OPINION OF ADVOCATE GENERAL ALBER

delivered on 4 October 2001 [1]

I — Introduction

1. The Commission brings the present case of failure to fulfil Treaty obligations against the Italian Republic with its complaint that the Law No 196 of 24 June 1997 [2] (hereafter 'Law No 196'), which for the first time regulates the supply of temporary labour to others in Italy, infringes the principles of freedom to provide services and the free movement of capital, as laid down in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 73b of the EC Treaty (now Article 56 EC), in that it requires undertakings engaged in the supply of temporary labour and wishing to operate in Italy to maintain their registered office or a branch office on Italian territory and to lodge a deposit of ITL 700 million as security with a credit institution having its registered office or a branch office on Italian territory.

II — Subject-matter and procedure

2. Law No 196 regulates the activity of undertakings (service providers) which provide another undertaking (user) with one or more workers, in order to meet the temporary needs of the latter undertaking.

3. Article 2 of the Law defines the persons who are permitted to engage in the provision of temporary labour. According to Paragraph 1 of this provision, only companies registered with the Ministry of Labour and Social Security may engage in this activity. To be registered on the relevant list those companies need a licence from the Minister, which is initially of a provisional nature and after the business has been operating for two years is issued for an indefinite period. That licence is issued subject to compliance with the conditions laid down in Paragraph 2 of this provision. Those conditions are the subject-matter of the present dispute in so far as they require that the registered office or a branch office of the undertaking must be established on Italian territory and that a deposit of ITL 700 million must be lodged as a security with a credit institution having its registered office or a branch office on Italian territory.

4. Failure to comply with the provisions of Article 2 of Law No 196 may lead to the

1 — Original language: German.

2 — GURI No 154 of 4 July 1997, Supplement No 136/L.

application of a penalty in accordance with Article 10, which refers back to Law No 1396 of 23 October 1960. [3]

5. As the Commission considered the conditions described above to be incompatible with Articles 59 and 73b of the Treaty, it initiated the infringement procedure under Article 169 of the EC Treaty (now Article 226 EC) by letter to the Italian Government of 29 July 1998. The Italian Government replied by letter of 6 November 1998, in which it sought to justify the Italian provisions at issue by reference to Articles 56 (now, after amendment, Article 46 EC) and 66 (now Article 55 EC) of the EC Treaty on grounds of public policy, which, it argues, includes effective protection of employees' rights in respect of pay and social security contributions as against their actual employer, that is the undertaking providing temporary labour.

6. The Commission considered the arguments put forward to be unsatisfactory and sent a reasoned opinion to the Italian Republic on 28 April 1999, calling on it to put an end to the alleged infringement within two months. That letter remained unanswered. The Commission thereupon brought an action before the Court by application of 12 July 2000, registered at the Court Registry on 13 July 2000.

3 — See GURI No 289 of 25 January 1960.

7. The Commission claims that the Court should:

(a) declare that, by requiring undertakings providing temporary labour which are established in other Member States to:

— maintain their registered office or a branch office on Italian territory; and

— lodge a deposit of ITL 700 million as security with a credit institution having its registered office or a branch office on Italian territory,

the Italian Republic has failed to comply with its obligations under Articles 59 and 73b of the EC Treaty;

(b) order the defendant to pay the costs.

8. The Italian Government contends that the Court should:

(a) dismiss the application;

(b) order the Commission to pay the costs.

9. In its rejoinder the Italian Government indicated that some of the provisions of Law No 196 which the Commission had criticised had been amended by Law No 388 of 23 December 2000 [4] by adding to both Article 2(2)(a) and Article 2(2)(c), in each case following the words 'registered office or branch office within the State's territory' or 'registered office or branch office on Italian territory', the phrase 'or in another Member State of the European Union'. [5] In its view, the Commission's complaints have therefore become to a large extent redundant. In that respect, the Italian Government proposes that the Commission should discontinue the proceedings, at least with regard to the first complaint and the second part of the second complaint.

10. The Commission did not accede to that proposal. No oral proceedings have taken place in this case.

4 — GURI of 29 December 2000, serie generale No 302.
5 — See Article 117(1) of the Law.

III — The relevant legal provisions

1. *Community law*

11. Articles 59 and 73b of the EC Treaty read as follows:

'*Article 59*

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community.

Article 73b

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

2. *National law*

Articles 2(2)(a) and 2(2)(c) of Law No 196 provide respectively:

The conditions required for carrying on the business mentioned in Paragraph 1 (placement of temporary labour) are the following:

(a) Incorporation of the company, in Italy or another Member State of the European Union, as a company with share capital or as a co-operative under Italian law or under that of another Member State of the European Union; inclusion in the company's name of the words 'company providing temporary labour'; indication of that business as the sole purpose of the company; paid-up capital of at least one billion lire; *registered office or branch office on Italian territory.* [6]

(c) As a security for sums owing to the workers employed under the contract covered by Article 3 (contract for the supply of temporary labour), *the lodging, for the first two years, of a deposit of ITL 700 million as a security with a credit institution having its registered office or a branch office on Italian territory;* [7] from the third year onwards, the provision, instead of the deposit, of a bank guarantee or equivalent insurance guarantee amounting to a least 5% of its turnover before VAT of the previous financial year and, in all cases, no less than ITL 700 million.

IV — Submissions of the parties

1. *The Commission*

(a) First complaint: infringement of Article 59 of the EC Treaty in respect of

6 — Emphasis added.
7 — Emphasis added.

the obligation for a company or firm to maintain its registered office or a branch office on Italian territory

12. The Commission, relying on the judgment in *Webb*, [8] claims that the provision of temporary labour constitutes a service within the meaning of Article 59 of the EC Treaty. It points out that the Court, as early as its judgment in Case 205/84 *Commission* v *Germany*, [9] held that the requirement of a permanent establishment constitutes a *de facto* negation of the freedom to provide services. Accordingly, the requirement that the company or firm maintain its registered office or a branch office on Italian territory is to be regarded as contrary to Community law.

13. It argues that the defence put forward by the Italian authorities in the pre-litigation procedure on the basis of Articles 56 and 66 of the EC Treaty is misconceived. Those derogating rules constituted by special provisions for foreigners, dictated by reasons relating to public order, public security and public health, are to be narrowly construed. According to the Court's consistent case-law, [10] recourse to the concept of 'public policy' presupposes a genuine and sufficiently serious risk affecting one of the fundamental interests of society. The fact that firms from other Member States engaging in the provision of temporary labour are operating from the territory of those Member States or the implication that such firms are acting fraudulently with respect to the payment of wages and salaries cannot justify recourse to Articles 56 and 66 of the EC Treaty. Similarly, the contention that any workers who have suffered loss are in certain circumstances forced to pursue their claims in foreign courts is equally inappropriate for justifying recourse to Articles 56 and 66 of the EC Treaty. With the growing internationalisation of the legal profession, it cannot simply be assumed that pursuing a legal claim in another Member State is more costly or more difficult. On the contrary, it can occasionally be cheaper, if one thinks for example of the possibility of trade union representation of employees before the courts in Belgium and in France.

(b) Second complaint: infringement of Articles 59 and 73b of the EC Treaty with regard to the requirement to lodge a deposit (first part of the complaint) as a security with a credit institution having its registered office or a branch office on the national territory (second part of the complaint)

14. The Commission's objection from the point of view of Community law to the requirement to lodge a deposit of ITL 700 million as a security with a credit institution having its registered office or a branch office on Italian territory is directed, on the one hand, to the unconditional nature of the requirement as such and, on the other hand, to the place of the deposit, that is, a bank with a branch office in Italy.

8 — Case 279/80 *Webb* [1981] ECR 3305.

9 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

10 — Case 30/77 *Bouchereau* [1977] ECR 1999, at paragraph 35; Case C-350/96 *Clean Car Service* [1998] ECR I-2521, at paragraph 40; Case C-348/96 *Calfa* [1999] ECR I-11, at paragraph 21 and Case C-335/98 *Commission* v *Belgium* [2000] ECR I-1221.

(aa) First part of the complaint

15. The requirement to lodge a deposit as a security constitutes a provision which applies without distinction to all undertakings providing temporary labour. Basing itself on the case-law of the Court [11] the Commission argues that Article 59 of the EC Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of all restrictions which are liable to prohibit, impede or render less advantageous their activities. In its submission, the requirement to lodge a deposit as a security is clearly such an obstacle. Accordingly, it must be considered whether or not that requirement can be justified. As a matter of principle, it may be justified by overriding requirements relating to the public interest and also only in so far as that interest is not already safeguarded by provisions of national law in the Member State in which the service provider is established. [12]

16. According to the Commission, the protection of workers is one of the overriding requirements relating to the public interest already recognised by the Court. Nevertheless, it must be examined whether that interest does not enjoy comparable protection under the provisions of national law in the State in which the service provider is established. Given the absolute and mandatory nature of the requirement to lodge a deposit as a security in accordance with Article 2(c) of Law No 196, there is no scope for such an examination. An undertaking providing services must therefore in certain cases provide a guarantee twice over. The Italian provision must therefore be regarded as an impediment for the purposes of Article 59 of the EC Treaty. Moreover, the provision of a deposit as a security, required, in other Member States, to cover debts arising there in respect of wages or salaries and of social security contributions is comparable with the provision required by Article 2(2) of Law No 196, since those claims are of the same kind as those which arise with respect to Italian social insurance bodies.

(bb) Second part of the complaint

17. Finally, as regards the requirement that credit institutions establish a branch office in Italy, with which deposits can validly be lodged as security for the purposes of Article 2(2)(c) of Law No 196, the Commission contends that it infringes both the principles of free movement of capital as provided by Article 73b of the EC Treaty and also the freedom to provide services as provided by Article 59 of the EC Treaty. In support of that contention, it cites the Court's judgment in *Svensson*. [13] The principles applied there must apply *a fortiori* in the present case. Whereas in *Svensson* obtaining a loan in another Member State was rendered more difficult, in the present

11 — Case C-76/90 *Säger* [1991] ECR I-4221, at paragraph 12; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, at paragraph 33.

12 — *Arblade and Others*, cited in footnote 11, above, at paragraph 34.

13 — Case C-484/93 *Svensson* [1995] ECR I-3955.

case the provision in question excludes the possibility of a service provider turning to a bank outside Italian territory.

18. In the Commission's submission, the lodging of deposits as a security is a capital movement within the meaning of the Nomenclature of capital movements, annexed to Directive 88/361/EC [14] for the implementation of Article 67 of the Treaty. The contested Italian provision therefore constitutes a restriction on the movement of capital. In conformity with *Svensson*, the Italian rules must also be assessed in the light of the provisions on the freedom to provide services. Since in this case it is a question of a service provided by foreign banks, the restriction on which cannot be justified by reasons of public security or public policy, it must be assumed, the Commission concludes, that there is also an infringement of the freedom to provide services.

2. *The Italian Government*

(a) The first complaint

19. The main argument which the Italian Government employs to justify the provision complained of is the need to have an effective system of worker protection with regard to the payment of wages and social security contributions *vis-à-vis* undertakings providing temporary labour. For that purpose, it relies on the judgment in *Webb*, [15] the findings in which with regard to the provision of labour continue, it claims, to be valid, that is to say a field which is characterised by fraudulent behaviour and the infringement of workers' rights, as important studies have demonstrated.

20. It argues that the requirement to maintain the company's registered office or a branch office on Italian territory is an instrument of worker protection in the area of pay and social security contributions, as otherwise the workers might be compelled to bring complex legal proceedings with scant prospects of success. In pointing to the internationalisation of the legal profession the Commission misrepresents the Italian Government's arguments. Nor are those arguments an expression of distrust with regard to the efficiency of the courts in other Member States. The obstacles, on which the Italian authorities base their argument, are primarily of an economic nature.

21. In view of the fact that the infringement of workers' rights is generally concerned with relatively small sums of money which have not been paid (remuneration and social security contributions), a worker bringing proceedings before the courts of another Member State faces costs which

14 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

15 — Footnote 8, above, at paragraph 18.

are as high as or exceed the sums claimed. The costs of proceedings in another Member State are such that the worker, the weakest link in the chain of production, will in all possibility be dissuaded from bringing a claim, so that the possibility of legal action is stripped of all practical effect. Since there has not yet been any harmonisation in this area at Community level, it has up to now also been impossible to rely on a form of cooperation between the Member States in order to guarantee the necessary controls and remedies.

(b) The second complaint

(aa) First part of the complaint

22. The Italian Government argues that the deposit of ITL 700 million as a security during the first two years of operation is intended to guarantee the workers' claims to wages and the corresponding social security contributions.

23. In complaining that guarantees furnished in other Member States are not taken into account, the Commission fails to appreciate that any claims arising in those other Member States are fundamentally different claims to those, for example, of the Italian social security bodies. The guarantees issued to secure the former claims are therefore not fully comparable.

24. Moreover, the Italian Government submits, the amount of the deposit lodged as security has been objectively limited, so that no breach of the principle of proportionality can be alleged.

(bb) Second part of the complaint

25. With regard to the requirement that the credit institution with which the deposit is lodged as a security have a branch office on Italian territory, the Italian Government points to the higher costs for workers which a guarantee in another Member State would bring with it.

26. After the communication by the Italian Government in its rejoinder of the enactment of Law No 388 of 23 December 2000, which in its view renders the first complaint and the second part of the second complaint redundant, it confines itself to defending the provision which continues to require the lodging of a deposit as a security. It points out that, whilst the Commission complains that any such deposits lodged in other Member States by undertakings providing temporary labour are not taken into account, it has not however identified those Member States in which an identical or comparable financial guarantee is required.

27. According to information in the possession of the Italian Government, such a financial guarantee is somewhat rare. In the United Kingdom, Denmark, Finland and Switzerland authorisation to carry on the business in question is not conditional on the provision of a guarantee. In other Member States which do require the lodging of a deposit as security, for example, France, Germany, Spain and Portugal, the methods of calculating it are different, so that only with difficulty can they be compared with one another. For example, in France, the amount of the financial guarantee must be no less than one per cent of net turnover and must not fall below an amount set by ministerial order. In Germany the undertaking must provide a guarantee of DEM 4 000 per worker. In Spain a guarantee must be provided which represents 25 times the annual minimum wage. Thus only with difficulty can both the financial guarantee and the claims thereby secured be compared.

V — Assessment

28. Since the Italian Republic, by its enactment of Law No 388 of 23 December 2000, has on two essential points satisfied the Commission's demands, it would be appropriate to declare the proceedings to that extent closed. Given the existing case-law of the Court in actions for failure to fulfil Treaty obligations, this is unfortunately not possible, because the matter must be viewed as it stood on the expiry of the period allowed for replying to the reasoned opinion.[16] It would have been for the Commission to discontinue the proceedings to the extent that the Italian Republic had satisfied its demands.

29. Although the Italian Republic has changed the legislative situation and thereby eliminated two important grounds of complaint, it cannot *be assumed* that it has accepted the Commission's argument. Rather, in its rejoinder, it draws attention to the fact that it still contends the application should be dismissed, principally of course with regard to the first part of the second complaint. Therefore it must be considered to what extent the Commission's complaints are justified.

1. *The first complaint*

30. It must firstly be determined whether the requirement for a company to maintain its registered office or a branch office on Italian territory in order to operate as an undertaking providing temporary labour is compatible with the freedom to provide services under the Treaty. Irrespective of whether the requirement concerns the registered office or a branch office, it concerns in any event a permanent establishment,

16 — See, for example, Case C-384/99 *Commission* v *Belgium* [2000] ECR I-10633, at paragraph 16.

which according to settled case-law, [17] constitutes a *de facto* negation of the freedom. Through the requirement of a permanent establishment in order to take up an economic activity in a Member State, the Treaty provision establishing the principle of freedom to provide services is deprived of all effectiveness, a provision the very purpose of which is to abolish the restrictions on the freedom to provide services for those persons who are not established in that State. [18] As the Court stated in its judgment in Case 205/84, if such a requirement is to be accepted it must be shown that it 'constitutes a condition which is indispensable for attaining the objective pursued'. [19]

31. In this regard the Italian Government has put forward the aim of worker protection, which in the Court's case-law to date [20] has been recognised and confirmed as an overriding requirement relating to the public interest. The Italian Government puts forward both worker protection with regard to the possible non-payment of the wage and salary entitlements of the workers supplied and the corresponding duty to make deductions *vis-à-vis* the social insurance institutions. In this context the Italian Government gives prominence to the greater difficulties in pursuing legal claims.

32. Outstanding wages and salaries, on the one hand, and social security contributions on the other must be kept separate when considering the possibility of recovering them through action in the courts. With regard to outstanding wages and salaries the worker is the creditor, whereas the employer owes the duty to make social security contributions to the social insurance institutions. The latter are without a doubt a stronger potential opponent in court proceedings.

33. First of all, the argument that the 'accessibility' of the debtor is a precondition for a successful legal action cannot be dismissed out of hand. Similarly, rules on jurisdiction are often influenced by the concern to make it easier for the weaker party to pursue his claim. [21] The Italian Government's argument that an establishment on Italian territory is apt to make it easier to bring an action against the undertaking is therefore wholly convincing.

34. It may be true that, in the abstract, it is no more difficult to pursue a legal claim in another Member State. As the Italian Government expressly makes clear, however, the reason for the provision at issue is not mistrust of the courts of other Member States, but the resources of the workers affected. Since in the case of unpaid wages and salaries it is — as the Italian Govern-

17 — See Case 205/84 *Commission* v *Germany*, footnote 9, above, at paragraph 52 and Case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at paragraph 31.

18 — *Commission* v *Germany*, footnote 9, above, with further references.

19 — See *Commission* v *Germany*, footnote 9, above, at paragraph 52.

20 — See, for example, *Webb*, footnote 8, above, at paragraphs 18 and 19; Case C-272/94 *Guiot* [1996] ECR I-1905, at paragraph 16; *Arblade*, footnote 11, above, at paragraph 36 and Case C-288/89 *Gouda* [1991] ECR I-4007, at paragraph 14, with further references.

21 — See, for example, Article 6 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1); it deals with matters of jurisdiction and provides that: 'judicial proceedings may be instituted in the Member State in whose territory the worker is ... posted.'

ment rightly points out — generally not a question of very large sums of money, there is a particular risk that the cost of bringing a legal action will be disproportionately high.

35. Despite the internationalisation of the legal profession, it is also in general more expensive to pursue a claim abroad in Europe than a claim where there is no foreign element. A correspondence lawyer must be engaged (who will also charge fees), there are language barriers, which can in certain circumstances only be overcome by arranging for translations, with their attendant costs, research must in certain cases be done about the legal system in another Member State, etc. Even access to trade union representation, referred to by the Commission, which exists in Belgium and France is not straightforward for a worker resident in Italy who is claiming payment of his wages.

36. It can be assumed that in addition to the purely financial aspect, the difficulties, costs and language barriers to be expected can operate psychologically to inhibit the worker in question.

37. The question is nevertheless whether pursuit of this legitimate interest constitutes an 'indispensable condition',[22] such that the freedom to provide services in this industry is negated. Therefore a test of proportionality must be applied, to compare the means used with the aim to be achieved. The accessibility of the employer as a defendant is clearly made easier when the undertaking maintains an establishment in the State of employment. This is, however, not the only possibility for satisfying claims for wages and salaries and the corresponding social insurance obligations. In this respect it is conceivable that securities can be provided, as indeed Law No 196 also demands. In this way assets are created in the State of employment which are designed to secure the satisfaction of claims and against which if necessary judgment can be executed. The link between the claim and recourse to the securities provides an adequate remedy. Should this not already be the case,[23] the worker could be given a remedy in the place of his employment, so that the employer has to bear the potential burdens of cross-border provision of services. It would also, for example, be conceivable that the worker claiming his pay could make his claim to the authority responsible for the registration of the undertaking. The details of how a claim could be made is a matter for the Member State.

38. The lodging of a deposit as security, together with the creation of a suitable legal remedy, would in any event constitute

22 — As regards this expression, see *Commission* v *Germany*, footnote 9, above, at paragraph 52.

23 — See Article 6 of Directive 96/71, footnote 21, above.

a lesser restriction on the freedom to provide services than its complete negation. Since the requirement to establish a head office or branch office on Italian territory does not therefore constitute an *indispensable condition* for the intended worker protection, this requirement should be considered as an infringement of the freedom to provide services under Article 59 of the EC Treaty.

2. *The second complaint*

(a) The first part of the complaint

39. The first part of the second complaint relates to the requirement to lodge a guarantee amounting to ITL 700 million. As expressly pointed out by the Commission, it is directed neither to the actual requirement to lodge a guarantee nor to the amount of the required guarantee. It criticises only the fact that according to the provision at issue it is not possible to take into account comparable security, which an undertaking supplying temporary labour may in a particular case have had to provide in another Member State.

40. The requirement to lodge a deposit as security applies equally to domestic and foreign service providers. In Community-law terms it is therefore only problematic if its effect is to hinder the freedom to provide services. [24] According to the Court's settled case-law, Article 59 of the EC Treaty also requires the abolition of any restriction 'which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services'. [25]

41. The requirement to lodge a deposit of ITL 700 million as security is certainly in itself liable to be an obstacle to the freedom to provide services. Nevertheless the freedom to provide services may according to settled case-law [26] be restricted by rules 'justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established.' [27]

42. That worker protection, as pleaded by the Italian Government, has been repeatedly recognised by the Court [28] as an overriding requirement relating to the public interest has already been made clear above. [29] Nevertheless, it must further be considered whether this interest is not

24 — In support of the view that the requirement to lodge a guarantee can be in conformity with Community law, see Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, at paragraph 47.

25 — *Arblade*, footnote 11, above, at paragraph 33, with further references.

26 — Ibid., at paragraph 34, with further references.

27 — Ibid., at paragraph 34.

28 — See the case-law cited in footnote 20.

29 — See above, point 31.

protected by the provisions of the Member State in which the service provider is established and whether the same result cannot be achieved by less restrictive provisions. [30]

43. In the course of these proceedings the parties expressed differing opinions to the comparability of the guarantees lodged and as to the comparability of the claims to be secured. The Commission takes the view that the nature of the claims to be secured is not decisive. It contends that in the end it makes no difference, in substance, whether a claim by an Italian social insurance institution for contributions or a claim by such an institution in another Member State is concerned, since in any event both claims have the same legal nature. The Italian Government replies that, on the contrary, it makes a significant difference whether a claim by a domestic social insurance institution or one by another Member State is concerned, since even the demands for contributions are not in themselves identical with one another.

44. In so far as the claims to be secured are those relating to matters of worker protection, these are, on the one hand, claims for wages and salaries, and on the other, social security contributions in their widest sense. [31] Whilst payments of wages and salaries are to be made to the workers concerned, the question of which social security institution is responsible for levying the contributions also depends on the structure of the employment relationship with the worker. If this employment relationship is established in another Member State and the services of the worker 'hired out' to the undertaking regarded as the recipient of services are provided in the course of a posting, [32] then it is highly conceivable that social insurance contributions will become due to a social security institution in another Member State and not to the Italian institutions. If on the other hand, the worker is hired in Italy, the Italian social insurance institutions are surely responsible. Furthermore it is also conceivable that the undertaking utilising the labour provided pays the wages and social charges with resulting consequences as regards the competence of the social security institutions.

45. What is important, therefore, is that any guarantees lodged in other Member States serve the purpose of securing wage and salary claims and the social charges falling due. If this should be the case, then there is clearly a case of provisions intended to safeguard the same interest.

30 — See *Arblade*, footnote 11, above, at paragraph 39, with further references.

31 — See *Guiot*, footnote 20, above, which concerned the payment of employer contributions in respect of loyalty and bad-weather stamps.

32 — See Directive 96/71/EC, footnote 21, above, Article 1(3)(c) of which applies the directive to undertakings which 'being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.'

46. The Italian Government has also raised the argument that the methods of calculation of and the detailed rules governing the guarantees demanded in other Member States differ so fundamentally from those in Italy that they are not comparable. This is a question requiring the examination of circumstances which differ in the legal systems of the various Member States.

47. The Commission has expressly conceded that only equivalent provisions of a guarantee in other Member States should be taken into consideration. If the law of a Member State does not prescribe any guarantee or only for a significantly smaller amount, then the Italian State is entitled to demand that a provider of services established in another Member State lodge a deposit pursuant to Law No 196. What is decisive is the fact that, certainly not in all, but in some, Member States guarantees are similarly demanded from undertakings in order that they may operate as providers of temporary labour. According to the Italian Government, these guarantees are in some Member States quite substantial. The decisive factor however in assessing the law at issue in this case is that it contains *no* possibility of 'offsetting' the guarantees already furnished by a provider of services established in another Member State.

48. From a Community-law perspective this complete disregard for sums of money already utilised in fulfilling the same purpose is to be criticised. The Italian State is under a duty to take guarantees of that kind into account. To the extent that Law No 196 precludes this it is incompatible with the freedom to provide services within the meaning of Article 59 of the EC Treaty.

(b) Second part of the complaint

49. The second part of the second complaint relates to the establishment requirement for credit institutions with which the deposit required for the purposes of Article 2(2)(c) of Law No 196 is to be lodged. The Commission contends that this infringes both the principle of free movement of capital and the freedom to provide services. In support of its contention it relies on the judgment in *Svensson*. [33]

50. The case of *Svensson* concerned a public subsidy for loan interest under Luxembourg law. In order to benefit from the subsidised interest rate, it was provided that the bank supplying the loan had to be approved in Luxembourg. A necessary precondition for approval was that the undertaking was established on Luxembourg territory. The Court concluded that this rule infringed both Article 59 and Article 67 of the EC Treaty.

33 — Footnote 13, above.

51. Article 67 of the EC Treaty originally provided for a programme according to which all restrictions on the movements of capital were to be progressively abolished. [34] The abolition of the restrictions was to be effected by means of directives adopted on the basis of Article 69 of the EC Treaty. [35] Council Directive 88/361 of 24 June 1988 for the implementation of Article 67 of the Treaty [36] is one such directive.

52. As a result of the Maastricht Treaty, new provisions on capital and payments were introduced with effect from 1 January 1994, which led to the repeal of the original Articles 67 to 73 of the EC Treaty. It can be assumed that initially movements of capital were liberalised at the level of secondary law by means of Directive 88/361. The content of that provision was substantially incorporated into Articles 73b to 73g of the EC Treaty which, following renumbering according to the Treaty of Amsterdam, became Articles 56 EC to 60 EC. Thus in the meantime the liberalisation of capital movements has been effected at the level of private law. Directive 88/361 continues in this respect to serve as an aid to interpretation.

53. At the time, therefore, when the law at issue in this case, Law No 196, was enacted, the liberalisation of capital movements had already taken place. According to the Nomenclature for capital movements contained in Annex I to Directive 88/361, which classifies the capital movements covered by that directive, 'sureties, other guarantees and rights of pledge' granted by non-residents to residents and vice versa are covered under its heading number IX. Deposits lodged as a security under Article 2(2)(c) of Law No 196 must therefore be regarded as 'liberalised capital movements', so that it must be established whether the requirement that the credit institutions at which the deposit may be lodged must have an establishment within the Member State entails an unlawful restriction on capital movements. The requirement of establishment in any event has a restrictive effect, since it prevents a provider of temporary labour from lodging a deposit as security with a bank established in another Member State, in order to obtain the necessary licence for operating on Italian territory.

54. The only possibility of justifying this restriction is to plead an overriding requirement relating to the public interest. Purely for the purposes of argument, what is concerned here is an analogy with the freedom to provide services. The freedom of banks established in other Member States to provide services is moreover

34 — Article 67 provided:
'(1) During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence where such capital is invested.
(2) Current payments connected with the movement of capital between Member States shall be freed from all restrictions by the end of the first stage at the latest.'

35 — Article 69 of the EC Treaty provided:
'The Council shall, on a proposal from the Commission, which for this purpose shall consult the Monetary Committee provided for in Article 109c, issue the necessary directives for the progressive implementation of the provisions of Article 67, acting unanimously during the first two stages and by a qualified majority thereafter.'

36 — See OJ 1988 L 178, p. 5.

restricted or, as the case may be, prevented by the requirement to be established in Italy.

55. To justify this requirement of establishment in Italy the Italian Government has pointed to higher costs for workers, without however elaborating on this.

56. What matters here is that a security be furnished and that a judicial remedy be available for any workers whose rights may have been infringed to pursue their claims. The location of the bank where the security has been lodged is, however, not decisive for that purpose, since a worker will not pursue his claim directly against the bank. Rather he must have the possibility of obtaining a binding determination of his entitlement before any recourse can be had to the security. The problems for any workers who may have suffered damage lie therefore at a different level. Only at an advanced stage of the proceedings, should it come to enforcement of their rights, does recourse to the guarantees play any role.

57. Since the lodging of a deposit as security must be proven to the competent authorities, it may be that they too must provide assistance to the workers in the event that it proves necessary to execute judgment against the security. Such a procedure would in any event be an effective solution for the purposes of worker protection, without restricting, in this absolute form, on the one hand, the free movement of capital and, on the other, the freedom to provide services.

58. Where the employer is in breach of his duties, the social insurance institutions are also likely to take action, for which the problems of procedural accessibility are not as acute as they are for the workers.

59. Reliance on worker protection is therefore not an appropriate justification for the requirement that credit institutions with which effective security may be lodged must have an establishment on Italian territory.

60. Finally, reference should be made once again to the judgment in *Svensson*. The Commission rightly argues that the principles elaborated in that judgment fall to be applied '*a fortiori*' in the present case. On the one hand, the judgment in *Svensson* was given still on the basis of Article 67, whereas now the liberalisation of capital movements under the Treaty is to be presumed. On the other hand, the applicants in that case were able, in principle, to take advantage of the services provided by banks established in other Member States. They 'only' could not benefit from the interest rate subsidy at issue in the case. In the present case the restriction is significantly more far-reaching. Under Article 2(2)(c) of Law No 196 the possibility of taking advantage of the service provided by banks established in other Member States is wholly excluded. As a

result, it must be concluded that the requirement that banks have an establishment on Italian territory is both contrary to the principle of free movement of capital, as established in Article 73b of the EC Treaty (now Article 56 EC), and to the principle of freedom to provide services, as established in Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

61. Since, for the purposes of giving judgment in an action for failure to fulfil Treaty obligations, the material time is the date on which the period prescribed for replying to the reasoned opinion expired, a time when Law No 196 still applied in its original form, the Commission's complaint against the Italian Republic must be upheld.

VI — Costs

62. As to the decision on costs, Article 69(2) of the Rules of Procedure is to be applied, according to which the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

VII — Conclusion

63. In the light of all the foregoing considerations, I propose that the Court give judgment as follows:

(1) By requiring undertakings providing temporary labour which are established in other Member States to

— maintain their registered office or a branch office on Italian territory, and

— lodge a deposit amounting to ITL 700 million as security with a credit institution having its registered office or a branch office on Italian territory,

the Italian Republic has failed to comply with its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 73b of the EC Treaty (now Article 56 EC).

(2) The Italian Republic shall bear the costs of the proceedings.