JUDGMENT OF THE COURT (First Chamber)

15 June 2006 *

In Case C-255/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 June 2004,

Commission of the European Communities, represented by A.-M. Rouchaud-Joët and E. Traversa, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and A. Hare, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that:

— by making the grant of a licence to a performing artists' engagements agency, established in another Member State, subject to the criterion that the agency's activity must be of benefit, having regard to the need to engage performers, and

— by imposing the presumption of salaried status on a performing artist who is recognised as a service provider and established in his Member State of origin, where he usually provides similar services,

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

Legal context

Community legislation

2 The present case raises questions concerning Community social security legislation, in addition to the question of the application of Article 49 EC.

3 Article 4(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28,

p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71') provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits'.

4 Article 13(1) of that regulation provides:

'... the persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.'

5 Under Article 14a(1)(a) of Regulation No 1408/71, '[a] person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months'.

National legislation

6 The French legislation at issue in the present case is concerned with the activity of engaging performing artists and the activity of performing as an artist.

The French regime regulating the activity of engaging performing artists

— Making the grant of a licence subject to the needs of the market

7 Article L. 762-3 of the Code du travail (Labour Code) (Law No 73-4 of 2 January

1973, JORF, 3 January 1973, p. 52) in the version in force at the end of the period prescribed in the reasoned opinion, provides:

'the conditions under which a performing artists' agent's licence shall be granted, renewed or withdrawn shall be determined by a decree in the Conseil d'État.

Those conditions shall have regard to the conduct of the performing artists' agent, the way in which the agent pursues his or her activity and whether that activity is of benefit, having regard to the need to engage performing artists.'

8 To that end, Article R. 762-6 of the Code du travail, in the version in force at the end of the period prescribed in the reasoned opinion, provides that 'all documents and all information regarding the character, conduct and occupational activities of those concerned, the particular conditions in which they practise or have practised the activity of performing artists' agent and the need for engagement of performing artists shall be communicated to the members of the Council [Advisory Council set up by the minister responsible for employment under Article R. 762-3 of the Code du travail], who shall be required to respect the confidentiality of the information thus imparted to them'.

9 Article L. 762-3 of the Code du travail was subsequently amended by Law No 2005-32 of 18 January 2005 introducing a social cohesion programme (JORF, 19 January 2005, p. 864), which contains no further reference to the needs of the market.

— The requirement to use a French agent as intermediary

10 Under Article L. 762-9 of the Code du travail, in the version in force at the end of the period prescribed in the reasoned opinion, 'in the absence of a reciprocal convention between France and their country, performing artists' agents may not engage performing artists in France other than through the intermediary of a French performing artists' agent'.

11 That provision was amended by Ordonnance No 2001-177 of 22 February 2001, adopted for the application of Articles 43 EC and 49 EC to the occupation of performing artists' agent (JORF, 24 February 2001, p. 3024). Since that amendment, performing artists' agents established in another Member State are no longer required to use a French agent as an intermediary but are merely required, in certain circumstances, to obtain a licence.

— The requirement to obtain a licence

12 Since Ordonnance No 2001-177, Article L. 762-9 of the Code du travail provides that 'performing artists' agents ... in a Member State of the European Community or in a State party to the Agreement on the European Economic Area may practise their activity in France provided they obtain a licence in accordance with the conditions laid down by Article L. 762-3 or produce a licence issued in one of those States under comparable conditions'.

— The requirement of establishment in France

13 Under Article R. 762-12 of the Code du travail, in the version in force at the end of the period prescribed in the reasoned opinion:

'A licence holder shall within one month notify the Directeur départemental du travail et de la main-d'oeuvre [Director of the Labour and Employment Office] for the *département* in which the agency's principal place of business is situated of the engagement by a performing artists' agency of any client seeking work ...'.

14 Article R. 762-13 of that code, in the version in force at the end of the period prescribed in the reasoned opinion, provides:

'A performing artists' agency shall be required each month to provide the direction départemental du travail et de la main-d'oeuvre for the *département* in which the agency's principal place of business is situated with statistical information on the engagements undertaken ...

...'

15 As a result of Decree No 2004-206 of 8 March 2004 on the pursuit of the activity of performing artists' agent by nationals of a Member State of the European Community or of a State party to the Agreement on the European Economic Area (Part II, Decrees of the Conseil d'État, JORF, 10 March 2004, p. 4685), Articles R. 762-15 and R. 762-17 simply provide that applications by a performing artists' agent from another Member State must state 'where appropriate, the location of the ancillary offices or branches the performing artists' agent intends to set up in France'.

— The French regime governing the activities of performing artists

16 Article L. 762-1 of the Code du travail, in the version in force at the end of the period prescribed in the reasoned opinion, lays down a presumption of salaried status. Under that article:

'Any contract under which a natural or legal person secures, for consideration, the engagement of an artist for a performance with a view to its production shall be

deemed to be an employment contract provided that that artist does not practise the activity that is the subject of the contract in circumstances requiring him or her to be entered in the commercial register.

That presumption shall remain irrespective of the means or the amount of the consideration or the status accorded to the contract by the parties. Nor shall it be rebutted by evidence that the artist retains freedom of artistic expression, is the owner of all or part of the material used or employs one or more persons as assistants where he or she personally participates in a performance.

...'

The facts and the pre-litigation procedure

17 Having given the French Republic an opportunity to submit its observations, the Commission, on 26 January 2000, issued a reasoned opinion stating that certain aspects of the national regimes regulating the activity of engaging performing artists and the activity of performing artist appeared to be incompatible with Articles 43 EC and 49 EC. It therefore invited that Member State to comply with its obligations under the EC Treaty within a period of two months from notification of that reasoned opinion. Since it was not satisfied with the French authorities' reply by letter of 28 April 2000 and the details provided on 29 December 2000, 13 March 2002, 20 February and 4 September 2003, the Commission decided to bring this action.

The action

18 In its application, the Commission relies on two heads of complaint concerning the French regime regulating the activity of engaging performing artists and the activity of performing artist, the first of which is composed of four parts.

19 The four parts of the first head of complaint allege:

— incompatibility with Articles 43 EC and 49 EC of the French legislation in force at the end of the period prescribed in the reasoned opinion requiring agents engaging performing artists, established in another Member State, to operate through the intermediary of a French agent;

— incompatibility with Article 49 EC of the French legislation in force at the end of the period prescribed in the reasoned opinion requiring agents engaging performing artists, established in another Member State, to have their principal place of business or a permanent establishment in France;

— incompatibility with Article 49 EC of the French legislation adopted after the end of the period prescribed in the reasoned opinion requiring agents engaging performing artists, established in another Member State, in certain cases, to obtain a licence from the French authorities without account being taken of the evidence and guarantees already submitted in the Member State of origin; and

— incompatibility with Article 49 EC of the French legislation in force at the end of the period prescribed in the reasoned opinion making the grant of a licence to agents engaging performing artists, established in another Member State, subject to the need for engagement of performers.

20 The second head of complaint alleges incompatibility with Article 49 EC of the French legislation in force at the end of the period prescribed in the reasoned opinion, which provides that any contract under which a natural or legal person secures, for consideration, the engagement of an artist for a performance with a view to its production shall be deemed to be an employment contract, in so far as that legislation applies to performing artists who are service providers from another Member State ('the presumption of salaried status at issue').

21 During the written procedure, the Commission withdrew the first and second parts of the first head of complaint.

22 This action is thus confined to an examination of the third and fourth parts of the first head of complaint and the second head of complaint in the light of Article 49 EC.

The third part of the first head of complaint relating to the requirement, in certain cases, to obtain a licence from the French authorities without account being taken of the evidence and guarantees already submitted in the Member State of origin

23 The French Government objects that the action is inadmissible on the basis of inconsistency between the grounds pleaded and the heads of claim in the application. In its view, the third part of the first head of complaint is not set out in the heads of claim in the application.

24 By virtue of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure, the Commission must, in the heads of claim in an application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule (see, to that effect Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28, and Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17). Those heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see, to that effect, Joined Cases 46/59 and 47/59 *Meroni* v *High Authority* [1962] ECR 411, 419, and Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 121).

25 In the present case, whilst the Commission refers to the complaint in question in the grounds of its application, it does not include it in its heads of claim. As it is not one of the complaints which are the subject of its application, that complaint must be regarded as inadmissible.

26 In the light of the foregoing, the third part of the first head of complaint is inadmissible.

The fourth part of the first head of complaint relating to making the grant of a licence subject to market needs

Arguments of the parties

27 The Commission submits that national legislation which makes the grant of a licence to performing artists' agents established in another Member State subject to the need to engage performers constitutes an unlawful restriction on freedom to provide services provided for by Article 49 EC.

28 The French Government acknowledges that there was a restriction on the freedom of performing artists' agents established in another Member State to provide services, as the Commission complained, but it points out that the provision in question has been amended in the meantime by Law No 2005-32.

Findings of the Court

29 In that regard, it is sufficient to find that, as the French Government has, moreover, acknowledged, national legislation which makes the grant of a licence to pursue an activity such as the engagement of performing artists subject to the need to engage performing artists constitutes a restriction in that it tends to limit the number of suppliers of services. The French Government has not given any reason whatsoever that could justify that restriction.

30 With regard to the French Government's argument that there was in the meantime a legislative amendment, it is to be noted that in an action under Article 226 EC, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, paragraph 21).

31 In the present case, at the end of that period, that is to say, by 26 March 2000, the French legislation which made the grant of a licence to performing artists' agents established in another Member State subject to the need for engagement of performers had not yet been amended.

32 It follows that the fourth part of the first head of claim is well founded.

The second complaint relating to the presumption of salaried status at issue

Arguments of the parties

33 The Commission maintains that the presumption of salaried status at issue, which, moreover, it would be difficult to rebut, is an obstacle to the free movement of services in so far as, in order to prevent their contract being accorded the status of employment contract, which would subject them to the social security scheme for employed persons and the scheme for paid annual leave, performing artists established in another Member State are obliged to prove that they do not have the status of employees but, on the contrary, are self-employed. That obstacle, the Commission argues, is disproportionate in relation to the aims which it pursues.

34 The French Government counters by saying that that presumption does not constitute an obstacle to the free movement of services and is, moreover, easily rebuttable. Following Circular DSS/DACI No 2001/34 of the Minister for Employment and Solidarity of 18 January 2001 on the case-law of the Court of Justice of the European Communities explaining the legal concepts contained in Articles 14(1)(a), 14a(1)(a) and 14c of Regulation (EEC) No 1408/71, all that is required to remove the presumption of salaried status is to submit Form E 101.

35 Further, that government maintains that the presumption of salaried status at issue is, in any event, justified by public interest considerations linked to the social protection of performing artists and action to combat concealed employment.

Findings of the Court

36 At the outset, it should be stated that the present action is confined to performing artists recognised as service providers established in their Member State of origin where they usually provide similar services ('the performing artists in question'). It therefore concerns individuals who go to France to pursue their activities on a temporary, self-employed basis. That action does not relate either to performing artists established in France (see, to that effect, Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraph 24) or to performing artists pursuing their activities in France as employees and therefore as 'employed persons' within the meaning of Community law (see, to that effect, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 25). It follows that, by the present action, the Commission calls French law into question only in so far as it applies to performing artists who are service providers from another Member State.

37 It is settled case-law that Article 49 EC requires not only the elimination of all discrimination against service providers from other Member States, but also the abolition of any restriction on the freedom to provide services, even if that restriction applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of service providers from other Member States who lawfully provide similar services in their Member State of origin (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 28). That freedom is enjoyed by both providers and recipients of services (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 22).

38 In the present case, it must be held that the presumption of salaried status at issue, irrespective of whether it is more or less difficult to rebut, constitutes a restriction on freedom to provide services within the meaning of Article 49 EC. Even if it does not deprive, in the true meaning of the word, the performing artists in question of

the opportunity to pursue their activities in France in a self-employed capacity, it none the less places them at a disadvantage that may impede their activities as service providers. In order to avoid their contract being accorded the status of employment contract, which would entail additional costs because of the obligation, in France, to pay contributions as affiliates of the social security scheme for employed persons, and bring them under the scheme for annual paid leave, they must prove that they do not work as employees but, on the contrary, are self-employed. Thus, the presumption of salaried status at issue is likely both to discourage the artists in question from providing their services in France and discourage French organisers of events from engaging such artists.

39 The French Government maintains that the presumption of salaried status at issue cannot constitute a restriction on the freedom to provide services since it is a procedural requirement which observes the principle of effectiveness laid down in the case-law of the Court.

40 Whilst, as with any presumption, the presumption of salaried status at issue constitutes a procedural measure, it is clear that the case-law to which the French Government refers does not apply automatically to all national measures of a procedural nature but is concerned only with the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law (see, in particular, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12). The presumption of salaried status at issue in the present case does not serve to guarantee rights derived from Community law but, on the contrary, to place a restriction on such rights.

41 The French Government further maintains that, since Ministerial Circular DSS/DACI No 2001/34 was issued, for the performing artists in question, all that is required to remove the presumption of salaried status at issue is to submit Form E 101.

42 Even if the effect of that ministerial circular was indeed to make the presumption of salaried status at issue automatically inapplicable to performing artists who are entitled to use Form E 101, it is clear that that ministerial circular was adopted on 18 January 2001 and therefore much later than the end of the period prescribed in the reasoned opinion. Therefore, on any view, that ministerial circular cannot in any way alter the finding in paragraph 38 above.

43 The freedom to provide services may, however, be restricted by national regulations justified on the grounds set out in Article 46(1) EC in conjunction with Article 55 EC or by overriding reasons in the public interest (see, to that effect, Case C-262/02 *Commission* v *France*, paragraph 23), to the extent that there are no Community harmonising measures providing for measures necessary to ensure those interests are protected (see, to that effect, in the context of the free movement of goods, Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31 and case-law cited).

44 As a rule, it is for the Member States to decide on the degree of protection which they wish to afford to such lawful interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective they pursue and not go beyond what is necessary in order to attain it (see, in particular, *Säger*, paragraph 15, and Case C-262/02 *Commission* v *France*, paragraph 24).

45 In the present case, it is therefore necessary, in order to determine whether the second head of complaint put forward by the Commission is well founded, to examine whether the presumption of salaried status at issue, which implies that the performing artists in question are subject to the social security scheme for employed

persons and the scheme for paid annual leave, may be justified on one of the grounds referred to in paragraph 43 above and whether such a measure is proportionate to the objectives pursued, or whether there are in fact Community harmonisation measures which preclude such a justification.

46 The French Government submits that that presumption is justified by two overriding requirements in the public interest, which are, firstly, social protection of the performing artists in question and, secondly, the campaign against concealed employment.

47 Firstly, with regard to social protection of the performing artists in question, it is certainly not inconceivable that, in the same way as employed persons, self-employed workers, such as service providers, may need specific measures to afford them a certain degree of social protection (see, to that effect, with regard to freedom of establishment, Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 13). Thus, the social protection of service providers may, in principle, be one of the overriding requirements of public interest which may justify a restriction on the freedom to provide services.

48 However, with regard, firstly, to ensuring social security provision, it should be noted that there are Community measures in place specifically for the coordination of the legislation applicable to the social security of service providers. It is clear from Article 13(1) of Regulation No 1408/71, in conjunction with Articles 4 and 14a(1)(a) of that regulation, that individuals who normally pursue activities as self-employed persons in a Member State and who work on a temporary basis in another Member State remain subject to the legislation of the former Member State. Under the system established by that regulation, the performing artists in question are therefore entitled to the social security provided by their Member State of origin and not that provided by the Member State of destination, a form of protection which they can, moreover, prove by a model certificate, known as Form E 101 (see, to that effect, Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraphs 33 and 34).

49 In those circumstances, the French Republic is not entitled to subject the performing artists in question to its own social security system (see, to that effect, *Banks and Others*, paragraphs 41 and 42).

50 With regard, secondly, to the right to paid leave, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) lays down rules on paid leave. However, those rules are concerned only with employed persons and not with service providers.

51 Whilst the matter of paid leave for the performing artists in question has not therefore been harmonised at Community level and the French Republic thus retains, in principle, the right to provide for such a form of protection, it must nevertheless be stated that a right to paid leave on the part of a service provider (established either indirectly by a presumption of salaried status or directly) is difficult to reconcile with the concept of self-employment. Entitlement to leave paid by an employer is one of the most fundamental characteristic rights of salaried employment. By contrast, self-employed activity is characterised precisely by the absence of a right to paid leave.

52 With regard, secondly, to the objective of combating concealed employment, the fact that performing artists are normally engaged on an intermittent basis and for short periods by different show organisers cannot, of itself, mean that a general assumption of concealed employment is well founded. That is particularly so in this case because the performing artists in question are recognised as service providers, established in their Member State of origin, where they usually provide similar services.

53 In those circumstances, as the Commission suggests, the establishment of a system of ex post facto control, together with deterrent penalties to prevent and identify individual instances of the use of bogus amateur or unpaid status, would suffice to combat concealed employment effectively.

54 Accordingly, the second complaint is well founded.

55 It must therefore be held that:

— by making the grant of a licence to performing artists' engagements agencies, established in another Member State, subject to the need to engage performers, and

— by imposing the presumption of salaried status on performing artists who are recognised as service providers and established in their Member State of origin, where they usually provide similar services,

the French Republic has failed to fulfil its obligations under Article 49 EC.

Costs

56 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, if each party succeeds on some and fails on other heads. Since the parties have respectively been unsuccessful on a number of heads, they must be ordered to bear their own costs.

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

1. **Declares that:**

   — **by making the grant of a licence to performing artists' engagements agencies, established in another Member State, subject to the need to engage performers, and**

   — **by imposing the presumption of salaried status on performing artists who are recognised as service providers and established in their Member State of origin, where they usually provide similar services,**

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

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the French Republic to bear their own costs.**

[Signatures]