OPINION OF ADVOCATE GENERAL ALBER

delivered on 29 May 2001 [1]

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I — Introduction

1. In this action for failure by a Member State to fulfil its obligations, the Commission is objecting to the fact that certain Italian national and regional provisions contain requirements directed at the organisers of trade fairs and individual trade-fair events and exhibitors. The Commission maintains that these requirements infringe the principle of the free movement of services — Article 59 of the EC Treaty (now, after amendment, Article 49 EC) — and, in part, also the principle of the freedom of establishment that is laid down in Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2. The Commission maintains specifically that the following conditions laid down for trade-fair organisers are incompatible with the freedom to provide services.

— the requirement to obtain official recognition of trade-fair organiser status; [2]

— the limitation on the possible legal forms that a trade-fair organiser may use; [3]

— the requirement for the trade-fair organiser to have a permanent establishment; [4]

— the restriction on the organiser's business to arranging trade fairs; [5]

— the prohibition on profit-making. [6]

3. The Commission considers that the influence of the public authorities which is prescribed by the legislation as regards the constitution of bodies that organise trade fairs, [7] and the requirement that a local authority must be one of the founder members of such bodies, [8] are incompatible with both the freedom to provide services and the freedom of establishment.

4. The Commission also states that a number of conditions relating to the organisation of individual trade fairs

2 — Point 75 et seq. of this Opinion.
3 — Point 82 et seq. of this Opinion.
4 — Point 85 et seq. of this Opinion.
5 — Point 92 et seq. of this Opinion.
6 — Point 97 et seq. of this Opinion.
7 — Point 106 et seq. of this Opinion.
8 — Point 117 et seq. of this Opinion.

infringe the freedom to provide services. These requirements are:

— that specified fairs must be held periodically; [9]

— that fairs must be organised in conformity with regional and national planning; [10]

— that applications for authorisation for fairs must be submitted two years before they take place, [11] and

— that fairs may be held only after being included in an official calendar. [12]

5. In addition, the Commission objects to other requirements providing for local undertakings to participate in the procedure for recognition of the status of organisers and authorisation of fairs. [13]

6. Lastly, the Commission also complains of those requirements which permit only producers to exhibit at fairs. [14]

7. Italy responded substantively to these objections only in its reply to the Commission's letter of formal notice. In its defence, the Italian Government referred to a draft law that had been submitted at that time and was adopted early in 2001, which was intended to amend the provisions objected to. Therefore, although the failure to fulfil obligations is ultimately beyond dispute, this is the first time the fundamental freedoms have been applied to requirements imposed upon organisers of trade fairs and individual trade-fair events. How such rules are assessed is significant beyond the boundaries of Italy. The Commission's objections must therefore be examined in detail. The submissions of the parties, that is the statement of reasons put forward by the Commission and the corresponding arguments put forward by Italy in the response to the letter of formal notice, are set out in detail in the section containing my opinion.

8. As regards the Italian legislation, the State has overall competence in connection with trade-fair events. That competence is supplemented by regional laws. The Commission is therefore challenging rules com-

9 — Point 122 et seq. of this Opinion.
10 — Point 129 et seq. of this Opinion.
11 — Point 137 et seq. of this Opinion.
12 — Point 144 et seq. of this Opinion.
13 — Point 154 et seq. of this Opinion.

14 — On the admissibility of this complaint, see point 25 et seq. of this Opinion.

prising three national decrees and nine regional laws. The individual provisions are set out when each objection is discussed.

II — Procedure and submissions

9. Following complaints made by various organisers of trade fairs, the Commission inquired into the provisions on the organisation of trade fairs, exhibitions and markets in Italy and made the above findings.

10. In a letter of formal notice, of 16 April 1996, the Commission drew the Italian Government's attention to these questions and required it to make its own observations within two months. The Italian Government responded, in its letter of 16 July 1996, primarily raising basic objections to rebut the Commission's objections, at least in part. The latter, not persuaded by this response, sent the Italian Government its reasoned opinion of 18 May 1998, giving it a maximum of two months to reply to the criticisms. That period expired on 18 July 1998 but nothing had been done. With its letter of 15 February 1999, the Permanent Representation of the Italian Republic to the European Union forwarded a draft law already passed by the Senate but still under examination by a committee of the Chamber of Deputies. The Commission felt that this draft law took account of its observations to a substantial extent.

11. The Commission brought an action before the Court of Justice on 17 November 1999 asking the Court to:

(1) Declare that the Italian Republic has failed to fulfil its obligations under Article 59 et seq. of the EC Treaty by maintaining in force the following provisions:

— Article 2, first paragraph, and Article 7 of Decree Law No 454 of 29 January 1934;

— Article 2, first paragraph, of Presidential Decree No 7 of 15 January 1972;

— Article 2, paragraphs 4, 6 and 7 of Presidential Decree No 390 of 18 April 1994;

— Article 4 of Regional Law of Liguria No 40 of 14 July 1978;

— Article 6, paragraph (1)(e), (f), (g) and (h), Article 6(4) and Article 7 of Regional Law of the Veneto No 35 of 2 August 1988;

— Article 2, sixth paragraph, Article 4, first indent, Article 6, third and fourth paragraphs, and Article 10, third paragraph, (a) of Regional Law of the Marches No 16 of 12 March 1979;

— Article 4, Article 5, sixth paragraph, subparagraphs (a) and (c), Article 6, first paragraph, Article 8, first and second paragraphs, and Article 16 of Regional Law No 43 of Emilia-Romagna of 26 May 1980;

— Article 4, paragraph 1(c), Article 4, paragraph 2 and Article 15, paragraph 3, of Regional Law of Lombardy No 45 of 29 April 1980;

— Article 3, Article 4 and Article 8, last paragraph, of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981;

— Article 2, last paragraph, and Article 6 of Regional Law No 75 of Abruzzo of 13 November 1980;

— Article 3, Article 5, Article 6, third and fourth paragraphs, Article 12 and Article 19, first paragraph, of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978;

(2) Declare that the Italian Republic has failed to fulfil its obligations under Article 52 et seq. and Article 59 et seq. of the EC Treaty by maintaining in force the following provisions:

— Article 3 of Presidential Decree No 7 of 15 January 1972;

— Article 2(c) and (d), Article 3, first paragraph, (b) and (c) and Article 5, first paragraph, (a) of Regional Law No 12 of Liguria of 3 November 1972;

— Article 8, paragraph 1, of Regional Law No 35 of the Veneto of 2 August 1988;

— Article 6, third paragraph, points 3 and 4, Article 7, Article 8, second paragraph, and Article 11, first paragraph, of Regional Law No 43 of Emilia-Romagna of 26 May 1980;

— Article 5(2) and (5), Article 10(4), Article 11(2) and (3) and Article 15(1) of Regional Law of Lombardy No 45 of 29 April 1980;

— Article 5, Article 13, Article 14 and Article 15, first paragraph, (a) of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981;

— Article 7 of Regional Law No 75 of Abruzzo of 13 November 1980;

— Articles 6, 7 and 23 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978;

(3) Order the Italian Republic to pay the costs of the proceedings.

12. In its defence, submitted on 13 March 2000, the Italian Republic made no submissions and in fact did not contest the failure to fulfil its obligations. It simply referred several times to a draft framework law to regulate trade fairs. In the meantime, this draft has been adopted as Law No 7 of 11 January 2001, entitled 'Legge quadro sul settore fieristico'. [15]

III — Opinion

A — *Admissibility of the application*

13. Since the Commission has made some errors in its written submissions in citing the provisions objected to, the admissibility of the application must be verified.

(1) Provisions not cited in the text of the reasoned opinion

14. In its application, the Commission objects to a number of Italian requirements

15 — GURI No 26, 1 February 2001.

that, in the reasoned opinion, are mentioned only in the statement of reasons. The requirements concerned are:

— Article 16 of Regional Law No 43 of Emilia-Romagna of 26 May 1980;

— Articles 3 and 4 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981, and

— Article 7 of Regional Law of the Veneto No 35 of 2 August 1988.

15. The question therefore arises whether the pre-litigation procedure was conducted properly. That decision must be based on the spirit and purpose of the pre-litigation procedure. The Court has consistently held that the purpose of this stage of proceedings is 'to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, factors enabling it to prepare its defence ... and, second, to enable the Member State to comply before proceedings are brought before the Court'. [16]

16. Therefore an action for failure by a Member State to fulfil its obligations, under Article 169 of the EC Treaty (now Article 226 EC), must be preceded by a letter of formal notice and a reasoned opinion. The action can be based only on the grounds already set out in the reasoned opinion. [17] That also applies, although rather less strictly, for the complaints referred to in the letter of formal notice. [18] The application is otherwise inadmissible. [19]

17. When, as in this case, the defendant State can identify an objection that is not in the text of the closing plea in the reasoned opinion, but only in its statement of reasons, the quality of the drafting of that document certainly seems open to question, but the purpose of the pre-litigation procedure none the less stands. In the final analysis, the objections arise from the statement of reasons and not from the simple requirement to amend this or that provision. A Member State charged with failure to comply with the Treaty may be expected to do its best to provide an explanation, if there is one, and if appropriate to make good the failure. [20] The first step is a careful reading of the letter of formal notice and the reasoned opinion.

16 — Judgment in Case C-230/99 *Commission* v *France* [2001] ECR I-1169, paragraph 31, in particular as regards the letter of formal notice.

17 — See judgment in Case 347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 16.

18 — See Opinion in Case C-230/99 *Commission* v *France* [2001] ECR I-1169, point 27 et seq.

19 — Judgment in Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 13 et seq.

20 — See judgment in Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 26 et seq.

18. However, the provisions objected to by the Commission were clearly indicated in the statement of reasons. The application is therefore admissible.

(2) Provisions not cited clearly

(a) Article 7 of Regional Law No 43 of Emilia-Romagna of 26 May 1980

19. In point 2 of the claims in its application, the Commission objects to the whole of Article 7 of Regional Law No 43 of Emilia-Romagna of 26 May 1980. However, in point 54(i) of its application, the Commission mentions only Article 7(a) as a provision contrary to Community law. In the full quotation of the provision in footnote 85, it becomes clear that the Commission means to refer to Article 7, second paragraph, (a), which mentions subsidies for trade fairs organised with the participation of public entities or in the public interest. At most, therefore, the application is admissible in respect of the part of the requirement mentioned in the statement of reasons.

20. But in addition to this, the letter of formal notice and the reasoned opinion, in the context of the draft law on intervention by public establishments in the organisation of trade fairs, referred only to the third and fourth paragraphs of Article 7 which apparently provide that subsidies may be given only exceptionally and subject to time-limits for the purpose of promotional activity and trade-fair management.

21. The application thus modifies the objection which the Commission made during the pre-litigation procedure. It might even be said that only the application accurately reflects the objection to this provision, while the references in the pre-litigation procedure contain no evidence of impermissible influence in regard to the organisation of trade fairs. Therefore, in respect of Article 7 of Regional Law No 43 of Emilia-Romagna of 26 May 1980, no proper pre-litigation procedure has been conducted and the claim set out in point 2 of the action is thus inadmissible.

(b) Article 6 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978

22. The Commission made a further error when citing Article 6 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978. During the pre-litigation procedure and in the plea set

out in point 1 of the application, the Commission cites Article 6, third and fourth paragraphs, in connection with the infringement of the freedom to provide services. But Article 6 is subdivided not into paragraphs, but into lettered subparagraphs. It is only in the reasons for the application that we find that the Commission was referring to Article 6(d) and (e). The subject-matter at issue is therefore unclear and the proper pre-litigation procedure has not been conducted in respect of those provisions. The claim set out in point 1 of the application is therefore inadmissible as regards Article 6, third and fourth paragraphs, of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978.[21]

(c) Article 15 of Regional Law of Lombardy No 45 of 29 April 1980

23. Different considerations apply in so far as in the application, the Commission limits the number of provisions it claims are unlawful. For example, with reference to Article 15 of Regional Law of Lombardy No 45 of 29 April 1980, in the operative part of the Commission's reasoned opinion it challenges the whole of Article 15 whereas, in the plea in point 1 of the application, it criticises only the third paragraph. Since, under the case-law mentioned above, the scope of objections may be reduced, the action is admissible in this respect.

21 — It should be noted here that, as regards their content also, these provisions clearly do not conflict with the freedom to provide services.

B — *Provisions no longer in force*

24. Further problems regarding the admissibility and even the validity of the action stem from the fact that at least six of the laws objected to by the Commission are no longer in force.

(1) Regional Law of the Marches No 16 of 12 March 1979 and Regional Law No 75 of Abruzzo of 13 November 1980

25. In reply to the Court's request for information, both parties acknowledged that:

— Regional Law of the Marches No 16 of 12 March 1979 was revoked in Article 20 of Regional Law of the Marches No 52 of 13 April 1995, and

— Regional Law No 75 of Abruzzo of 13 November 1980 was revoked in Article 18 of Regional Law No 58 of Abruzzo of 10 September 1993.

At the time of service of the letter of formal notice of 16 April 1996, the provisions objected to in those laws were therefore no longer in force.

26. The Commission none the less pointed out that a number of provisions of Regional Law of the Marches No 52 of 13 April 1995, and of Regional Law of Abruzzo No 58 of 10 September 1993 follow, more or less word for word, the content of the rules to which it objects in the laws mentioned above. It refers to the judgment in Case C-105/91, [22] which is applicable by analogy in the present case.

27. It must first be observed that the Commission's application is unfounded in respect of the provisions repealed prior to the letter of formal notice. When the period set by the Commission in its reasoned opinion expired, the infringement of Community law to which it expressly objected no longer remained. That part of the application as formulated by the Commission must therefore be rejected.

28. However, the reference to the judgment in Case C-105/91 and the re-enactment of the provisions objected to could be regarded as a tacit modification of the application.

29. It should be noted, firstly, that such modification of the application is to be regarded as a new reason for the purposes of Article 42(2) of the Rules of Procedure. Since it is founded on an element of fact occurring before the judicial proceedings started, it is to be rejected as out of time.

30. Nor is the Commission's argument convincing on the substance. In its judgement in Case C-105/91, the Court observed that, in an action for failure to fulfil obligations, the Commission may challenge legislation which the defendant Member State has adopted only after notification of the reasoned opinion and where such legislation as a whole maintains the system originally objected to. [23]

31. This case-law overturns the general principles of the pre-litigation procedure in actions for failure by a Member State to fulfil its obligations. The pre-litigation procedure can fulfil both its functions, which are to establish the subject-matter of the pre-litigation procedure dispute and to give the defendant Member State an opportunity to defend itself only if the letter of formal notice states as specifically as possible which measures of the defendant Member State the Commission is objecting to.

22 — Judgment in *Commission* v *Greece* [1992] ECR I-5871.

23 — In this connection, see also the earlier judgment in Case 45/64 *Commission* v *Italy* [1965] ECR 885, in particular page 896.

32. A complaint regarding provisions which have been revoked in the meantime but have been re-adopted in more or less comparable form does not fulfil either function. Neither the Court nor the defendant Member State are required to determine the subject-matter of the dispute by comparing the Commission's submissions with the law in force. The Member State may also entertain doubts as to whether and to what extent the subsequent measures are contrary to Community law and, in making a defence or in seeking to make good the position, it encounters further, unnecessary difficulties.

33. On the basis of the case-law referred to, alteration of the subject-matter of the dispute may be justified only where the Commission — although using its best endeavours — cannot foresee any change to national law. Furthermore, unless it is possible to modify the subject-matter of the dispute, there would be a risk that Member States might improperly obstruct proceedings for failure to fulfil obligations. Were the Member States able to initiate the pre-litigation procedure by revoking the contested legislation and embodying it in a new law without substantive changes, the effectiveness of proceedings for failure to fulfil obligations would be seriously jeopardised.

34. However, if — as in the present case — the Commission objects to legislation that has already been revoked before delivery of the first letter of formal notice, there is no risk of such abuse. Rather, the Commission is not fully discharging its duty to clarify the subject-matter at issue in the proceedings for failure to fulfil obligations. [24]

35. Nor can the contention that Italy infringed its duty to cooperate constructively in proceedings for failure to fulfil obligations in the present case [25] justify subsequent modification of the subject of the dispute. In principle, the Italian Republic was required to make an adequate response to the first letter of formal notice. Since a Member State must have knowledge of its own law, the Italian Government should have recognised the Commission's errors regarding Italian law and should have referred to these errors in its response to the letter of formal notice. But, this (probably negligent) omission by the Italian Government is far less serious than repealing and re-enacting contested measures (normally deliberate) after notification of the reasoned opinion. Furthermore, in the present circumstances, the Commission may also be accused of contributory, indeed overriding, negligence. Subsequent modification of the application is therefore not permissible.

24 — See judgments in Case 97/81 *Commission* v *Netherlands* [1982] ECR 1819, paragraph 6, and in Case 192/84 *Commission* v *Greece* [1985] ECR 3967, paragraph 20 et seq.

25 — See judgments in Case 97/81 (cited in footnote 24), paragraph 7, and in Case 192/84 (cited in footnote 24), paragraph 21.

36. Since these two laws are the only ones which the Commission is criticising on the grounds that they allow only producers to operate as trade-fair organisers, this plea must also be rejected in its entirety.

(2) Laws revoked after the action was brought

37. The Court has consistently held that where measures complained of are modified subsequent to the period set by the Commission in the reasoned opinion — in this case, 18 July 1998 — that cannot be regarded as extenuation in proceedings for failure to fulfil obligations. [26]

38. Therefore the repeal of the following laws is of no effect in the proceedings for failure to fulfil obligations:

— Regional Law of Liguria No 40 of 14 July 1978, repealed by Article 19 of Regional Law of Liguria No 8 of 9 February 2000;

— Regional Law No 43 of Emilia-Romagna of 26 May 1980, repealed by Article 23 of Regional Law of Emilia-Romagna No 12 of 25 February 2000;

— Decree Law No 454 of 29 January 1934 and Presidential Decree No 390 of 18 April 1994, and also all other provisions repealed by Article 13 of the framework law on the trade-fair sector of 11 January 2001. [27]

C — *Validity of the application*

39. The remaining objections of the Commission relate to obligations on organisers of trade fairs and to obligations relating to the fairs. We must therefore first set out the principles on application of the freedom to provide services and the freedom of establishment as regards the organisation of trade fairs.

26 — Judgments in Case C-123/94 *Commission* v *Greece* [1995] ECR I-1457, paragraph 7, and in Case C-361/95 *Commission* v *Spain* [1997] ECR I-7351, paragraph 13 et seq.

27 — Apart from revoking the two instruments specifically indicated, this law also revokes all other legislation conflicting with the framework law.

(1) Preliminary general considerations

40. The Commission's objections relate to both national and regional provisions. Of course only Member States are bound by Community law but the Court has consistently held that they may not plead provisions, practices or circumstances existing in their internal legal system in order to justify a failure to comply with obligations resulting from Community law. [28] With reference to the areas of freedom to supply services and freedom of establishment, the Court has stated that these principles are intended to attain equality between citizens of Member States and citizens of third countries in order to prohibit all discrimination resulting from national or regional legislation. [29] Regional provisions may therefore also result in a failure to fulfil obligations.

(a) Applicability to the organisation of trade fairs of the freedom to supply services

41. There can be no doubt that trade-fair organisers of other Member States might be interested in conducting trade fairs in Italy without establishing a presence there. The scope *ratione personae* of the freedom to provide services thus opens up and the cross-border requirement is satisfied.

42. Services fall with the scope *ratione materiae*. These are defined in Article 60 of the EC Treaty (now Article 50 EC) as self-employed activities that are normally provided for remuneration. Since organisers of trade-fair events as a rule receive remuneration from the exhibitors and often also from the visitors to a trade fair, that criterion is also fulfilled.

(b) Restrictions on freedom of establishment

43. In the *Gebhard* case, the Court ruled that 'The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply only if

28 — See, for example, the judgment in Case 254/83 *Commission v Italy* [1984] ECR 3395, paragraph 5.

29 — Judgment in Case 63/86 *Commission v Italy* [1988] ECR 29, paragraph 13.

those relating to the right of establishment do not apply.' [30]

44. In its reply to the letter of formal notice, Italy objected that the contested provisions cannot in fact breach the principle of freedom to provide services because they do not apply to services to individuals but to the general organisation of trade fairs. That activity is directed at an unspecified group of fellow traders and depends on the organiser's right of access, at least temporarily, over the area used for the fair. The principle of freedom of establishment therefore applies, whilst the freedom to provide services only comes into play in respect of individuals who offer support services for the fairs (for example, the setting-up of stands at the fairs, support and consultancy or secretarial services) which are not restricted in Italian law.

45. The Commission considers that application of the principle of freedom of establishment does not depend only on the duration of the service but also on its frequency and continuity. Even the organisation of fixed structures does not exclude applicability of the freedom of establishment. [31]

46. I agree with the Commission. In distinguishing between freedom to provide services and freedom of establishment, the only decisive point is whether the party concerned is trading temporarily only or is firmly integrated into the economy of the host State. What distinguishes a trade fair or a market is that the event which takes place is restricted to a specific length of time, not more than a few days. The organiser of such an event is therefore, in principle, engaged in business only temporarily. As the *Gebhard* judgment held as regards members of the legal profession, this applies also where the organiser in Italy sets up with a certain level of infrastructure. [32]

47. There is no need to clarify here where precisely the dividing line is to be drawn, where fairs are held with frequency, as between an organiser of fairs operating only occasionally in a Member State and an organiser who is established there.

48. Rules on the conduct of trade fairs may in every case impinge on the freedom to provide services of foreign operators wishing to organise fairs in Italy on an occasional basis only.

30 — Judgment in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22.

31 — The Commission refers to the *Gebhard* judgment (cited in footnote 30), paragraph 27.

32 — *Gebhard* judgment (cited in footnote 30), paragraph 27.

(c) No restriction of the scope of applicability of the basic freedoms by prohibiting the pursuit of profit

49. In its reply to the Commission's letter of formal notice the Italian Republic did note that neither the principle of freedom of establishment, within the meaning of the second paragraph of Article 58 of the EC Treaty (now the second paragraph of Article 48 EC), nor — pursuant to the cross-reference in Article 66 of the EC Treaty (now Article 55 EC) — the freedom to provide services apply to non-profit companies. However, since only non-profit entrepreneurs may organise trade fairs or markets, in this case — the Italian Government maintains — the provisions on freedom to provide services are not applicable.

50. The Commission points out here that the Member States may not make certain sectors subject to exceptional rules by permitting only service providers who fall within an exception.

51. The second paragraph of Article 58 of the EC Treaty governs only the personal scope of the freedom of establishment or the freedom to provide services. It is true that, under that provision, certain legal persons are excluded from the scope of the principle of freedom to provide services but the Member States may not exclude areas of activity by allowing only those operators who do not come within the personal scope of the fundamental freedoms.

52. Nor is the fact that organising trade fairs is a non-profit-making activity attributable to the nature of the activity: it is simply a requirement of Italian law. As such, that requirement is likely to restrict [33] the freedom to provide services but it cannot exclude its applicability altogether.

(d) Provisions derogating from Article 55 of the EC Treaty

53. In its reply to the letter of formal notice, the Italian Government had first objected that the organisation of trade fairs did not fall within the scope of the freedom to provide services at all because Article 55 of the EC Treaty, read together with Article 66 of the EC Treaty (now Articles 45 EC and 55 EC respectively), excludes activities which are connected with the exercise of official authority. The Commission believes that Article 55 of the EC Treaty is not relevant.

54. As a derogating provision, Article 55 of the EC Treaty must be interpreted restrictively. 'Official activity' must involve a

33 — On this, see below, point 97 et seq.

direct and specific participation in the exercise of official authority.[34] The Court has not given a conclusive definition of the exercise of official authority, but it is clear that merely having regard to the common interest is not sufficient to suppose a presumption of official authority. Rather, there must as a rule be authority to take final official decisions that are capable of affecting the freedom of private persons.[35] Although the organisation of trade fairs may serve the common interest, the organisers do not in principle have to take any official decisions. The organisation of trade fairs therefore does not constitute an official activity.

(e) Treatment of obstruction of the relevant fundamental freedoms and of the justification for this

55. The freedom to provide services and the freedom of establishment prohibit unjustified discrimination and restrictions.

56. Regarding the freedom to provide services, the Court has most recently found as follows:

'The Court has consistently held that the freedom to provide services requires not only the elimination of any discrimination against a service provider established in another Member State on the basis of his nationality but also the removal of any restriction, even where that is applied without distinction to national providers and those of other Member States, where it is such as to prohibit, hinder or render less attractive the activities of the provider established in another Member State where he lawfully provides similar services'.[36]

57. The Court has also ruled:

'Secondly, the freedom to provide services, being a fundamental principle of the Treaty, may be restricted only by means of rules that are justified by overriding reasons relating to the public interest applicable to every person or undertaking pursuing an activity within the territory of the host Member State. Furthermore, in order to be so justified, the national legislation concerned must be capable of guaranteeing attainment of the end pursued and not go beyond what is required to attain that end'.[37]

58. Justification on public interest grounds is not possible where any interest 'is...

34 — Judgment in Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8.

35 — On this, see the judgement in *Thijssen*, cited in footnote 34 (paragraph 17 et seq.).

36 — Judgment in Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21, with further citations.

37 — Judgment in *Analir and Others*, cited in footnote 36 (paragraph 25, with further citations).

safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established.' [38]

59. Similar criteria apply to the freedom of establishment, with the exception of the requirement to have regard to the rules to which the service provider is subject in the State of origin:

'Under the second paragraph of Article 52 of the Treaty, exercise of the freedom of establishment is subject to the conditions laid down for its own nationals by the law of the country of establishment. As a result, where access to or exercise of a specific activity is subject within the host Member State to certain rules, a citizen of another Member State intending to pursue that activity must as a rule meet the requirements laid down in those rules. ...

The case-law of the Court shows however that, to be justified, national measures restricting or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaty must meet four conditions: to be applied without discrimination, to satisfy overriding reasons relating to the public interest, to be such as to guarantee attainment of the end pursued and not to go beyond what is required to attain that end ...'. [39]

60. By way of clarification, it should be added that special rules for foreigners can be justified only on the basis of Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC), whereas overriding reasons relating to the public interest are capable of justifying all other possible restrictions. The concept of overriding reasons relating to the public interest is to be construed in such a wide sense as to include the grounds set out in Article 56(1) of the EC Treaty: public policy, public security or public health. [40]

61. Specifically, it will be seen that the contested Italian provisions do not create any overt discrimination, and no justification is therefore required under Article 56 of the EC Treaty.

62. In justification of the contested legislation, Italy essentially argued that trade fairs must be properly conducted, making a special point of the dangers to the health and security of trade-fair visitors, particularly where a considerable number of persons visit the site of the fair for a limited time. Fairs must also be compatible with

38 — Judgment in Case C-355/98 *Commission* v *Belgium* — private surveillance services [2000] ECR I-1221, paragraph 37.

39 — Judgment in Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 25 et seq.

40 — Judgment in *Mac Quen* (cited in footnote 39), paragraph 26.

local conditions and with any other events to take place in the area. Traffic and environmental aspects must be taken into account. That is why trade fairs are regulated by the State in other Member States too.

63. The Commission rejects this viewpoint under each head of the objections.

64. The interest in ensuring that trade fairs are conducted in a manner compatible with public order is in principle worthy of protection. Ensuring that a trade fair does not disrupt local traffic, the reliability of the fair organisers and the security of the site justify measures by the public authorities. Simple restrictions on the freedom to provide services or the freedom of establishment, or legislation creating covert discrimination must therefore be scrutinised to determine whether they are justified by overriding reasons relating to the public interest.

(f) The organisation of trade fairs as a provision of services of general economic interest

65. Although the Italian Republic did not expressly invoke Article 90(2) of the EC Treaty (now Article 86(2) EC), its arguments in the reply to the Commission's letter of formal notice show that it does regard trade fairs as services of general economic interest. For the purposes of Article 90(2) of the EC Treaty, the rules in the Treaty apply to undertakings entrusted with the operation of services of general economic interest, provided that the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In fact the most recent case-law makes use of this requirement also as a justification within the sphere of the fundamental freedoms. [41] It is therefore also necessary to examine how far this provision — in the light of the contested Italian legislation — excludes application of the fundamental freedoms.

66. In its interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions, the Commission describes these latter as the concrete expression of the market concept. [42] Trade fairs are also described as an instrument to promote sales, complementary to advertising, since they bring together the demand for and supply of products exhibited in an atmosphere that is propitious to the operators. They afford the participants an opportunity

41 — See the evidence in the Opinion of Advocate General Fennelly in Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 40.

42 — OJ 1998 C 143, p. 2.

to improve their knowledge of the market, to identify new trends, to assess the position of the competition or to make contacts.

67. So, it has been said in the Opinion in *Agorà*, regarding application of the law on public tenders, the organisation of a fair can be of general interest. [43]

68. The organisation of trade fairs can therefore essentially be regarded, like the provision of other infrastructures, as a provision of services of general economic interest.

69. Therefore, the Member States may adopt measures *vis-à-vis* trade-fair organisers which have been given responsibility for conducting fairs that are incompatible with the fundamental freedoms if those measures are necessary to ensure the conduct of such 'official' fairs.

70. However, it must also be remembered that trade fairs do not necessarily have to be conducted exclusively as a provision of services of general economic interest, characterised by specific privileges: they may be conducted also by private organisers working in competition with other organisers.

71. Article 90(2) of the EC Treaty is capable of justifying the imposition of conditions on private organisers or on the fairs that they conduct only if those conditions relate to any consequences 'private' fairs may have for 'official' fairs which might compromise the provision of the services that are in the general economic interest.

72. The Italian argument might therefore be taken to mean that the entire system of Italian law on trade fairs is intended to allow only fairs of general economic interest conducted by 'public persons' of a particular type, in a manner that is particularly suited to serving the public interest. The Italian Government's argument could have been persuasive only if it had shown that it is not possible to ensure the adequate provision of fairs in Italy by less strict measures. This it has not done.

73. If we consider the disputed legislation in isolation, such justification is conceivable only in regard to the inclusion of trade-fair events in an official calendar. [44]

43 — Opinion in Joined Cases C-223/99 and C-260/99 [2001] ECR I-3605, point 53 et seq.

44 — On this, see point 147 et seq.

74. In the light of these considerations, the individual rules objected to by the Commission must be examined.

(2) Requirements regarding organisers of trade fairs

75. The Commission maintains that a number of conditions imposed on the organisers of trade fairs are not compatible with the freedom to provide services and that they also partially infringe the freedom of establishment.

(a) Requirement to obtain recognition of trade-fair organiser status

76. The following Italian legislation requires the organisers of trade fairs and markets to be officially 'recognised':

— Article 2, first paragraph, of Decree Law No 454 of 29 January 1934, as amended by Article 2, first paragraph, of Presidential Decree No 7 of 15 January 1972, under which entities established to organise trade fairs of national and international standing must be recognised by a Presidential Decree;

— Article 2(4) of Presidential Decree No 390 of 18 April 1994 under which an application for recognition as an organiser of trade fairs and markets of international standing must be made to the competent authorities not later than 30 September two years before that in which the event is to be held;

— Article 8, first and second paragraphs of Regional Law No 43 of Emilia-Romagna of 26 May 1980 under which new entities wishing to organise trade fairs, shows and exhibitions in that region must be recognised in a Decree of the President of the Regional Council;

— Article 5, first paragraph, of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978, under which trade fairs and markets can be organised by public and private entities, provided these are officially recognised;

— Article 7 of Regional Law of the Veneto No 35 of 2 August 1988, under which entities which wish to organise trade fairs and markets must obtain official recognition from the President of the Regional Council;

— Article 4(1)(c) of Regional Law of Lombardy No 45 of 29 April 1980, under which trade-fair events may legally be organised by private entities recognised by the Region.

77. In its judgment in Case C-355/98, the Court ruled as follows:

'According to consistent case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty ...'. [45]

A recognition requirement is therefore indicative of a restriction. Italy has not offered any evidence to show that recognition does not, in practice, prevent exercise of the freedom to provide services.

78. It is possible to plead by way of justification the public interest in ensuring that a trade fair is conducted properly, since a recognition procedure is in principle a good way of assessing the reliability of a trade-fair organiser.

79. However, there is no need for a recognition requirement where it only confirms that the organiser meets conditions which he must already meet in his State of origin. Here the recognition procedure would lead to pointless duplication which cannot be justified. [46]

80. On the other hand, there may be trade-fair organisers who wish to organise fairs in Italy as service providers but are not recognised as such in another Member State. In such cases, it might be reasonable to provide for substantive recognition. However, where it is not clear that the organiser organises fairs in Italy on a regular basis, it must be sufficient to vet

45 — Cited in footnote 38 (paragraph 35).

46 — See judgment in *Commission* v *Belgium* (cited in footnote 38), paragraph 37 et seq.

him in the context of permission for a particular trade fair. Since the Italian Government has not said that this is the purpose of the recognition procedure,[47] it must be inferred that there is no justification even in such cases.

81. The Commission's first plea is therefore valid.

(b) Limitation on the permissible legal form of a trade-fair organiser

82. The Commission raises this objection only in relation to Article 4 of Regional Law No 43 of Emilia-Romagna of 26 May 1980. This provision, revoked in 2000, provides that markets and fairs may be organised only by legal persons recognised under Article 8 (bodies established for that purpose within the region), other public entities, organisations directly established by the trade associations, private associations and by committees with other objects.

47 — On the conditions that Italy's arguments should satisfy, see above, in point 78.

83. The question therefore arises whether this requirement as to a specified form of organisation — other than the obvious restriction on providing services — also creates overt or covert discrimination because, unlike national organisers, foreign applicants will not normally meet this criterion. The restriction cannot be justified because there is no reason to consider that only organisers structured according to one of the legal forms mentioned above will guarantee proper management of fairs.

84. Therefore the second plea also is valid.

(c) Requirement of a permanent establishment

85. The Commission challenges two regional provisions that prescribe conditions of establishment for trade-fair organisers:

— Article 15, third paragraph, of Regional Law of Lombardy No 45 of 29 April 1980 under which, for private persons to be recognised as organisers of regional, national or international

events, they must have a registered office within Lombardy and must have an appropriate technical and administrative structure, and

— Article 8, last paragraph, of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981, under which national and international trade-fair events conducted in regional territory must have a permanent establishment.

86. The Commission maintains that this latter provision is to be taken in the sense that an office is required within the Region. That interpretation is plausible, in particular, because the rule does not refer to the organiser but to the trade fair itself which will, necessarily, be taking place within that region. Since Italy did not challenge that view, the rule must be considered as so interpreted.

87. According to the Commission, the requirement to have a permanent establishment within the host State in principle, constitutes a restriction on the freedom to provide services[48] affecting foreign providers. It is precisely in the case of occasional and short-term events, such as the organisation of a trade fair or market, that an organiser from another Member State is seriously restricted if his activity is contingent on his having some form of permanent presence in the host State.

88. The Commission's view is correct. The Court has repeatedly declared that the requirement to have an establishment is almost a negation of the freedom to provide services.[49] The requirement to have a permanent presence completely removes the ability to cross borders purely for the purpose of providing services.

89. But this restriction is not discriminatory. If the requirement to set up an establishment were restricted to Italy, it would have to be regarded as discriminatory since all Italian organisers would necessarily satisfy that condition whereas foreign organisers could satisfy it only in exceptional cases. But the requirement here is to establish an office in the region concerned, which not even Italian organisers would necessarily satisfy. There is therefore no need to have recourse to Article 56 of the EC Treaty as a justification. Consideration must rather be given to whether there is a justification based on overriding reasons of general interest.

90. It must be pointed out here that having a trading office where the fair takes place is likely to be conducive to the trade-fair

48 — The Commission refers to the judgment in Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31.

49 — See also judgments in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 52, and in *Commission* v *Belgium* (cited in footnote 38), paragraphs 27 and 31 et seq.

organiser overseeing matters and to enabling there to be collaboration with him for the proper management of the fair. However, whether there is a need for a permanent presence is open to question with modern communications facilities. The benefits gained by imposing this requirement are in no way proportionate to the seriousness of the infringement of the freedom to provide services. There can be no justification for totally excluding the principle of the freedom to provide services in a given economic sector on the basis of relatively minor abstract risks.

91. This plea also is therefore valid.

(d) Restriction on the organiser's activity to arranging trade fairs

92. Here the Commission is objecting to the following provisions, under which trade-fair organisers may not engage in any other activity besides the organisation of trade fairs:

— Article 4(1)(c) of Regional Law of Lombardy No 45 of 29 April 1980;

— Article 3 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981 and

— Article 5 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978.[50]

93. The Commission submits that these rules in practice exclude any operator who, in addition to organising trade fairs, is also engaged in other activities, and it cannot see a single objectively justified reason for this.

94. Even taking into account that the second and third paragraphs of Article 5 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978 do allow other persons as organisers, the Commission is right in saying that, on the wording, authorisation may be given to private operators only if they are engaged in no other activity. The same is true of the wording of the other contested provisions specified by the Commission.

95. The prohibition on other activities is a restriction on the freedom to provide services. It is not justified in this all-embracing form. Certain other activities may well be

50 — The Commission refers only to the first paragraph of this Article, and not to the second and third.

incompatible with the organisation of trade fairs or of a specific fair for overriding reasons of general interest. Examples might be activities which lead the organiser to deal unfairly with certain potential exhibitors for ideological or economic reasons. There must however be a less severe means of determining on a case-by-case basis whether an organiser's other activities are compatible with organising trade fairs or markets.

96. This plea also is therefore valid.

(e) Prohibition on profit-making

97. A large number of provisions permit only non-profit-making organisers, or impose more restrictive access conditions on organisers pursuing a profit. The Commission mentions the following:

— Article 4(1)(c) and Article 4(2) of Regional Law of Lombardy No 45 of 29 April 1980;

— Article 6(1)(e), (f), and (h) of Regional Law of the Veneto No 35 of 2 August 1988;

— Article 4 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981;

— Article 3, Article 5 and Article 12 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978;

— Article 4 of Regional Law of Liguria No 40 of 14 July 1978;

— Article 5, sixth paragraph, subparagraph (c) of Regional Law No 43 of Emilia-Romagna of 26 May 1980.

(i) Restriction

98. As already explained, the ban on profit-making does not exclude the *application* of

the freedom to provide services.[51] It is therefore necessary to examine only the *restriction on* the freedom to provide services inherent in these provisions, and any justification.

99. The Commission considers that the prohibition on profit-making discriminates against organisers from other Member States. Italian profit-making organisers may choose not to pursue their business in that region or to establish a non-profit associate there. Profit-making organisers from other Member States face insurmountable obstacles. They incur higher costs but cannot expect any economic 'return'.

100. However, it is not clear here why Italian organisers should in principle be treated more favourably than organisers from other Member States. The only obvious beneficiaries of the requirement appear to be established non-profit trade-fair organisers. All profit-making organisers, on the other hand, who are banned from organising fairs, are placed at a disadvantage. The fact that Italian organisers probably incur lower costs and, because they are closer, perhaps also derive other benefits from non-profit activities does not of itself constitute discrimination. The advantage of being closer is rather an inevitable result of their location. The prohibition on profit-making therefore has no discriminatory effect.

101. The prohibition on profit-making does however represent a very considerable restriction on the freedom to provide services. It will deter most private organisers of trade fairs in the region concerned, since they will essentially be motivated by the expectation of making a profit. There are very few organisers who are able to derive benefits from a trade fair which produce a profit only indirectly.

(ii) Justification

102. The Commission notes that a requirement like that above is always disproportionate. This is because — as the absence of any requirement of this type in the national law indicates — the general interest does not require organisers of trade fairs to work without a profit motive.

103. That argument is not convincing in so far as Article 117 of the Italian Constitution assigns legislative power to the Regions and it is not clear why this requirement had to be laid down in the framework law as a matter of urgency.

104. But the Commission's conclusion must be right. There is no reason why non-profit organisers should enjoy greater

51 — See above, point 49 et seq.

trust than those which are profit-making. Both are equally capable of ensuring that all conceivable overriding general interests are protected.

105. Therefore this plea also is valid.

(f) Public-authority participation in the appointment of trade-fair organisers

106. Here the Commission objects to the following provisions as incompatible with the principle of the freedom to provide services and of the freedom of establishment:

— Article 3 of Presidential Decree No 7 of 15 January 1972: under this, the governing boards of bodies which organise international trade fairs must include two members appointed by the Regional Council of the region within which the fair is held. One of the regional representatives must sit on the executive board of the entity and the other must sit on the board of auditors. Three members of the governing board of entities set up to organise trade fairs rated as national must be appointed by the President of the Council of Ministers; the president of the organising entity must be selected from these three members and appointed by the competent regional body. The board of auditors is to include one member appointed by the Ministry of Industry, Commerce and Crafts;

— Article 2(c) and (d), Article 3(b) and (c), and Article 5(a) of Regional Law No 12 of Liguria of 3 November 1972, which repeat the provisions described above;

— Article 8(1)(d) of Regional Law No 35 of the Veneto of 2 August 1988, which provides that three members of the governing board must be appointed by the Regional Council and also that the president of the board of auditors is appointed by the Regional Council;

— Article 8, second paragraph, and Article 11(a), (b), (c) and (d) of Regional Law No 43 of Emilia-Romagna of 26 May 1980, under which the president and the governing board of the organising entity must be appointed in a Decree of the President of the Regional Council, and

— Article 5 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981, under which some members of the governing board of national or international trade-fair entities must be appointed by the regional administration.

107. These conditions are not compatible with the freedom to provide services because — as stated above — the implicit restriction on the type of legal form to companies with boards constituted in accordance with those requirements cannot be justified. The same applies in respect of the freedom of establishment.

108. However, here too it is necessary to assess the specific nature of the restriction on the fundamental freedoms.

(i) Freedom to provide services

Restriction

109. The Commission says the State's improper interference in the composition of trade-fair organisers is a restriction on the freedom to provide services. In seeking to influence the decisions of such bodies 'from the inside', the State is exercising disproportionate control. This has the effect that organisers without an office in Italy are obstructed in the exercise of their freedom to provide services. Nor can Italy claim that these requirements relate only to the internal organisation of 'Italian legal persons under public law',[52] since a trade-fair entity need not necessarily be a legal person of that type.

110. The Commission's reasoning is right. It is clear from the contested provisions that trade-fair entities do not necessarily have to be public-law persons.[53] Furthermore, the requirement that an organiser of trade fairs must be structured as a legal person under Italian public law is contrary to Article 52 et seq. and to Article 59 et seq. of the EC Treaty. There is accordingly a restriction on the freedom to provide services which could even constitute indirect discrimination since it is almost impossible for service providers from other Member States to have representatives of local authorities on their boards.

52 — The Italian Republic uses the term 'soggetti pubblici italiani'.

53 — See, for example, Article 4 of Regional Law No 43 of Emilia-Romagna of 26 May 1980 and Article 3 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981, which expressly refer to legal persons under public or private law.

Justification

111. The Commission perceives no overriding reason of general interest in maintaining these provisions and points out in particular that it is sufficient in order for the State to exercise the requisite control over these events that its control be exercised from outside.

112. However here again it could be countered that there is a public interest in trade fairs being managed properly which must in principle be protected. But the conditions imposed here are disproportionate. A reasonable degree of State control may be exercised through supervisory authorities that are not directly represented on the boards of the trade-fair organisers.

113. This plea is therefore valid with regard to the free movement of services.

(ii) Freedom of establishment

114. The Commission submits in relation to the freedom of establishment that the non-nationals who do not even fit into any of the prescribed structures are restricted in that they are required to tolerate the presence of outsiders who must be allowed to participate in their decision-making.

115. The Commission is right as regards the restriction. Clearly the requirement to have outsiders on the board or to appoint a board at all is likely to deter companies from exercising the freedom of establishment.

116. This restriction on the freedom of establishment is no more justifiable than that on the freedom to provide services. [54]

(g) Participation of a local authority from the region in the trade-fair organiser

117. The Commission challenges Article 8, second paragraph, of Regional Law No 43 of Emilia-Romagna of 26 May 1980. This provision of the Law, repealed in 2000, provided that the status of 'trade-fair organiser' was subject to the condition that at least one of the founders or the members of the company concerned should be a local authority in Emilia-Romagna.

54 — See above, point 111 et seq.

118. This condition again is incompatible with the principle of the freedom to provide services because — as stated above — the implicit requirement that a trade-fair organiser must adopt the legal form of a company cannot be justified. The same of course applies to the freedom of establishment.

119. But it is also incompatible with both of the fundamental freedoms for the reasons already stated as regards the participation of representatives of the State. Indeed a company law provision requiring local authority participation represents a far more onerous restriction than a requirement to have representatives of the public authorities on certain committees.

120. Therefore this plea also is valid.

(3) Conditions for individual trade-fair events

121. Next the Commission maintains that various requirements laid down for individual trade-fair events infringe the freedom to provide services.

(a) Periodicity and duration of fairs

122. Here the Commission relies only on Article 6, first paragraph, of Regional Law No 43 of Emilia-Romagna of 26 May 1980, under which national and international trade-fair events must be held periodically and be of a pre-determined duration. [55]

(i) Restriction

123. The Commission states here that the periodicity and duration requirements for trade fairs and markets restrict the freedom of foreign trade-fair organisers to provide services since, unlike Italian operators, they pursue their business in Italy on an occasional basis only.

124. The rule does not create open discrimination as it is not expressly connected with nationality. However, it is less onerous for a national than a non-national to have to hold a further trade fair solely to meet a periodicity requirement. An applicant from another Member State who wishes to organise a fair or a market in

55 — Article 8, last paragraph, of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981 at least also includes a similar provision but the Commission has not objected to that in this context.

Italy once only may be excluded solely because he cannot or does not wish to organise the event on a periodical basis. This condition therefore does not only create a restriction but also indirect discrimination.

125. The fact that the local authorities have power to prescribe the duration of the trade-fair event does not, on the other hand, create so far as can be ascertained a greater burden for organisers without a permanent establishment in Italy. This has to be regarded as a restriction simply because it restricts the freedom of the organiser as regards the way in which the trade-fair event is held.

(ii) Justification

126. The Commission considers that these restrictions are certainly disproportionate and, therefore, unjustified.

127. Conditions relating to the duration of a trade fair may in exceptional cases be conducive to the proper management thereof. If it is too short, there may be too high a concentration of visitors at one time, which is best avoided for traffic-related reasons. If it is too long there may in certain cases be undesirable effects on the environment. But the law requires that the duration be determined in advance, along with the periodicity. This undermines the ability to arrange the trade fair in response to demand, which may perhaps be determined at a relatively late stage only, and it may even be prejudicial to the overriding public interest.

128. This plea is therefore also valid.

(b) Conformity with regional planning

129. The Commission objects to Article 5, sixth paragraph, subparagraph (a) of Regional Law No 43 of Emilia-Romagna of 26 May 1980. This provision, repealed in 2000, requires authorisation for a trade-fair event to be given only where it has been confirmed that the event is compatible with forecasts in regional plans relating to the economic development of the region and, more generally, with forecasts in economic plans.

(i) Restriction

130. The Commission maintains that it is much more difficult for a foreign trade-fair organiser than for a national organiser to keep abreast of the relevant provisions in national or regional legislation. Furthermore, the requirements relating to economic objectives at national and regional level contain a power, the scope of which is uncertain, to refuse permission and are unlawful because a (foreign) operator may receive a refusal the validity of which he cannot verify.

131. Neither line of argument is convincing. Undertakings with no permanent establishment in Italy naturally find it harder to obtain information in Italy. That does not constitute discrimination. [56]

132. There is no need to determine whether Community law prohibits national authorities from restricting the fundamental freedoms in a manner that is not clearly defined. At all events, the Commission's submissions do not show conclusively that the rules cited confer an insufficiently well-defined power to refuse permission for a trade-fair event. The reference in a law to regional and national plans does not necessarily evidence a lack of clarity. Even if the cross-reference were to be a 'dynamic one', because the plans are liable to be altered at regular intervals, the power is not necessarily uncertain in scope. The only decisive point is whether a citizen is in an unambiguous position in law. That means the provisions must be made accessible to those to whom they are addressed by publication through the normal channels. The Commission did not claim this did not happen. Consequently, the *legislative technique* used in referring to regional plans does not constitute an infringement of the principle of the freedom to provide services.

133. Rather it is the fact that trade fair organisers are required to adjust to regional and national economic plans in the area of trade fairs that constitutes an infringement of the principle of the freedom to provide services. Potential trade fairs that do not correspond to such plans have no chance of coming to fruition. That is a substantial restriction on the freedom to provide services.

(ii) Justification

134. State planning for the economic development of a region is not an objective of general interest such as to justify a restric-

56 — See judgment in Case C-177/94 *Perfili* [1996] ECR I-161, paragraph 16 et seq.

tion on the fundamental freedoms. Such planning may be intended to protect overriding general interests but the connection between any restriction on the organisation of trade fairs and the protection of general interests must surely be closer than where such planning is abstract in nature to justify a restriction.

135. Nor do the rules protect the interests of the potential attendees at the trade fair. Since neither participation in nor attendance at a trade fair is compulsory, any incompatibility with regional economic structures can only cause the fair to fail but it cannot damage third parties.

136. This plea is therefore also valid.

(c) Deadlines for applications for authorisation

137. The Commission challenges Article 2 of Presidential Decree No 390 of 18 April 1994. The fourth paragraph of that article, repealed in January 2001, provides that applications for the status of trade fair of international standing must be made to the competent authorities not later than 30 September two years before that in which the event is to be held. The subsequent paragraphs lay down deadlines for applications for authorisation by the regions and reporting by national authorities.

(i) Restriction

138. Primarily, the Commission's objection in this connection is directed at the excessive length of the application period as compared with the — unalterable — dates of the event. In particular, it is much more difficult for operators from abroad and offering their services in Italy only on an occasional basis to comply with these strict requirements than for their Italian competitors.

139. The need to comply with precise deadlines applies in the same way to Italian and foreign entities. At most there might be covert discrimination, to which the Commission also appears to point in stressing that it is more difficult for foreigners to meet these deadlines. However, on the view now propounded the claim of a need for greater effort on the part of outlay for foreign operators is not sufficient for a finding of indirect discrimination. [57]

57 — The same arguments apply here as above, in points 100 and 131.

140. The requirement to submit an application two years in advance is none the less an obstacle to the organisation of trade-fair events. It is scarcely possible for undertakings to decide whether, after such a lengthy period of time, it is still worthwhile organising a trade fair. It may be that the preparations for a fair do actually require such a long time period. Preparing the preparation of a fair and, in particular, the time when a binding commitment is undertaken in regard to its organisation, are none the less essentially matters within the responsibility of the organiser and not of the authorising body. In those circumstances there is a restriction.

(ii) Justification

141. At least initially, in its letter of response to the Commission, the Italian Republic gave as the overriding reason of general interest the need for official time-tabling, in order to be able to give operators and visitors timely information of fair types, sites and times.

142. The general interest in proper management of trade fairs certainly requires the organisation of a trade-fair event to be announced in advance and officially. It is also clear that some form of time-tabling by the competent authorities is essential to ensure the protection of overriding general interests. However, a period of two years with no allowance for exceptions is no longer necessary to protect overriding general interests.

143. This plea is therefore likewise well founded.

(d) Provisions requiring, in respect of the organisation of a trade fair, inclusion of particulars in an official calendar

144. In this connection the Commission is challenging two provisions:

— Article 7 of Decree Law No 454 of 29 January 1934, under which no trade-fairs, shows or exhibitions may take place other than those shown provided for in the official calendar, and

— Article 16(1) of Regional Law No 43 of Emilia-Romagna of 26 May 1980, which was in similar terms.

145. The Commission takes the view that the possibility of establishing an official calendar of events for the organisation of trade fairs and markets does not permit the competent national authorities to exclude the organisers of other private trade fairs

for the sole reason that the date set is too close to the date of the following trade fair. The financial risk is incurred by the organiser and no official rules are therefore required; furthermore, the market itself acts as a regulatory mechanism.

146. The latter provision is closely linked with the preceding one, because only those events which have completed the authorisation procedure, in compliance with all the due dates are included in the official calendar. In regard to substantiation of a restriction on freedom to provide services reference may be made in general to the matters set out above.

147. However, a justification in the present case might be found in Article 90(2) of the EC Treaty. The protection of existing trade fairs, which must be regarded as supplies of services of general economic interest, appears to be essentially appropriate as justification for a restriction on competing events held at little distance in time. The success of a trade fair, as temporary and local embodiment of the market in certain economic sectors, depends on its representing supply and demand as comprehensively as possible. If it were possible to organise another event on the same theme close to that fair in time and space, the representative nature of the fair worthy of protection could be jeopardised.

148. Conversely, if the market were to perceive such a competing event as an extension of the trade fair proper, there would likely be a 'cherry-picking' or 'free-loading' effect: the competing fair would profit from the reputation of the fair worthy of protection and from its market success. It might also perhaps offer exhibitors and clients more advantageous terms, because it would not be bound by any obligation concerning representativity or frequency. [58]

149. In its interpretative communication concerning the application of the Single Market rules to the sector of fairs and exhibitions, the Commission itself acknowledges explicitly that that interest deserves protection:

'Similarly the competent public authorities could impose specific requirements — non-discriminatory, of course — on official fairs/exhibitions held under their control, e.g. ... by drawing up ... a calendar of official events [and] by prohibiting several fairs of the same type from being held simultaneously ...'. [59]

150. Even if this statement is to be interpreted as meaning that the Commission

58 — Whilst such conditions could not be imposed upon all fairs (see above, point 122 et seq.), they might be permissible for fairs of general economic interest which are organised at the initiative of the State.

59 — OJ 1998 C 143, p. 6 (cited in footnote 42).

accepts restrictions only on 'official' events under the control of the Member States but not restrictions on private organisers, it cannot however be denied that important trade-fair events deserve to be protected from such forms of (unfair) competition.

151. Article 15(3) of Regional Law No 43 of Emilia-Romagna of 26 May 1980 also appears to provide, in this connection, that the regional authorities may propose a change of dates where a trade fair competes as to timing with similar or identical events.

152. Therefore the need for inclusion in an official calendar is essentially justified by the aim of ensuring the effectiveness of trade-fair events as services provided in the general economic interest. The Commission has not specifically demonstrated that the Italian legislation is inappropriate, unnecessary or unreasonable for the purposes of securing that objective.

153. This objection by the Commission must therefore be rejected.

(4) Conditions for organisers and events

154. Lastly, the Commission challenges certain provisions requiring the intervention of locally established undertakings in the procedures for recognising organiser status and for authorising trade-fair events.

155. Those are the following provisions:

— Article 6, third paragraph, points 3 and 4 of Regional Law No 43/80 of Emilia-Romagna of 26 May 1980 under which, as part of the authorisation procedure, the relevant regional trade associations had first to be consulted and, in addition, a favourable opinion had to be obtained from the municipality concerned and an opinion from the regional union of chambers of commerce;

— Articles 6, 7 and 23 of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978, under which the commission with competence to regulate and promote trade-fair events must — among its other members — include a representative

of the leading trade organisations in each of the sectors of agriculture, crafts, industry, tourism and commerce; the commission also gives an opinion on the allocation of subsidies;

— Articles 13 and 14 and Article 15(a) of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981 providing that the consultative committee supporting the executive committee for authorisation of trade-fair events must include representatives of the local economic structures and also four presidents from the trade-fair organisers with an office in the region, and

— Article 5(2) and (5), Article 10(4), Article 11(2) and (3) and Article 15(1) of Regional Law of Lombardy No 45 of 29 April 1980, providing that one representative of the regional chambers of industry, commerce, agriculture and crafts, and also three representatives of the regional industrial, craft, farmers' and trade associations as well as three representatives of the trade unions must sit on a commission consulted in an advisory capacity and that the chambers are to express a further opinion.

156. On this point the Commission states that the participation of competing organisations at local or regional level in the decision-making process in regard to the authorisation of trade fairs and recognition of trade-fair organisers would specifically place non-Italian trade-fair organisers at a disadvantage. It refers to the Opinion of Advocate General Gulman in Case C-306/91,[60] according to which the consultative committee under discussion in that case would result in domestic competitors receiving in advance information on pricing policy.

157. Using the example of Regional Law No 43/80 of Emilia-Romagna, the Commission explains that potential competitors might exert influence not only through the open participation of representatives of trade-fair organisers with an office in the area concerned but also through the participation of other representatives of local economic associations. Under this law, power to influence the authorisation of trade-fair events would be enjoyed by the very representatives of interests which are entitled to be consulted on appointments to leading positions in regional trade-fair entities.

158. At least as regards the freedom to provide services, the Commission notes that organisers from other Member States may not take part in the proceedings of the regional associations. But even organisers established within the area concerned exert only a limited influence.

60 — Opinion in *Commission* v *Italy* [1993] ECR I-2133, I-2146, point 10.

159. A particularly clear privilege favouring national organisers stems from the grant of official subsidies only to undertakings in whose incorporation public bodies were involved, as, for example, provided for in Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978. Hence the assertion that the competent authorities make impartial and fair decisions does not carry conviction.

160. In the present case, there appear to be two separate allegations: first, the Commission is objecting to the involvement of representatives of regional trade associations in the various decisions concerning the organisation of trade-fairs. Secondly, it is objecting to the fact that only certain trade-fair entities may obtain subsidies, that is to say undertakings in which public bodies are participants.

161. Since the complaint concerning the selective grant of assistance does not appear either in the letter of formal notice or in the reasoned opinion, it cannot be regarded as actually forming part of the subject-matter of these infringement proceedings, but only as an argument in support of the view that the Italian authorities might be biased in their decisions.

162. Moreover, the Commission does not point to any actual cases in which the legislation cited has led to discrimination against organisers of trade fairs. Examination of this allegation must therefore be restricted to the objection that the institutional structures create a disadvantage for organisers from other Member States.

163. In order to determine whether the intervention of regional economic representatives in the procedures does infringe freedom to provide services or freedom of establishment, it must first be remembered that measures may be described as interference only if they are likely to prevent the exercise of a fundamental freedom, or obstruct it or make it less attractive. [61]

164. Thus it must first be noted that the Commission does not complain that the bodies mentioned themselves adopt decisions relating to the organisation of trade-fairs. Instead, it primarily points out that interference might arise only in that these bodies are consulted prior to the decision by the Italian authorities and may therefore exert some influence.

165. Such a possibility of exerting influence may prevent the exercise of a fundamental

61 — See above, point 55 et seq.

freedom, or make it less attractive, where direct competitors of the trade-fair event organisers participate. They might seek to delay important decisions, they might propose excessive restrictions or they might obtain information of relevance to competition. However, such intervention is provided for only in Article 14 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981.

166. Neither overriding reasons of general interest nor the possible assignment to these competing trade-fair entities of services of general economic interest can justify such an infringement of the fundamental freedoms.

167. Conversely, the intervention of general business representatives or of representatives of the parties concerned in a fair cannot be regarded as an infringement in every case. Such groups might bring valuable knowledge and experience to the procedure. Accordingly, there may be an infringement of the fundamental freedoms only if it is possible to document actual cases where such intervention has operated to the detriment of trade-fair organisers from other Member States.

168. Nor do the Commission's remarks concerning intervention by the relevant bodies in appointments to leading positions in regional trade-fair entities or concerning the rules on the grant of subsidies lead to any different result.

169. Involvement in appointments to leading positions by competing undertakings does not result in those bodies being equated to competitors of the trade-fair entities: it does not follow from that involvement that those bodies also have an economic interest in the success of regional trade-fair entities. As regards the rules on the grant of subsidies, their discriminatory effect stems not from the involvement of the representatives of the economic sector but solely from the restrictive provisions of the law concerned.

170. Consequently, the Commission has not been able to demonstrate that the involvement of regional business representatives in official decisions relating to the management of trade fairs constitutes an infringement of the principle of freedom to provide services or of freedom of establishment.

171. Accordingly, the Commission's objection may be upheld only to the extent to which it complains of the involvement of competitors in the adoption of decisions regarding the management of trade fairs (Article 14 of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981).

IV — Costs

172. 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. The Italian Republic has been wholly unsuccessful in nine out of the ten points at issue and partially unsuccessful in the tenth. As regards the failure of the action in respect of one ground of appeal, because the contested provisions were repealed before delivery of the letter of formal notice, the Italian Republic — as stated above in point 35 — is at least jointly culpable by not responding appropriately to the allegation. Consequently, application for costs must be granted and the Italian Republic must be ordered to pay them.

V — Conclusion

173. I therefore propose that the Court should rule as follows:

(1) The Italian Republic has failed to fulfil its obligations under Article 59 et seq. of the EC Treaty (now, after amendment, Article 49 EC et seq.) by retaining the following provisions:

— Article 2, first paragraph, of Decree Law No 454 of 29 January 1934;

— Article 2, first paragraph, of Presidential Decree No 7 of 15 January 1972;

— Article 2, paragraphs 4, 6 and 7 of Presidential Decree No 390 of 18 April 1994;

— Article 4 of Regional Law of Liguria No 40 of 14 July 1978;

— Article 6, paragraph 1(e), (f), (g) and (h), Article 6(4) and Article 7 of Regional Law of the Veneto No 35 of 2 August 1988;

— Article 4, Article 5, sixth paragraph, (a) and (c), Article 6, first paragraph, and Article 8, first and second paragraphs, of Regional Law No 43 of Emilia-Romagna of 26 May 1980;

— Article 4, paragraph 1(c), Article 4, paragraph 2 and Article 15, paragraph 3, of Regional Law of Lombardy No 45 of 29 April 1980;

— Articles 3, 4 and 8, last paragraph, of Regional Law No 10 of Friuli Venezia Giulia of 23 February 1981;

— Articles 3, 5, 12 and 19, first paragraph, of Provincial Law No 35 of the Autonomous Province of Trento of 2 September 1978.

(2) The Italian Republic has failed to fulfil its obligations under Article 52 et seq. of the EC Treaty (now, after amendment, Article 43 EC et seq.) and Article 59 et seq. of the EC Treaty by retaining the following provisions:

— Article 3 of Presidential Decree No 7 of 15 January 1972;

— Article 2(c) and (d), Article 3, first paragraph, (b) and (c), and Article 5, first paragraph, (a) of Regional Law No 12 of Liguria of 3 November 1972;

— Article 8(1) of Regional Law No 35 of the Veneto of 2 August 1988;

— Article 8, second paragraph, and Article 11, first paragraph, (a), (b), (c) and (d) of Regional Law No 43 of Emilia-Romagna of 26 May 1980;

— Articles 5 and 14 of Regional Law No 10 of Friuli Venezia Giulia No 10 of 23 February 1981.

(3) The remainder of the application is dismissed.

(4) The Italian Republic is to pay the costs.