commission v Germany*, paragraph 55.

35 — Case C-496/01 *Commission v France*, paragraph 74.

46. I concur with the Commission's view that that recommendation must be regarded as a limitation of the freedom to fix scales of charges, in spite of the denial that that is the case by the Italian authorities, according to which that recommendation simply suggests that the Questori should provide operators with details of price lists based on objective factors (costs, the ratio of supply and demand in relation to services, etc.). However, the fact that those details are binding is apparent from the defendant's own admission that the development of excessive price competition could prompt the law-enforcement authority to suspend or even revoke the licences of responsible operators.

47. Like the Commission, I consider that that limitation of the freedom to fix scales of charges is such as to hinder or make less attractive the exercise of the freedom of establishment and the freedom to provide services and therefore constitutes an obstacle to those two fundamental freedoms.³⁶ Even if it is not discriminatory, it is such as to restrict access to the Italian market in activities concerned with extrajudicial debt recovery by operators wishing to establish themselves in Italy or provide their services

in that State. As the Court made clear in *CaixaBank France*,³⁷ price competition is often the best way of attracting customers and thus entering a market, in particular for operators who are not yet present in that market and are therefore unknown to customers. Accordingly, any national measure which has the effect of limiting it constitutes a restriction on the exercise of the right of establishment and the right to provide services.

48. This is manifestly the case, for the reasons just given, where the national measure seeks to impose minimum prices. Moreover, in this case, the recommendation to the Questori to establish objective and uniform parameters for fixing scales of charges seems to pursue this rather than any other purpose, since the aim of that recommendation, as the Italian authorities have admitted, is to prevent the development of unbridled competition on prices for services, which could pose a threat to public order. This might be the case even where the national measure had the effect of imposing maximum prices.³⁸ Such a limitation could actually hinder a provider of services, by

37 — It should be borne in mind that, in that case, the Court held that the French legislation prohibiting the remuneration of sight accounts constituted 'a serious obstacle to the pursuit of their activities ... affecting their access to the market', because it deprives foreign companies of the possibility of 'competing more effectively ... with the credit institutions traditionally established in the Member State of establishment' (paragraphs 12 and 13). See also my reasoning in relation to the restriction on the freedom of lawyers to provide services through the setting of minimum fees in my Opinions in *Cipolla and Others*, points 62 to 65.

38 — See to that effect, with regard to the free movement of goods, the judgments in Case 116/84 *Roelstraete* [1985] ECR 1705, paragraph 21, and Case C-249/88 *Commission v Belgium* [1991] ECR I-1275, paragraph 7. See also, with regard to the freedom to provide services, my Opinion in *Cipolla and Others*, points 66 to 70.

36 — See, to that effect, Case C-65/05 *Commission v Greece*, paragraph 48.

preventing him from including in the scale of charges for his service certain costs, in particular travel costs, which operators in situ do not have to bear. It could also hinder an operator wishing to become established, by preventing him from including the start-up costs which operators already established have long since recouped.

fix the minimum prices which may be charged by debt recovery agencies for the services provided to their creditor customers in order to prevent the development of price competition.

49. In order to demonstrate the lawfulness of that restriction, the Italian Government relied at the hearing on Article 3(1)(e) of Directive 2000/35/EC of the European Parliament and of the Council,³⁹ which authorises the Member States to fix, while respecting the principles of transparency and proportionality, maximum amounts for the recovery of costs that creditors may reclaim from a debtor in the event of the latter's late payment. That textual argument is not relevant. Even though Directive 2000/35 deals with debt recovery, the authorisation granted to the Member States relates to the maximum costs of recovery which may be reclaimed from the debtor by his creditor. The objective is to protect the weaker party, namely the debtor, whilst preventing him from taking advantage of the low rates of late-payment interest incurred and the slowness and cumbersome nature of the appeals procedures in order to misuse late payments. In this case, the effect of the Italian rules is to

50. The defendant also puts forward the sibylline argument that unbridled competition on prices for services could be a factor disturbing public order. It is no doubt suggesting by this that, in order to offer the lowest possible prices, recovery agencies would be encouraged to cut their costs as far as possible, by endeavouring to recover the amounts owed by debtors by any means, including the most vigorous, as quickly as possible.

51. Although such excesses are not out of the question, supervision of the integrity of operators should be capable of preventing them and criminal prosecution and sentencing capable of punishing them. I do not therefore see how limiting the freedom to fix scales of charges for services is an appropriate and necessary measure for attaining the public policy objective pursued. In any event, as I need hardly say again, it is for the Member States to accompany the reason invoked by way of justification 'by an analysis of the appropriateness and proportionality of the restrictive measure adopted', which the Italian authorities have failed to do.⁴⁰ Thus, in response to the French Government's

³⁹ — Directive of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35).

⁴⁰ — *Lindman*, paragraph 25.

reference, by way of justification for the rules on fuel prices, to the threat to public order represented by the violent reactions which would have to be anticipated on the part of retailers affected by unrestricted competition, the Court held that the French Government had not shown that it would be unable, using the means at its disposal, to deal with the consequences which a free pricing arrangement would have upon public order and security.⁴¹

52. The defendant has also referred to the threat which would be posed to workers' rights to the payment by their employer of social contributions and compliance with the requirements of collective agreements. However, while the protection of workers does constitute an overriding reason in the general interest, here too, as the Commission has rightly objected, their rights are preserved by rules of labour law and social security law infringements of which are subject to criminal penalties.

53. It is therefore appropriate to uphold the complaint alleging that Articles 43 EC and 49 EC have been infringed by the limitation of the freedom to fix scales of charges.

E — The prohibition on the pursuit of debt recovery activities concurrently with the provision of banking and credit services

54. Finally, the Commission alleges that the Italian Republic has infringed the freedom of establishment and the freedom to provide services, inasmuch as the 1976 circular of the Ministry of the Interior makes the activity of extrajudicial debt recovery incompatible with the banking and credit services governed by Legislative Decree No 385/93.

55. In so far as that incompatibility has the effect of prohibiting banking operators from other Member States who are authorised, if they so wish, to pursue both lines of activity concurrently in their country of origin from pursuing debt recovery activities in Italy, it indisputably hinders their right to freedom of establishment and freedom to provide services.⁴² It seems difficult to find any justification for such a general prohibition, which is applicable even if operators fulfil the financial and integrity conditions laid down by the rules of the Member State in which they are established. Moreover, the defendant has not tried to do so.

⁴¹ — See Case 231/83 *Cullet* [1985] ECR 305, paragraphs 32 and 33.

⁴² — It will thus be noted that the Court has already held that the requirement to conduct the business of trade-fair organiser on an exclusive basis is contrary to the freedom to provide services (see Case C-439/99 *Commission v Italy*, paragraph 32).

56. On the other hand, the defendant vigorously disputes the Commission's interpretation of the 1996 circular of the Ministry of the Interior. In its submission, that measure does not in any way prohibit the concurrent pursuit of the aforementioned activities but merely states that the authorisation to carry on the activity of debt recovery does not also permit an operator to pursue the activities of savings collection and credit management governed by Legislative Decree No 385/93, which must themselves be the subject of a specific authorisation.

banking and credit services. Even if, as the defendant maintains, that term is inappropriate, it is in any event such as to lead banking and financial undertakings which have their registered offices in another Member State to believe that it is not possible for them to pursue the activity of debt recovery in Italy and, therefore, to deter them from applying to the Italian police for a licence to do so. It is settled case-law that 'the principles of legal certainty and the protection of individuals require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations are observed'.⁴⁴ In line with that case-law, the Court has, more specifically, already censured legal uncertainty as to the criteria to be fulfilled which is such as to deter operators from providing their services.⁴⁵

57. Adopting a position on this point is no easy matter, since the contested passage of that circular is difficult to interpret. It states that, 'with regard to the question of the incompatibility between the operation of debt recovery agencies and other activities ..., those agencies are deemed not to be entitled to provide the financial services governed by Legislative Decree No 385/93, which are reserved exclusively for the financial intermediaries entered in the *ad hoc* register of the Ministry of the Treasury'. At first sight, the term 'incompatibility' used here supports the interpretation put forward by the Commission, since it denotes a legal bar on the pursuit⁴³ of debt recovery activities concurrently with the provision of

58. I therefore propose that the Court should also uphold the complaint alleging that Articles 43 EC and 49 EC have been infringed by the incompatibility between the activity of debt recovery and banking and credit services.

43 — The very definition of the term given by Cornu, G. (under his editorship), *Vocabulaire juridique*, Quadrige, Seventh edition, PUF, 2005.

44 — See, in particular, Case C-187/98 *Commission v Greece* [1999] ECR I-7713, paragraph 54. See also, in a slightly different form of words, Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 79.

45 — See *Canal Satellite Digital*, paragraph 41.

III — Conclusion

59. In conclusion, for the reasons I have given above, I propose that the Court should find that:

- by making pursuit of the activity of extrajudicial debt recovery subject to the issue of a licence; and
- by authorising the Questore to make the grant of the licence subject to requirements additional to those laid down by the Law on public security, adopted by means of Royal Decree No 773 of 18 June 1931, as interpreted and supplemented by a circular of the Ministry of the Interior of 2 July 1996, so as to maintain public confidence,

the Italian Republic has failed to fulfil its obligations under Article 49 EC;

- by restricting the territorial scope of the licence;
- by making pursuit of the activity of extrajudicial debt recovery subject to the possession of premises in each province for which the operator holds a licence and requiring the latter to display at all times in his premises the table of services which he provides;

- by restricting the freedom to fix scales of charges; and

- by prohibiting the pursuit of debt recovery activities concurrently with the provision of banking and credit services,

the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.