

OPINION OF ADVOCATE GENERAL

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delivered on 7 December 2004¹

1. In these Treaty infringement proceedings, brought pursuant to Article 226 EC, the Commission of the European Communities seeks a declaration by the Court of Justice that the Hellenic Republic, by the conditions it has imposed on both natural and legal persons for authorisation to operate opticians' shops in its territory, has failed to fulfil its obligations under Articles 43 EC and 48 EC.

2. This is another case concerning the so-called 'measures which apply without distinction', since the relevant legislation does not differentiate between own nationals and the nationals of other Member States. The difference in treatment may arise indirectly from other requirements, which appear to be neutral, in the present case the requirement that authorisation to open an optician's shop can be granted only to a recognised optician, acting either in his own capacity or through his share in a partnership.

I — The relevant Community provisions

3. Title III of the EC Treaty is devoted to the fundamental freedoms of movement of persons, services and capital; it makes specific provision for the right of establishment in Chapter 2, which includes Articles 43 to 48, the first and last of which are of interest in this case.

4. Article 43 EC sets the limits of that right:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

¹ — Original language: Spanish

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

5. Article 48 EC places legal persons on the same footing as natural persons for the purpose of exercising that freedom:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

II — The relevant national provisions

6. In Greece, the setting up of opticians' shops is governed by Law No 971/79.² Article 6(6) contains the rule that, subject to what is authorised in Article 6(3)³ and Article 8(2),⁴ opticians' shops shall be managed in person by whomever has been granted authorisation for the purpose, which means, the provision adds, that each optician, as a *natural person*, cannot run more than one shop.

7. However, not every professional in the field is in a position to set up a business since, according to Article 7(1) of Law No 971/79, these shops must be established by people holding an optician's licence and their operation is subject to the grant of the appropriate authorisation, which, as is stated in Article 8(1), '... is personal and non-transferable.'

8. As regards *legal persons*, Article 27(4) of Law No 2646/98,⁵ on the modernisation and

2 — Official Journal of the Hellenic Republic, Series I, No 233, 1979. This law governs not only the establishment and operation of opticians' shops, but also the conditions for exercising the profession of optician.

3 — This deals with the setting up of opticians' businesses in chemists' shops.

4 — Concerning the transfer of the business to relatives.

5 — Official Journal of the Hellenic Republic, Series I, No 236, 20 October 1998.

organisation of the health system, which supplements Law No 971/79, only permits qualified opticians to form a collective or limited partnership in order to operate an optician's shop, provided that the person holding the authorisation to operate the shop holds at least 50% of the share capital. The optician in question may participate at most in one other company but the authorisation for that shop must be in the name of another qualified optician.

domiciled in another Member State, and its Greek subsidiary) which had been refused authorisation to open an optician's shop pursuant to Law No 971/79, the Commission, by letter of 27 January 1998, drew the attention of the Greek authorities to the fact that that legislation was incompatible with Articles 52 and 58 of the EC Treaty (now Articles 43 EC and 48 EC).

9. In the rejoinder, the Greek Government stated that a legislative amendment was pending to include the various types of partnership among the possible recipients of the authorisation, provided that the majority of their share capital is held by qualified opticians.

11. On 27 April 1998 the Greek Government stated that it was amending the law; on 13 January 1999, after it had received the corresponding formal notice, it informed the Commission that the amendment had been effected by Law No 2646/98.

At the hearing, the representative of the defendant State confirmed that, in his view, Law No 3204/2003 had put an end to all the infringements which Greece was alleged to have committed.

12. The Commission considered that the content of this latter legislation was likewise not in accordance with Community law and sent the Greek Government a second formal notice on 3 August 1999.

III — The administrative procedure

10. As a result of the complaint made by two limited companies (the parent company,

13. Notwithstanding the Greek contentions of 17 May 2000, the Greek Government received on 24 January 2001 a reasoned opinion, to which it replied on 2 May 2001.

IV — The forms of order sought by the parties and the procedure before the Court of Justice

capital of a collective or limited partnership, and

14. The Commission brought this action on 27 March 2003. It claims that the Court of Justice should:

(b) the optician may participate at most in one other company owning a shop in the sector, subject to the condition that the authorisation in respect of that shop is granted to another qualified optician,

— declare that by enacting and maintaining in force Law No 971/79, which does not permit a qualified optician to operate more than one optician's shop, the Hellenic Republic has restricted the conditions of establishment in breach of Article 43 EC, and

the Hellenic Republic has restricted the right of establishment of legal persons operating as opticians in a manner inconsistent with Article 43 EC and has infringed Article 48 EC in conjunction with Article 43 EC by imposing on companies conditions different from those imposed on natural persons.

— declare that by enacting and maintaining in force Law No 971/79 and Law No 2646/98, under which the establishment by a company of an optician's shop is subject to the following two conditions:

15. The defendant State contends that the Court should dismiss the action on the ground that the restrictions on companies were imposed for reasons relating to the protection of public health.

(a) the authorisation must be issued in the name of a qualified optician holding at least 50% of the share

16. After the reply and the rejoinder the written stage of the procedure was closed.

17. On 23 September 2004 the hearing was held at the request of the defendant Government; both parties to the proceedings participated.

economy',⁶ always linked to the exercise of an economic activity.⁷

V — Assessment of the action

18. The Commission considers that the restrictions imposed by the Greek legislation in respect of opticians' shops are inconsistent with freedom of establishment in two domains: that of natural persons, by infringing Article 43 EC, and that of legal persons, by infringing Article 48 EC in conjunction with the former provision.

20. This fundamental freedom, which is granted to the natural and legal persons of any Member State, includes, subject to the exceptions and requirements laid down, the right to take up and pursue any kind of activity as a self-employed person in the territory of the rest of the Community. It also includes the right to set up and manage undertakings and to establish agencies, branches or subsidiaries.

21. According to the case-law, this concept is a very broad one, which allows a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.⁸

A — Freedom of establishment and its limits

19. Freedom of establishment is inseparable from the political programme of the European Union, and is achieved by removing the barriers affecting production methods. Not for nothing is it stated that 'establishment means integration into a national

22. For the purpose of deciding the present case, it is particularly important to note that

6 — Opinion of Advocate General Darmon in Case 81/87 *Daily Mail and General Trust PLC* [1988] ECR 5483, point 3.

7 — Fallon, M., *Droit matériel général des Communautés européennes*, Ed. Bruylant, Paris, 1997, p. 394.

8 — Case 2/74 *Reyners* [1974] ECR 631, paragraph 21; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25; Case C-212/97 *Centros* [1999] ECR I 1459, paragraph 34; and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57.

the right of establishment also entails the right to set up and maintain, subject to observance of the rules of professional practice, more than one centre of activity within the territory of the European Union.⁹ These rules, in turn, cannot violate the conditions laid down by the Community legal order.

23. To this end, the Court of Justice has sometimes allowed the taking up and pursuit of specific activities to be subject to compliance with certain statutory, legislative or administrative provisions, provided that they fulfil four conditions:

- they must be applied in a manner which does not discriminate on grounds of nationality,

- they must be justified by overriding requirements of the general interest,

- they must be suitable for securing the attainment of the objective which they pursue, and

⁹ — Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19; Case 143/87 *Stanton* [1988] ECR 3877, paragraph 11; Joined Cases 154/87 and 155/87 *Wolf* [1988] ECR 3897, paragraph 11; and Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 20, amongst others.

- they must not go beyond what is necessary in order to attain it.¹⁰

24. The purpose of these proceedings is to consider whether these conditions are met, in respect of both natural and legal persons, and also to examine the different treatment they are accorded by the Greek legislation. In any event, it is necessary to take into consideration the fact that, as Community law has developed, the personal scope of the principle of the free movement of persons has expanded.¹¹

B — Restrictions on the freedom of establishment of natural persons

25. Article 6(6) of Law No 971/79 does not permit an optician, of any nationality, to

¹⁰ — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and *Gebhard*, cited in footnote 8, paragraph 37.

¹¹ — Lirola Delgado, I., *Libre circulación de personas y Unión Europea*, Ed. Civitas, Madrid, 1994, p. 61, maintains that, during the process of European integration, the principle of the free movement of persons, owing both to its own dynamics and to the development of its political dimension, has expanded through the addition of new categories to the persons covered by Community law. That has happened gradually, in a process fraught with difficulties and, sometimes, contradictions, in which the starting-point lies in the broad interpretation of the content which may be included in the context of the economic freedoms.

operate more than one optician's business. It therefore applies without discrimination, because it treats Greek subjects in the same way as the citizens of other Member States.

26. The defendant Government itself acknowledges that this limitation reduces the Community freedom, but justifies it on public health grounds.

27. One of the grounds, put forward by the Greek Government at the pre-litigation stage, is the need to ensure a balanced geographical distribution of opticians' shops. However, as the Commission emphasises in its application, the rule of 'one qualified person per shop' is not in itself sufficient to achieve the objective pursued, since there is nothing to prevent qualified opticians from avoiding setting up business in the most remote or least profitable towns or regions.¹²

In any event, the defendant State did not repeat that line of argument before the Court of Justice, so that it must be understood to have abandoned it.

28. Apart from that, it is true that public health, as a whole, constitutes an overriding reason based on the general interest justifying national measures which may restrict freedom of establishment or render it less attractive. The Court of Justice has drawn attention to this circumstance, highlighted in Article 3(o) of the EC Treaty (now, after amendment, Article 3(1)(p) EC), pointing out that the activities of the Community are to include, as provided in the Treaty and in accordance with the timetable set out therein, contributing to the attainment of a high level of health protection.¹³

29. According to the defendant Government, the contested legislation seeks to preserve the personal relationship of trust in the context of the sale of opticians' goods, and to ensure the absolute liability of the qualified optician, who is in turn the owner of the business.

It also argues that 'only an optician, a qualified specialist, who participates directly in the running of his business, without expending physical and mental energy on running other branches, can guarantee the desired result'.

12 — Which brings to mind the aphorism 'the chemist in his chemist's shop' (*Apotheker in seiner Apotheke*) of German law, which had effects similar to those produced by the Greek legislation in the present case, in connection with the pharmaceutical business, in the period prior to the consolidation of the decision in *Gebhard* (see, in this regard, Friauf, K.H., *Das apothekenrechtliche Verbot des Fremd- und Mehrbesitzes*, Ed. C.F. Müller, Heidelberg, 1992, p. 7).

13 — Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraphs 28 and 29; although, as Advocate General Mischo pointed out in the Opinion in that case, the main responsibility lies with the Member States.

30. It must be accepted that a Member State may consider, as an overriding reason of the general interest, that the products and services offered in an optician's shop should be the responsibility of a qualified optician. The Court of Justice has accepted similar arguments in relation to other health professionals.¹⁴

31. However, the restriction, if it is not to be incompatible with Community law, must be appropriate for achieving that objective and proportionate to the legal benefit pursued.

32. It is not obvious that the contested measure is suitable. The defendant Government merely cites Article 6 of Law No 971/79, and the case-law which interprets it, according to which the sale of spectacles and other lenses to correct sight defects must be carried out in shops which are *run* or *managed*¹⁵ by qualified staff, although they are not required to be present or to attend the customer.

33. However, in this case, the condition of proportionality is not fulfilled, because there are measures which are less restrictive and comply better with Community law than those implemented in Greece.

34. There are two spheres of relationship in the shops, one internal and the other external. The first comprises ownership — which includes, for example, the premises or room in which it is situated, the list of customers, the goods or trade name —, the labour links with the employees and, particularly relevant to the problem presented by these proceedings, proprietorship — which is not the same as ownership, with which it is connected through various legal forms —, as well as administration and management.

The second comprises relations with third parties, particularly with suppliers and, of interest in this case, with buyers, customers or, if you prefer, patients.

35. The Greek legislation confuses these two profiles. In the field of internal relations, it prohibits a qualified optician from setting up more than one shop, justifying the measure on grounds of an external nature, basically

14 — See, in relation to doctors and dentists, Case C-351/90 *Commission v Luxembourg* [1992] ECR I-3945.

15 — This paraphrases paragraph 13 of the judgment in Case C-271/92 *Laboratoire de prothèses oculaires (LPO)* [1993] ECR I-2899.

on the special personal relationship of trust with the customer and the optician's unlimited liability.

for damage caused by the shop assistants or the obligation to take out an insurance policy.

36. If it distinguished between them, there would be less serious consequences for Community freedom, because the establishment of several shops would not be contrary to the requirement that qualified staff should do the dispensing and also attend to the customers.

39. It should be pointed out that these proceedings concern neither the recognition of qualifications nor the activities of opticians;¹⁷ the judgment in *LPO*,¹⁸ cited by the Greek State, is therefore not relevant.

37. Furthermore, as regards contact with the individual, the Court of Justice does not require the practitioner to be close to the patient or client all the time,¹⁶ and has referred expressly to a general practitioner, dentist or veterinary surgeon or even a medical specialist; there is therefore no reason why this doctrine should not be extended to opticians.

That case, which arose out of a dispute between a distributor of contact lenses, intra-ocular implants and related products and a number of professional organisations of opticians, in fact related to the compatibility with the free movement of goods of national legislation which reserved the sale of optical products to holders of an optician's certificate.

38. Compensation for damage, on which the defendant Government bases its argument that the restriction is lawful, could be secured by using certain legal instruments to provide full redress, such as, for example, the direct or secondary liability of the owner

The Court of Justice considered that that legislation was guided by a lawful objective to protect human health, and that its application was not disproportionate to the aim pursued. It therefore held that national legislation requiring contact lenses and related products to be sold in commercial

16 — *Commission v Luxembourg*, cited in footnote 14, paragraph 22, which refers to Case 96/85 *Commission v France* [1986] ECR I-475, paragraph 13.

17 — In spite of the fact that, as Advocate General Mischo stated in point 35 of the Opinion in *Mac Quen and Others* (see footnote 13), the activity of optician is not covered by Community legislation.

18 — Cited in footnote 15.

establishments run or managed by persons who fulfilled the conditions laid down for practising as opticians was justified on grounds of the protection of public health.

40. However, the Court did not decide whether the qualified optician also had to be the financial proprietor of the company, let alone the number of shops he could operate. In those circumstances, this legal precedent throws no light on the dispute in the present case, although it does confirm the specific nature of the optician's business.¹⁹

41. In any event, the formula used in paragraph 13 of the judgment in *LPO* does not seem wholly appropriate: what should matter in the interests of protecting public health is not so much that the shop is *run* or *managed* by opticians, these being essentially commercial, administrative or bookkeeping tasks, as that the customer, when he is considering buying optical goods, is attended by qualified staff. This lack of precision has no effect whatsoever on the present case.

42. Finally, the judgment in *Mac Quen and Others*,²⁰ which was also cited in the reply and in which the qualifications required for performing certain objective optical examinations were considered, is not pertinent either. The issue discussed was whether legislation which reserved the power to carry out those examinations to ophthalmologists, to the exclusion of opticians who are not qualified medical doctors, was contrary to the freedoms guaranteed by the Treaty.

The Court of Justice pointed out that, although in the absence of harmonisation at Community level with regard to the subject at issue the Member States retain jurisdiction, they must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty.²¹

In that case, the specific qualification requirements imposed by national law were considered justified for the reasons of public health put forward.

The requirements to be judged there related to patient care, and fall within that external sphere to which I have referred above,

19 — The Court acknowledged that the sale of contact lenses, even if ophthalmologists are responsible for prescribing them, cannot be regarded as a commercial activity like any other, since the vendor must be able to provide users with information on the use and care of the lenses (paragraph 11).

20 — Cited in footnote 13 of this Opinion.

21 — With reference to the judgments in Joined Cases C-193/97 and C-194/97 *De Castro Freitas and Escallier* [1998] ECR I-6747, paragraph 23; and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31.

whereas the dispute under consideration now turns on the authorisation for opening an optician's shop, which is seen as a business project.

45. These conditions differ from those imposed on natural persons, and the Commission therefore seeks a declaration that, owing to this fact, the duty of equal treatment enshrined in Article 48 EC has been infringed.

43. From the above, I infer that the restriction imposed by the Greek legislation on freedom of establishment, to the effect that an optician may run only one shop, infringes Article 43 EC.

46. The proposal is rather simplistic, so it is necessary to make three observations.

C — Restrictions on the freedom of establishment of companies

47. First, natural and legal persons by their very nature have fundamentally different legal status, so that any comparison, as a rule always incomplete, must reflect that essential difference. Article 48 EC therefore requires a teleological interpretation: the Treaty requires that legal persons enjoy freedom of establishment to the same extent as natural persons.

44. So far as concerns legal persons, I have already pointed out that Law No 2646/98 restricts the freedom to set up in business, by only allowing opticians to set up collective or limited partnerships to operate the shops, and requiring that the optician hold more than 50% of the share capital: he may participate at most in one other company, subject to the condition that the authorisation for that shop is granted to another authorised optician.

48. My second observation has to do with the hypothetical nature, as I have just stressed, of the other element of the comparison. The duty to accord equal treatment is not imposed restrictively, on pain of infringement, but in order to allow companies to aspire to enjoy a right of at least similar scope. From that it follows that Article 48 EC is not infringed by a Member State which, whilst authorising freedom of establishment for legal persons, prohibits or

unreasonably reduces freedom of establishment for natural persons. For the same reason, the other point of reference in the comparison cannot be constituted by legislation which in itself infringes Community law.

companies are accepted and that the legal amendment announced by the defendant State extends the authorisations to limited companies, provided that a qualified optician holds the absolute majority of the shares.

49. Thirdly, there are serious obstacles to accepting the Commission's view on the way in which the regime accorded to companies by the defendant State should be classified. Although it differs from that applied to natural persons as regards the detailed rules it provides for, they both contain the operative rule of 'one qualified optician per shop'; in one case, by means of an express condition, and in the other, by requiring that the interested party shall be the majority shareholder.

52. Thus, the contested measures, even though they may not be discriminatory and may seek to protect public health, are not proportionate to the aim which they pursue. There are others, which more closely observe the principle of freedom of establishment. As I have pointed out,²² it is possible, by distinguishing between ownership, proprietorship and internal administration of the business, on the one hand, and contact with customers, on the other, to achieve a solution more in accord with Community law, whether it is the contact between the person who runs the office and the purchaser or the liability for damage which is taken into account.

50. Bearing in mind that the legislation applicable to natural persons, the incompatibility of which with Community law I have pointed out above, is similar to that applicable to legal persons, it appears that the latter likewise does not satisfy the requirements of European law.

53. The judgment in *Commission v Luxembourg*²³ should be interpreted along these lines. The defendant Government had defended the single practice rule, which is ultimately the effect of the Greek provision relating to the structure of the shareholding in opticians' businesses, stating that a medical contract is a contract *intuitu personae*, requiring the continuous presence of the practitioner at his surgery or place of employment in order to ensure that care is permanently available.

51. An analysis of the Greek legislation on the establishment of this kind of business, which is based on the special relationship of the optician with the customer and the liability he assumes, shows that only private

22 — See points 34 to 38 of this Opinion.

23 — Cited in footnote 14 of this Opinion.

The Court of Justice considered that that continuity could be achieved in less restrictive ways, such as by requiring minimum attendance or having arrangements for providing replacements. The national provision was therefore too absolute and general in nature for it to be justified in the interests of public health.²⁴

majority shareholding in a company seeking authorisation to open an optician's shop to be in the name of a qualified optician. The two spheres to which I have referred — the ownership of the undertaking, on the one hand, and the nature of the services offered to third parties, on the other —, are again combined, to the detriment of a fundamental freedom established in the Treaty.

54. Finally, even if, as it stated at the hearing, the Hellenic Republic has twice amended its legislation in order to adapt it to Community law, the case-law has stated that whether there has been a failure to fulfil obligations must be examined on the basis of the position in the Member State at the end of the period laid down in the reasoned opinion. The Court of Justice cannot take account of any subsequent change,²⁵ since there is an interest in assessing the situation at that moment in order, for example, to establish the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default.²⁶

56. Consequently, the Hellenic Republic, by making the establishment of an optician's shop subject to the issue of an authorisation granted to a qualified optician who holds at least 50% of the share capital of a collective or limited partnership, and by stipulating that that optician may participate at most in one other company, subject to the condition that the authorisation for that company is issued in the name of another qualified optician, has infringed Article 48 EC.

55. Apart from that, it should be added, merely by way of illustration, that the recently amended scheme²⁷ appears to repeat the previous errors, by requiring the

VI — Costs

57. 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 Commission's application should be upheld and it has applied for an order for costs against the Hellenic Republic, that State should be ordered to pay the costs.

²⁴ — *Ibid.*, paragraphs 22 and 23.

²⁵ — Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 23; Case C-209/02 *Commission v Austria* [2004] ECR I-1211, paragraph 16; and Case C-168/03 *Commission v Spain* [2004] ECR I-8227, paragraph 24.

²⁶ — Case 154/85 *Commission v Italy* [1987] ECR 2717, paragraph 6, and Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899, paragraph 11.

²⁷ — See point 9 of this Opinion.

VII — Conclusion

58. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) Declare that the Hellenic Republic:

- by maintaining in force Law No 971/79, which does not permit a qualified optician to operate more than one optician's shop, is restricting freedom of establishment in breach of Article 43 EC; and
- by enacting and maintaining in force Law No 971/79 and Law No 2646/98, under which the establishment of an optician's shop is subject to the issue of authorisation granted to a qualified optician who holds at least 50% of the share capital of a collective or limited partnership, and which stipulate that that optician may participate at most in one other company, subject to the condition that the authorisation for that company is issued in the name of another qualified optician, has infringed Article 48 EC.

(2) Order the Hellenic Republic to pay the costs.