OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 15 December 1993 *

Mr President,
Members of the Court,

A — Introduction

1. This action for failure to comply with obligations under the Treaty primarily concerns the provisions laid down by the Spanish State regulating the activity of tourist guides and guide-interpreters. [1] In the Commission's view, those provisions prevent nationals of other Member States from having access to the profession of tourist guide, and prevent tourist guides from other Member States from carrying out their activities, thereby infringing the EEC Treaty (now: the EC Treaty). Those provisions are contained in an Order of 31 January 1964 approving the Rules on the Exercise of the Activity of Private Tourist Guide (hereinafter 'the 1964 Order'). [2]

2. According to the provisions of that order, the profession of tourist guide (or guide-interpreter) may be exercised only by a person who has passed the examinations organized for that purpose by the Ministry of Information and Tourism (Article 12). The exercise of that activity by unauthorized persons is subject to sanctions (Article 7). Only persons with Spanish nationality are admitted to those examinations (Article 13 (a)). Moreover, although tourist groups may be accompanied by a courier (*correo del turismo*) from their own country, the latter must, however, use the services of a guide-interpreter (Article 11 (3)), who is also required by Article 13 (a) to be a Spanish national.

3. The Commission claims, first, that to require candidates for the examinations to have Spanish nationality is incompatible with Articles 48, 52 and 59 of the Treaty.

4. It then considers that the failure of the Spanish rules to provide for a procedure for assessing qualifications obtained in other Member States and attested by a certificate of competence infringes Articles 5, 48, 52 and 59 of the Treaty.

5. Finally, referring to the 'tourist guide judgments' of 26 February 1991, [3] it objects

* Original language: German.

1 — Since both those provisions are subject to the same rules, for the sake of simplicity only the term 'tourist guide' will be used.

2 — BOE of 26 February 1964.

3 — Case C-154/89 *Commission* v *France* [1991] ECR I-659; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727.

to the fact that the need for a guide to hold a licence for which a course of vocational training with an examination is required prevents self-employed or employed tourist guides accompanying private groups of tourists on visits to Spain from pursuing their activities. That requirement is not compatible with Article 59 of the Treaty in so far as it relates to services provided at places other than museums or historic monuments which require the services of a specialized tourist guide.

6. Secondarily, the Commission considers that, by failing to communicate the information requested regarding the legal provisions of the Comunidades Autónomas (Autonomous Communities) concerning the activity of tourist guide and guide-interpreter, Spain has infringed Article 5 of the Treaty.

7. The Commission therefore claims that the Court should declare that, for the reasons set out above, the Kingdom of Spain has infringed Articles 5, 48, 52 and 59 of the Treaty. Moreover, it claims that the defendant Member State should be ordered to pay the costs of the action.

8. The Kingdom of Spain contends that the Court should declare that there are no grounds for holding that the Kingdom of Spain has infringed the Treaty and ordering it to bear the costs. In its defence, it refers to Decrees No 210/1989 of the Generalitat de Catalunya and No 72/1992 of the Junta de Castilla y León. Moreover, it refers to the regulations adopted by the Spanish State to implement Community Directives (EEC) No 75/368 [4] and 89/48. [5]

9. Further details of the facts and the relevant provisions will, in so far as is necessary, be set out later in this opinion.

B — Analysis

I. *Barriers to the freedom of nationals of other Member States to exercise a profession*

10. *1.* This part of the complaint requires the subject-matter of the dispute to be defined more precisely.

4 — Council Directive of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities (OJ 1975 L 167, p. 22).

5 — Council Directive of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years duration (OJ 1989 L 19, p. 16).

11. In that context it must be noted that the Kingdom of Spain consists of 17 Autonomous Communities. It is common ground between the parties that those communities enjoy certain legislative competence in the area of tourism concerned in this case. It is also not disputed that the 1964 Order continues to apply in the territory of each of those communities for so long, and in so far as, the competent legislative body has not adopted different rules.

12. At the time of the oral procedure only two of the 17 communities had adopted certain provisions which could be relevant to the present proceedings. Those provisions were communicated to the Commission only in the defence. The Commission then commented on them in its reply and in the oral procedure.

13. In view of the above, the Commission stated in the oral procedure that it did not wish the Court to comment specifically on those provisions of the two Autonomous Communities. After those provisions had been considered by the Commission, they would, if necessary, be the subject of another action for failure to fulfil obligations under the Treaty. In its reply and in the oral procedure the Commission merely took the opportunity to comment on those previously uncommunicated provisions and to state that ultimately there continued to be a breach of the Treaty in those communities as well. It had complained of an infringement of Article 5 of the Treaty in its application, because Spain had not communicated the text of those provisions of the Autonomous Communities within the prescribed period.

14. In view of those statements, the first part of the form of order sought by the Commission, with which we are here concerned, must be understood to the effect that it is aimed at establishing the infringement caused, in its opinion, by the 1964 Order throughout the whole of the area of its application, with the exception of the Autonomous Communities of Catalunya and Castilla y León. In other words, that part of the form of order sought is limited geographically to the part of Spanish territory where it is established that the 1964 Order has not been amended or supplemented by provisions of the (abovementioned) Autonomous Communities.

15. 2. When the Commission's submissions are interpreted in that way, I consider them to be well founded.

16. (a) The Spanish Government accepts that the *nationality requirement under Article 13 (a)* of the 1964 Order, [6] continues to apply except in the abovementioned two Autonomous Communities. That requirement is a condition of access to the profession of tourist guide, because that profession may only be exercised after passing the examinations provided for under Article 12,

6 — See point 2, above.

and only persons of Spanish nationality are admitted to those examinations. It being discrimination based on nationality, it falls in principle under Article 48 (in so far as it affects employed tourist guides) and under Articles 52 and 59 of the Treaty (with respect to self-employed tourist guides). Since no grounds can be discerned which could justify the different treatment (under Articles 48 (4), 55 and 56), Spain has infringed those provisions of the Treaty.

17. With regard to Article 48 in particular, the Commission has limited its complaint to workers who were already employed in Spain at the time of its accession. That calls for the following comments.

18. Upon the expiry of the period set by the Commission in its reasoned opinion (December 1991), [7] the rights to freedom of movement for workers, as more precisely defined by Articles 1 to 6 of Regulation (EEC) No 1612/68, [8] did not apply, in accordance with Articles 55 and 56 of the Act of Accession. Those transitional rules were intended to prevent disturbances on the Spanish labour market which might have resulted from the inflow of persons from other Member States in search of work. [9] However, there are no such grounds with regard to workers from other Member States already lawfully employed on Spanish territory. Not only the provisions of Title II of Regulation No 1612/68 apply for those workers, but *also Articles 48 and 49 of the Treaty*. [10] Accordingly, with regard to that group of workers, the nationality requirement in dispute infringed Article 48 of the Treaty from the effective date of Spain's accession (1 January 1986), and thus also upon the expiry of the period set by the reasoned opinion. The Commission's complaint with regard to Article 48 of the Treaty is accordingly justified, at least in the limited form accepted by the Commission itself. [11]

19. In that context, the Spanish Government asks for understanding for the difficulties of a State, constructed along the lines of the

7 — That is the relevant date: see most recently the judgment of 1 December 1993 in Case C-37/93 *Commission* v *Belgium* [1993] ECR I-6295, paragraph 5.

8 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968 (II), p. 475).

9 — See, with respect to the reciprocal clause in favour of the other Member States, the judgment in Case 9/88 *Lopes da Veiga* v *Staatssecretaris van Justitie* [1989] ECR 2989, paragraph 10.

10 — See the judgment in Case 9/88, cited in the previous footnote, paragraphs 10 and 11, and the judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461. The latter judgment concerned Article 45 of the Greek Act of Accession.

11 — In reality, according to the case-law cited, those migrant workers who were lawfully employed in Spain only *after the accession* enjoy the rights resulting from Article 48 of the Treaty before the expiry of the transitional period within the meaning of Article 56 of the Act of Accession. It is only for their first employment that they are unable to rely on Article 48.

Spanish State, in which the autonomous authorities react most sensitively to any initiative which restricts their exclusive powers and is not limited to making proposals and coordinating activities or to supervision by the State. In that respect, the Spanish Government refers to the existence of unforeseen difficulties within the meaning of the judgments in Case 52/84 *Commission* v *Belgium* [12] and Case 94/87 *Commission* v *Germany* ('Alcan'). [13]

20. That submission cannot be accepted. According to that case-law, the existence of 'unforeseen difficulties' (which in any case must also be 'unforeseeable') imposes on the Commission a duty of genuine cooperation, in the sense that it must negotiate on proposals of the Member State concerned for amendments to a decision under Article 93 (2) of the Treaty in order to overcome the difficulties whilst observing Community law.

21. Consequently, such difficulties can give rise to a duty on the Commission to accord *considerate treatment in the proceedings* brought to ensure the application of Community law. However, they cannot result in the substantive principles of that legal order themselves being called into question.

12 — [1986] ECR 89, paragraph 16.

13 — [1989] ECR 175.

22. In addition it should be recalled that the Court has consistently held that a Member State may not plead internal circumstances in order to justify a failure to comply with obligations resulting from Community law. [14]

23. As a result it is established that, by applying the nationality requirement in question, Spain infringes Articles 48, 52 and 59 of the Treaty.

24. (b) With regard to the failure to provide for a *procedure for assessing qualifications obtained in other Member States*, the Commission correctly points out that the basic freedoms granted by Articles 48, 52 and 59 [15] include *inter alia* the following principle:

'A Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification, must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same

14 — See, for example, judgment in Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 10.

15 — Whilst the case-law cited below admittedly relates only to Articles 48 and 52, there is however no doubt that the principles developed in that respect are also applicable in the case of Article 59.

profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates.' [16]

25. Moreover, any decision taken must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed and the person concerned must be able to ascertain the reasons for the decision taken in his regard. [17]

26. With regard to the adjustment of national law to those principles, the Commission implicitly assumes that the defendant Member State must incorporate those principles in the provisions concerning the profession of tourist guide by means of express rules.

27. That view is correct. The principles of legal certainty and the protection of individuals require that, in areas covered by Community law, the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed. [18]

28. It being clear that the 1964 Order contains no provision satisfying those principles, the defendant Member State has relied on the rules implementing Directives 75/368 and 89/48. [19] It must therefore be examined whether, in adopting those provisions, it has done everything necessary.

29. It should first be stated that Directive 75/368 and the Spanish provisions

16 — Judgment in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraphs 16 and 17; judgment in Case C-104/91 *Aguirre Borrell* [1992] ECR I-3003, paragraphs 11 and 12.

17 — Judgment in *Vlassopoulou*, cited above, paragraph 22, and in *Aguirre Borrell*, cited above, paragraph 15; see most recently the judgment of 31 March 1993 in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 40.

18 — Judgment in Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 11.

19 — Point 8, above.

adopted for its implementation do not cover tourist guides. [20] Moreover, they do not permit *qualifications evidenced by a certificate of competence* to be taken into account, which is the Commission's concern in the present case. They merely make it possible for an individual to adduce the *actual pursuit of the activity in question* as *evidence of the required knowledge and qualifications.* [21]

30. Accordingly, the infringement of the three basic freedoms concerned is cured neither wholly nor partially by the Spanish provisions implementing Directive 75/368.

31. The same applies to the provisions implementing Directive 89/48. It is true that Spain has adopted Royal Decree No 1665/1991 of 25 October 1991 [22] in order to implement that directive into national law. It is also true that Royal Decree No 767/1992 of 26 June 1992 [23] inserted the profession of Técnico de Empresas y Actividades Turísticas into the annexes to Decree No 1695/1991.

32. Nevertheless, the Commission has stated, without being contradicted by the Kingdom of Spain, that that profession is different from that of tourist guide. Moreover, it is apparent from the Spanish Government's statements that the possibility of pursuing the profession of tourist guide on the basis of a diploma as Técnico de Empresas y Actividades Turísticas without an additional examination (in accordance with Article 12 of the 1964 Order) exists, at most, in Catalunya and Castilla y León.

33. It follows from the above that, also from the point of view of the procedure for assessing qualifications obtained in other Member States, the Spanish rules do not satisfy the requirements of Community law.

34. Before I finish with that point, I would like to make two further short comments on the extent of that infringement.

35. First, contrary to the Commission's view, it does not seem to me to be appropriate to invoke Article 5 of the Treaty in addition to the provisions on the relevant basic freedoms (Articles 48, 52 and 59). In

20 — Article 2 (5) of the directive; Article 2 (f) of the Royal Decree No 439/1992 of 30 April 1992 (BOE No 111 of 8 May 1992).

21 — Article 7 (1) of directive and of the Royal Decree No 439/1992; see also the second and third recital of the directive.

22 — BOE No 80 of 22 November 1991.

23 — BOE No 170 of 16 July 1992.

Case 2/73 *Geddo* v *Ente Nazionale Risi* [24] the Court of Justice held:

'In providing that Member States shall take all appropriate measures to ensure that their obligations are carried out and shall abstain from any measure liable to jeopardize the attainment of the objectives of the Treaty, Article 5 imposes a general obligation on Member States, the actual significance of which depends, in each particular case, on the provisions of the Treaty or on the rules laid down within its general framework.'

36. According to the case-law cited above, [25] the obligation of the Member States to provide for a procedure for assessing qualifications obtained in other Member States flows directly from the basic freedoms concerned, which admittedly have been interpreted in the spirit of the general rule laid down in Article 5. [26] If there is a failure to observe that obligation, there is no independent infringement of Article 5 (alongside the disregard of the basic freedoms).

37. Secondly, because of the infringement of Article 48, the limitation arising out of the *Lopes da Veiga* case applies. [27]

38. (c) While the aspects considered up to this point concerned the access to the licence entitling the profession of tourist guide to be pursued, the Commission's *complaint based on the 'tourist guide judgments'* poses a question which arises before the question of the requirements for access to the profession. That question is whether the *extent to which a licence is needed as such* is compatible with Community law, in particular with Article 59 of the Treaty.

39. It must first be noted that under Articles 4, 7 and 12 of the 1964 Order the professional exercise of 'tourist information activities' as a tourist guide (or guide-interpreter) can be carried out only by those tourist guides who have successfully passed an examination, which is certified by the licence provided for in Article 21.

40. According to Article 1 of that order, 'tourist information activities' are activities which consist in the regular provision for reward of services which include the guidance of, and provision of information and

24 — Judgments in Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865, paragraph 4; on the relationship between Article 5 and Article 76 of the Treaty, see the judgment in Case C-195/90 *Commission* v *Germany* [1992] ECR I-3141, paragraphs 36 to 38; with respect to the relationship between Article 5 and Article 189 (3), see now also the judgment of 13 October 1993 in Case C-378/92 *Commission* v *Spain* [1993] ECR I-5092, paragraph 6.

25 — Footnote 16 above.

26 — See, for example, the judgment in Case C-104/91 *Aguirre Borrell*, cited above, footnote 16: operative part and paragraph 9 respectively.

27 — Point 18 and footnote 9 above.

help to, tourists with regard to both historical monuments, art or history and also transport connections, accommodation and, generally, all areas which could be of interest, with the objective of imparting an extensive knowledge of the touristic wealth of the country and ensuring that the available facilities are fully used for the benefit of travellers and tourists.

41. That definition embraces all the activities concerned in the judgment in Case C-198/89 *Commission* v *Greece*, [28] one of the three 'tourist guide judgments'. [29]

42. With respect to the Greek rules, the Court of Justice held that the Hellenic Republic:

'by making the provision of services by tourist guides travelling with a group of tourists from another Member State, where those services consist in guiding such tourists in places other than museums or historical monuments which may be visited only with a specialized professional guide, subject to possession of a licence which requires specific training evidenced by a diploma, [had] failed to fulfil its obligations under Article 59 of the EEC Treaty'.

43. That finding is wholly applicable to the abovementioned Spanish provisions.

44. The infringement of Article 59, which is moreover not contested by the Spanish Government, is therefore established.

II. *The failure to communicate the legal provisions of the Autonomous Communities*

45. The Commission complains that, by failing to communicate the wording of the provisions adopted by the Autonomous Communities, despite repeated requests to do so, the defendant Member State has infringed Article 5 of the Treaty.

46. As a matter of principle, it should be stated that under Article 5 the Member States are required, following a request from the Commission, to communicate to it within a reasonable period the information needed by

28 — Footnote 3 above.

29 — See paragraph 2 of that judgment.

it for the performance of its tasks under Article 169. [30]

47. In the present case, the Commission requested in writing on 8 July and 11 October 1989 (and again during the preliminary procedure) that the provisions of the Autonomous Communities relating to the subject matter of the 1964 Order be communicated to it. It is not disputed that those communities enjoy certain powers with regard to that subject-matter. However, at the end of the period set by the Commission in its reasoned opinion (December 1991) that information had not been made available. It was instead only sent with the defence.

48. Accordingly, the Commission's complaint based on Article 5 of the Treaty is well founded.

C — Conclusion

49. For the above reasons I propose that the Commission's application be upheld in all respects and the Kingdom of Spain be ordered to pay the costs.

30 — Judgments in Case 272/86 *Commission* v *Greece* [1988] ECR 4895, paragraphs 31 and 32; Case C-137/91 *Commission* v *Greece* [1992] ECR I-4023, paragraph 3 et seq., in particular paragraph 6.