Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 19 July 2012 [1]

Case C-577/10

European Commission
v

Kingdom of Belgium

(Failure of a Member State to fulfil obligations — Article 56 TFEU — Freedom to provide services — National legislation imposing a prior declaration requirement on service providers established in other Member States — Self-employed workers — Discrimination — Objectively justified distinction — Obstacle to the freedom to provide services — Criminal sanctions — Justifications — Prevention of fraud — Protection against unfair competition — Protection of workers — Economically dependent self-employed workers — 'False self-employed' — Proportionality — Principle of consistency)

1. By this action for a declaration of failure to fulfil obligations, the European Commission seeks to obtain from the Court a declaration that the system created by the Kingdom of Belgium imposing a prior declaration requirement on service providers established in another Member State (the 'Limosa' system) [2] is incompatible with the freedom to provide services within the meaning of Article 56 TFEU. The Commission submits primarily that that system constitutes discrimination which is not justified on any ground relating to public policy, public security or public health within the meaning of Article 52 TFEU. However, the Commission is also careful to examine, in the alternative, whether that system may be justified by the objective in the public interest relied on by the Kingdom of Belgium, arising from the need to carry out the checks essential for compliance with overriding requirements in the public interest, and concludes that it is not, on any view, necessary for the achievement of those objectives and is disproportionate.

2. Since the 'specifically applicable' character of the Limosa system, within the meaning of the Court's case-law, cannot easily be called into question, the difficulty consists in determining whether this case can be considered in the light of the analysis presented in the alternative by the Commission, as the Court has been able to do in the case of measures affecting services provided by means of the posting of employed workers.

3. Indeed, the particularity of this case lies in the fact that, unlike closely related or similar cases which the Court has dealt with up to now, where the measures at issue were those affecting service providers in so far as they operated by posting their employed workers to a Member State other than their Member State of establishment, the Limosa system is called into question by the Commission to the extent that it affects the service providers themselves as self-employed workers.

1 — Original language: French.

2 — Acronym of the Dutch 'Landenoverschrijdend Informatiesysteem ten behoeve van Migratieonderzoek bij de Sociale Administratie' ('cross-border information system for the investigation of migration by the social security administration').

4. In this Opinion, I propose that the Court should approach this action for a declaration of failure to fulfil obligations concerning self-employed workers in a manner comparable to that in which it approached the cases concerning posted employed workers, and that it should therefore go beyond the argument that the Limosa system is discriminatory and not justified by one of the objectives referred to in Article 52 TFEU, and do so by including in its analysis an examination of the overriding requirements in the public interest relied on by the Kingdom of Belgium. This will involve, more specifically, taking into account the fact that the real situation of self-employed workers may, as such, and in certain circumstances, conceal situations no less worthy of protection than that of employed workers, in particular that of 'economically dependent self-employed workers', sometimes also referred to as 'economically subordinate self-employed workers' or 'parasubordinate workers',[3] but also taking into account more irregular phenomena such as, typically, that of the 'false self-employed'. However, in so far as the Limosa system establishes a general requirement prior to the performance of a good number of services, it calls for a particularly strict examination of its necessity, its proportionality and, finally, its consistency.

I – National legislation

5. The national provisions called into question by the Commission in its action for a declaration of failure to fulfil obligations are Articles 137(8), 138, third indent, 153 and 157(3) of the loi-programme (Programme Law) of 27 December 2006,[4] in the version in force since 1 April 2007, which form part of Chapter VIII governing the prior declaration for posted employed and self-employed workers. That prior declaration is part of a wider project to create a one-stop shop for all formalities related to employment in Belgium, namely the Limosa system.

6. Article 137 of the Programme Law at issue provides:

'For the purposes of this Chapter and its implementing decrees:

…

7. "self-employed workers" shall mean all natural persons carrying out a professional activity on account of which they are not bound by a contract of employment or service regulations.

8. "posted self-employed workers" shall mean:

(a) persons referred to in point 7 carrying out temporarily or partially one or more self-employed activities in Belgium without residing there on a permanent basis and who normally work within the territory of one or more countries other than Belgium,

(b) persons coming from abroad to Belgium for the purpose of carrying out there temporarily a professional activity as a self-employed person or of settling there temporarily as a self-employed person.

…'

3 — With regard to those workers, see, inter alia, the Commission Green Paper entitled 'Modernising labour law to meet the challenges of the 21st century' (COM(2006) 708 final) and Antonmattei, P.-H. and Sciberras, J.-C., *Le travail économiquement dépendant: quelle protection*?, report to the Minister for Labour, Social Relations the Family and Solidarity, November 2008.

4 — *Moniteur belge*, 28 December 2006, p. 75178; 'the Programme Law at issue'.

7. Article 138 of the Programme Law at issue states:

‘This Chapter shall apply to:

…

posted self-employed workers;

…’

8. Article 153 of the Programme Law at issue provides:

‘Prior to carrying out his professional activity within Belgian territory, a posted self-employed worker or his agent must make, to the National Social Security Institute for Self-employed Workers, a declaration by electronic means, drawn up in accordance with Article 154 and with the detailed rules determined by the King.

Prior to the commencement of his training within Belgian territory, a posted self-employed trainee or the institution at which he pursues his studies or undergoes his vocational training must make, to the National Social Security Institute for Self-employed Workers, a declaration by electronic means, drawn up in accordance with Article 154 and with the detailed rules determined by the King.

Where the posted self-employed worker or his agent or the posted self-employed trainee or the institution at which he pursues his studies or undergoes his vocational training is unable to make that declaration by electronic means, he may send it, by fax or by post, to the National Social Security Institute for Self-employed Workers, in accordance with the detailed rules laid down by that institution.

As soon as the declaration referred to in the preceding subparagraphs has been made, the declarant shall receive an acknowledgement of receipt as provided for by Article 3 of the … Law of 24 February 2003. Where the declaration has been made by fax or by post, the National Social Security Institute for Self-employed Workers shall issue an acknowledgement of receipt by fax or by post in accordance with a model which it shall establish.

The King shall determine the period within which a prior declaration may be cancelled.

Where the posting is extended beyond the duration originally envisaged, the declarant must make a new declaration before the end of the originally envisaged duration of the posting.’

9. Article 157 of the Programme Law at issue is worded as follows:

‘Without prejudice to Articles 269 to 274 of the Penal Code, the following shall be punished by imprisonment for eight days to one year and by a fine of EUR 500 to 2 500 or by one of those sentences only:

…

3. a posted self-employed worker who has not complied with provisions of this Chapter and its implementing decrees.’

II – Pre-litigation procedure

10. By letter of 22 June 2007, the Commission drew the attention of the Kingdom of Belgium to the problems which the obligation imposed on self-employed service providers to register and declare their activities in advance under the Limosa system seemed to raise in the light of Article 49 EC (now Article 56 TFEU), and asked it to send it any information relevant for an understanding of that system as well as the reasons justifying the establishment of such a general system of declaration.

11. By letter of 12 July 2007, the Kingdom of Belgium explained the context and philosophy of the Limosa system, stressing that it pursued a number of legitimate objectives, in the circumstances of this case administrative simplification and the creation of reliable statistical information as well as improvement of the monitoring and control of foreign activities in Belgium.

12. However, by letter of 2 February 2009, the Commission reiterated its concerns regarding the Limosa system and gave the Kingdom of Belgium notice to submit its comments in that regard and to answer a number of questions. The Commission claimed that the provisions of the Programme Law at issue definitely constituted an obstacle to the freedom to provide services, and even indirect discrimination based on nationality. It took the view, moreover, that the justifications put forward by the Kingdom of Belgium did not meet any of the three requirements mentioned in Article 46 EC (now Article 52 TFEU), did not constitute overriding reasons in the public interest and did not, in any event, satisfy the proportionality test.

13. By letter of 31 March 2009, the Kingdom of Belgium responded to the observations made by the Commission in its letter of formal notice, noting, first of all, that the latter referred only to self-employed service providers and not to the circumstances in which 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 [5] was applicable. It argued that the general objective of the Limosa declaration requirement was the monitoring and control of foreign activities in Belgium for the purposes of the social protection of the legitimate interests of all the parties concerned, maintenance of the financial balance of social security schemes and action to combat benefit fraud, tax evasion and unfair competition, as well as the creation of reliable statistical information and administrative simplification. The Limosa system made it possible, in particular, to combat the phenomenon of the false self-employed and, more specifically, fraudulent practices designed to circumvent the minimum standards of Directive 96/71 concerning social protection, consisting in describing posted workers as self-employed.

14. By reasoned opinion of 8 October 2009, sent to the Belgian authorities by letter of 9 October 2009, the Commission maintained its allegations with regard to the Limosa declaration, explaining that it considered the provisions of Articles 137(8), 138, third indent, 153 and 157(3) of the Programme Law at issue to be incompatible with Article 56 TFEU in so far as they concerned self-employed service providers, while reserving the right to examine subsequently, if necessary, the situation of posted workers within the meaning of Directive 96/71.

15. By letter in response to the reasoned opinion of 11 December 2009, the Kingdom of Belgium fully maintained its position. While continuing to deny that the Limosa system could be regarded as an obstacle to the freedom of self-employed workers to provide services, it again stressed that that obstacle was, in any event, justified, in particular, by the objectives of social protection for workers, maintenance of the financial balance of the social security system and effective fraud prevention, and constituted the least restrictive means of attaining those objectives.

5 — OJ 1996 L 18, p. 1.

III – Procedure before the Court

16. Those were the circumstances in which, by application lodged at the Registry of the Court on 10 December 2010, the Commission brought the present action.

17. By order of the President of the Court of 11 April 2011, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

18. The Kingdom of Belgium, the Kingdom of Denmark and the Commission presented their oral arguments at the hearing which was held on 29 March 2012.

19. The Commission claims that the Court should:

— declare that, by adopting Articles 137(8), 138, third indent, 153 and 157(3) of the Programme Law at issue, the Kingdom of Belgium failed to fulfil its obligations under Article 56 TFEU, and

— order the Kingdom of Belgium to pay the costs.

20. The Kingdom of Belgium contends that the Court should:

— declare the action unfounded inasmuch as the Commission has not adduced proof of the alleged failure to fulfil obligations;

— declare, should the Court hold that the Commission's application is substantiated, that, at least by adopting Articles 137(8), 138, third indent, 153 and 157(3) of the Programme Law at issue, the Kingdom of Belgium did not fail to fulfil its obligations under Article 56 TFEU, and

— accordingly dismiss the action and order the Commission to pay the costs.

IV – Analysis

A – *Summary of the parties' arguments*

21. The Commission claims, primarily, that the Limosa system constitutes a discriminatory restriction on the freedom of self-employed workers to provide services, which may, where appropriate, be justified only on the grounds listed in Article 52 TFEU arising from public policy, public security or public health. Since the Kingdom of Belgium has not relied on any of those grounds of justification, the Commission therefore asks the Court to declare that it has failed to fulfil its obligations under Article 56 TFEU. The Commission confirmed at the hearing that it was seeking primarily to obtain the declaration of the Kingdom of Belgium's failure to fulfil obligations on that basis alone.

22. The Commission also stresses the fact that its action relates only to self-employed workers, and not to posted employed workers falling within the scope of Directive 96/71, and therefore, although the relevant case-law in that regard, in particular the judgment in *Commission* v *Germany*,[6] may be a point of comparison and a consideration, it is not relevant, since the specific features of the respective situations of service providers (self-employed workers) and posted employed workers preclude any systematic parallel.

6 — Case C-244/04 [2006] ECR I-885.

23. The Commission was nevertheless careful, in the alternative, to examine at length, in its application initiating proceedings, the various objectives in the public interest relied on by the Kingdom of Belgium to justify the Limosa system, as well as the necessity and proportionality of the latter, and concluded that, in any event, that system constituted an unjustified restriction on the freedom of self-employed workers to provide services.

24. By contrast, the Kingdom of Belgium, supported in its main submissions by the Kingdom of Denmark, contends that the system in question cannot be characterised as discriminatory, since, on the one hand, it also applies to Belgian nationals established in other Member States and, on the other hand, and in any event, the situation of service providers established in Belgium is not comparable to that of service providers established in the other Member States. It further contends that the Limosa system constitutes only a minimal restriction on the freedom to provide services, that its effects on that freedom are too indirect and uncertain for it to be prohibited under Article 56 TFEU and that it is, in any event, justified by overriding requirements in the public interest and perfectly consistent with the principle of proportionality.

B – *Preliminary observations*

25. It is important to note, as a preliminary point, that the Court has had occasion, many times, to hear and determine actions for declarations of failure to fulfil obligations or to answer questions referred for a preliminary ruling concerning various aspects of the application to posted employed workers either of Directive 96/71,[7] or of Article 56 TFEU,[8] and, in some instances, of both at the same time.[9] This, by contrast, is the first time that it has had brought before it a dispute of the same nature, but this time specifically concerning the service provider as a self-employed worker.[10]

26. Although it is self-evident that, as the Commission has pointed out, the Court's case-law specifically concerning Directive 96/71 is not directly relevant, inasmuch as it cannot purely and simply be transposed into the context of this case, the fact remains that the body of those decisions establishes a reference framework of judicial reasoning which can and must, at least in part, provide guidance for the answer to be given to the question raised by the present case.

27. The main idea which emerges from that case-law is that the Court adopts a cautious and nuanced approach when faced with national measures restricting the freedom to provide services which may be justified by the need to ensure, in particular, the monitoring of compliance with overriding requirements in the public interest. Even if such measures are, by their very nature, specifically applicable and could therefore, from the outset, be disqualified as discriminatory, the Court nevertheless refrains from systematically classifying them as such but, on the contrary, endeavours to examine rigorously the validity of their justifications, in so far as such justifications are relied on, as well as their necessity and proportionality.[11]

7 — Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733; Case C-60/03 *Wolff & Müller* [2004] ECR I-9553; Case C-346/06 *Rüffert* [2008] ECR I-1989; and Joined Cases C-307/09 to C-309/09 *Vicoplus and Others* [2011] ECR I-453. On the social security-related aspects of the posting of workers, see Case C-2/05 *Herbosch Kiere* [2006] ECR I-1079.

8 — Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453; 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; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189; Case C-164/99 *Portugaia Construções* [2002] ECR I-787; Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095; and Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133. On the particular case of the posting, by an undertaking in one Member State, of employed workers who are nationals of non-member States, to another Member State, see Case C-244/04 *Commission* v *Germany*; Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041; and Case C-219/08 *Commission* v *Belgium* [2009] ECR I-9213.

9 — Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323; and order of 16 June 2010 in Case C-298/09 *RANI Slovakia*.

10 — The Court has nevertheless already been required to hear cases concerning self-employed workers; see, inter alia, for tourist guides, Case C-398/95 *SETTG* [1997] ECR I-3091, for members of the Bar, Case C-309/99 *Wouters and Others* [2002] ECR I-1577; and for driving schools, the order of 19 June 2008 in Case C-104/08 *Kurt*.

11 — See, in that regard, in particular, the case-law relating to the posting of workers cited in point 25 of this Opinion.

28. That approach is, however, continually in tension with that – in the end more orthodox – which views as discriminatory any measures which are not applicable without distinction. The judgment delivered by the Court in *Commission* v *Germany* [12] is particularly illustrative of that duality and of the careful attention paid by the Court to the grounds of justification put forward by Member States when such mandatory monitoring requirements are in issue. [13]

29. Although it is true that the general approach followed by the Court in the various abovementioned cases which are analogous to this case does not always seem to be completely consistent with the rest of the case-law concerning the freedom to provide services or with the case-law relating to the other freedoms, the fact remains that those are nevertheless fundamental considerations which explain and justify it.

30. It is necessary, in that regard, to stress the fact that the Court has pointed out, on a number of occasions, that it has recognised that the Member States have the power to verify compliance with the provisions of national and European Union law in respect of the provision of services [14] or acknowledged the validity of monitoring measures needed to verify compliance with requirements themselves justified on grounds in the public interest, [15] always making it clear that such checks must observe the limits imposed by European Union law [16] and cannot, in any circumstances, render the freedom to provide services illusory. [17]

31. In *dos Santos Palhota and Others*, [18] in particular, the Court pointed out that Member States remained, inter alia, free to define, in compliance with the FEU Treaty and the general principles of law, the ancillary administrative rules designed to enable compliance with the substantive national rules on the terms and conditions of employment of posted workers, coordinated by Directive 96/71, to be monitored. [19]

32. Following a slightly different line of thought, the Court has also acknowledged that the Member State in which the service is provided could, within certain limits and in strict compliance with European Union law, take measures to prevent the freedom guaranteed by Article 56 TFEU from being diverted from its purpose or used by a service provider for fraudulent purposes. [20]

33. However, the Kingdom of Belgium and the Kingdom of Denmark maintain in essence that the distinction between the two categories of service providers made by the Programme Law at issue is objectively justified by the difference between their situations in terms of the checks which those Member States consider that they must be able to continue carrying out, in the absence of

12 — Case C-490/04, paragraphs 83 to 88.

13 — In that case, the Court was called upon to examine two aspects of the German rules concerning the posting of workers. Firstly, it held that the measure requiring the employer to retain certain documents in German, and thus imposing an obligation to translate on employers not established in a German-speaking Member State, was justified by the need to allow effective monitoring of compliance with legal obligations under those rules. Secondly, it held that the measure requiring temporary employment undertakings established in other Member States to communicate in writing various items of information on the placement of a worker with a user of his services in Germany was specifically applicable, not justified on grounds connected with public policy, public security or public health provided for in Article 52 TFEU, and therefore contrary to Article 56 TFEU.

14 — Case C-168/04 *Commission* v *Austria*, paragraph 43, and Case C-244/04 *Commission* v *Germany*, paragraph 36.

15 — *Arblade and Others*, paragraph 39; Case C-493/99 *Commission* v *Germany* [2001] ECR I-8163, paragraph 20; and *dos Santos Palhota and Others*, paragraph 48. See, inter alia, Gardenés Santiago, M., 'Le détachement transnational de travailleurs dans le cadre des prestations de services: un sujet spécialement difficile pour le marché intérieur', in *Mélanges en l'honneur du Professeur Joël Molinier*, LGDJ, Lextenso éditions, 2012, p. 255, especially p. 259.

16 — Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.

17 — On this 'criterion', in addition to the judgment in Case C-244/04 *Commission* v *Germany*, paragraph 36, see also point 71 of the Opinion of Advocate General Léger in Case C-168/04 *Commission* v *Austria*, and point 62 of the Opinion of Advocate General Mengozzi in Case C-46/08 *Carmen Media Group* [2010] ECR I-8149.

18 — Paragraphs 26 and 27.

19 — See also Case C-490/04 *Commission* v *Germany*, paragraph 19, and *Laval un Partneri*, paragraph 60.

20 — On this idea, see Case 33/74 *van Binsbergen* [1974] ECR 1299, paragraph 13; Case 39/75 *Coenen and Others* [1975] ECR 1547, paragraph 9; Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 22; Case 130/88 *van de Bijl* [1989] ECR 3039, paragraph 26; and Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 12.

harmonisation of national laws, inter alia in the field of employment and labour,[21] checks which are themselves necessary for the protection of the overriding requirements in the public interest additionally relied on by the Kingdom of Belgium, arising from action to combat fraud in general and 'false self-employment' in particular, from the prevention of unfair competition and social dumping and from the protection of workers.

34. Consequently, and following the general guidance which emerges from the case-law, I shall examine in turn whether the Limosa system constitutes an obstacle to the freedom to provide services (subheading 1), whether it may, in some circumstances, be justified on overriding grounds in the public interest (subheading 2) and, if so, whether it is perfectly consistent with the requirements arising from the principle of proportionality (subheading 3).

C – *Examination of the Limosa system in the light of the freedom to provide services*

1. A discouraging system constituting an obstacle to the freedom to provide services

35. There is little doubt that the Limosa system constitutes an obstacle to the freedom to provide services, from the point of view both of the service providers concerned and of the recipients of those services established in Belgium.

36. The very heart of the Limosa system, its inspiration, so to speak, is, first of all, discouraging to service providers wishing to pursue their activities in Belgium, simply because it requires them, on the one hand, to register by creating an account and, on the other, to declare, normally in advance of each service, using the particulars of that account, a number of items of detailed information including, inter alia, the date, duration, nature and place of performance of the service and the identification data of the customer established in Belgium. Those formalities definitely constitute a considerable administrative burden, in particular for tradesmen and small businesses who do not have the appropriate staff to carry them out and more especially for the provision of services of very short duration requiring very rapid intervention.

37. Furthermore, the Limosa system is also discouraging for recipients of services, in so far as it requires them to report service providers who do not present to them the acknowledgement of receipt proving that the Limosa declaration has been made, on pain of criminal sanction.

38. The Kingdom of Belgium, however, contends that the Limosa system produced too negligible or too indirect and uncertain an effect on the freedom to provide services to be classified as an obstacle.

39. Those two arguments must be rejected. Quite apart from the fact that the Court has never, in the context of the freedom to provide services, accepted arguments of that nature, it will simply be observed that, as the Commission has pointed out, although the extent or intensity of the restrictive effect of a measure on the freedom to provide services may, where appropriate, be taken into account in the examination of its proportionality, it cannot preclude the actual classification of that measure as restrictive.[22]

21 — *Finalarte and Others*, paragraph 73.

22 — See, to that effect, Case C-244/04 *Commission* v *Germany*, paragraph 33.

40. The Limosa system can therefore be allowed only on condition that it can be justified by overriding requirements in the public interest, provided that the interest protected is not safeguarded by the legislation of the Member State of establishment, that it complies fully with the requirements of clarity, legal certainty [23] and consistency, and that it remains fully proportionate, that is to say that it does not exceed that which is objectively necessary for that purpose and that the result cannot be achieved by less restrictive rules. [24]

2. Plausible justifications

41. It is apparent from the main arguments put forward by the Kingdom of Belgium and the responses given by the Commission that the obstacle to the freedom to provide services constituted by the Limosa system may be justified by objectives in the public interest arising, firstly, from the protection of self-employed workers, but also, more widely, from the protection of economically dependent self-employed workers and from the protection of employed workers through action to combat 'false self-employment', which I shall analyse subsequently.

42. The Kingdom of Belgium has relied on three series of justifications, the first arising from the prevention of unfair competition, viewed in its social dimension, which includes action to combat social dumping, [25] the second arising from maintenance of the financial balance of social security and from the need to prevent fraud and combat abuse, and in particular to take action to combat false self-employment, and the third arising from the need to ensure the protection of self-employed workers themselves, their terms and conditions of employment and work and, in particular, their health and safety, in relation to European Union requirements, [26] as the Kingdom of Denmark has pointed out.

43. The Commission claims, in that regard, that the Kingdom of Belgium has merely relied on the objectives of combating fraud and the risk of circumvention of the rules governing the free movement of workers by the 'false self-employed', without advancing the slightest specific evidence making it possible to assess the necessity and proportionality of the measures adopted. In so doing, as the Kingdom of Belgium has pointed out, the Commission accepts in principle the validity of monitoring measures necessary to combat fraud and abuse, while disputing that the Limosa system, in view of its philosophy and specific rules of application, can satisfy the criteria of necessity and proportionality.

23 — Case C-319/06 *Commission* v *Luxembourg*, paragraphs 77 to 82.

24 — Case 205/84 *Commission* v *Germany*, paragraphs 27 and 29; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 30 and 31; and Case C-255/09 *Commission* v *Portugal* [2011] ECR I-10547, paragraph 72.

25 — The Kingdom of Belgium refers, in this regard, to *Wolff & Müller*, and *Laval un Partneri*.

26 — See, in particular, Council Recommendation 2003/134/EC of 18 February 2003 concerning the improvement of the protection of the health and safety at work of self-employed workers (OJ 2003 L 53, p. 45); see also Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 245, p. 6).

44. It must be pointed out, to begin with, that there is no doubt that the need to ensure the protection of the health and safety of self-employed workers, or even, more widely, their terms and conditions of employment and work,[27] constitutes an objective worthy of protection, which is different from the exceptions to the freedom to provide services based on public health or public security which are referred to in Article 46 EC, and that, in the absence of harmonisation of laws in this respect,[28] it constitutes an overriding requirement in the public interest which is capable of justifying a restriction on the freedom to provide services.

45. It is sufficient, in that regard, to recall that primary law, and in particular Articles 3(3) TEU, 9 TFEU and 31 of the Charter of Fundamental Rights of the European Union, now guarantees a high standard of social protection for workers, without always distinguishing employed workers from others and that, as I have already had occasion to state in my Opinion in *dos Santos Palhota and Others*,[29] it is now important to take account of those provisions in the interpretation of the provisions of primary law defining the freedoms.

46. It is important here to state that the high standard of protection for which the European Union must strive must benefit all workers, employed as well as self-employed, but also all workers who find themselves in an intermediate situation, since particular attention is called for with regard to economically dependent self-employed workers or equivalent.[30]

47. The Court has, moreover, had occasion to accept as an overriding requirement in the public interest capable of justifying a restriction on the freedom to provide services the prevention of fraud in general, including in the field of games of chance,[31] or tax evasion in particular,[32] but it has not yet had occasion to examine that justification in a context such as that of the present case.

27 — In very general terms, and without going into the details at this juncture, what is at issue here is the monitoring of compliance with core national, European and international labour standards. I shall confine myself, in that regard, to mentioning Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 1988 L 299, p. 9), which falls within European Union social policy and the scope *ratione personae* of which is not defined in terms of the relationship of subordination between a worker and his employer.

28 — On the sharing of competences between the Member States and the European Union in the matter, see Opinion 2/91 [1993] ECR I-1061, paragraphs 13 to 21, with regard to Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work. It will be observed that, in its abovementioned Green Paper entitled 'Modernising labour law to meet the challenges of the 21st century', the Commission stressed that 'the problem of persons posing falsely as self-employed workers to circumvent national law should be dealt with primarily by Member States'.

29 — Points 51 to 53.

30 — It is important, in this regard, to point out that the classification of a self-employed person falls within the competence of the Member States, even though the Court has had occasion to point out that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article; see Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 71.

31 — See, inter alia, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 75; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46; Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 56; and Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 26.

32 — Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 81; Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraph 45; and Case C-153/08 *Commission* v *Spain* [2009] ECR I-9735, paragraph 36.

48. Although it does not seem that the European Union legislature has, up to now, viewed the 'false self-employed' as a specific problem,[33] or even that it has ever sought to define what that reality might cover,[34] the fact remains that this phenomenon is referred to in a number of documents[35] and that figures showing its extent can be found,[36] which is sufficient to enable an assessment to be made of the justification relied on by the Kingdom of Belgium.

49. In this instance, it must be acknowledged that the need to combat the phenomenon of the false self-employed and to carry out the necessary checks for that purpose constitutes an overriding requirement in the public interest capable of justifying a restriction on the freedom to provide services. That requirement, which makes it possible, in particular, to ensure compliance with the minimum standards of Directive 96/71, relates to the protection of workers, long affirmed by the Court as an overriding requirement in the public interest.[37]

33 — See, however, European Parliament resolution on the application of Directive 96/71 (OJ 2006 C 313E, p. 452), which '[c]alls for exchanges to be encouraged between Member States' employment inspection services to enable a joint campaign against sham self-employment, particularly by exchanging information', and European Parliament resolution of 6 May 2009 on the renewed social agenda (OJ 2010 C 212E, p. 11), which '[i]nvites the Commission to take initiatives that will lead to a clear distinction between employers, genuine self-employed and small entrepreneurs on the one hand and employees on the other' (point 33). See, above all, answer from the Commission to Written Question No E-5333/2009 by Proinsias De Rossa, concerning an EU initiative on a clear distinction between genuine self-employment and bogus self-employed (OJ 2011 C 10E), which mentions ongoing studies on all those questions and refers to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 24 October 2007, entitled 'Outcome of the Public Consultation on the Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century"' (COM(2007) 627 final, pp. 7 and 8).

34 — See, however, in that regard, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), which, in recital 87 in the preamble, recognises the right of Member States to determine the existence of a distinction between self-employed persons and employed persons, including 'false self-employed persons', while making it clear that '[a]ny activity which a person performs outside a relationship of subordination' must be classified as an activity pursued in a self-employed capacity for the purposes of Articles 43 EC (now Article 49 TFEU) and 49 EC. It can be inferred from this that a false self-employed person is a person who engages in an activity in the context of a relationship of subordination with a third party while making himself or being made out to be a self-employed person, with the objective of circumventing the minimum standards laid down in Article 3(1) of Directive 96/71. That being stated, it is self-evident that the status of self-employed worker involves numerous differences in social, tax and economic terms as compared with the status of employed worker.

35 — See, in addition to the Green Paper entitled 'Modernising labour law to meet the challenges of the 21st century' and the communication from the Commission which followed it (both mentioned above), Case C-161/07 *Commission* v *Austria* [2008] ECR I-10671; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 April 2012, entitled 'Towards a job-rich recovery' (COM(2012) 173 final, point 2.1.1); Commission White Paper of 1 July 2011 entitled 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (COM(2011) 144 final, point 8); and Own-initiative opinion of the European Economic and Social Committee on 'New trends in self-employed work: the specific case of economically dependent self-employed work' (OJ 2011 C 18, p. 44), which excludes false self-employed persons from the scope of its investigation. See also, on the health and safety at work of false self-employed persons, Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work', COM(2007) 62 final (OJ 2008 C 224, p. 88).

36 — Opinion of the European Economic and Social Committee on 'Work and poverty: towards the necessary holistic approach' (own-initiative opinion) (OJ 2009 C 318, p. 52), which cites, among the factors leading to in-work poverty, worker insecurity, of which the phenomenon of the false self-employed is a significant manifestation with nearly 29 million persons concerned, in particular in the construction and public works sector. The Commission points out, however, in its pleadings, that the data in that regard are few, as shown by a report commissioned from Prof. Jorens, Y., '*Self-employment and bogus self-employment in the European construction industry*', European Federation of Building and Woodworkers (www.efbww.org). See also Grignan, F., *Le BTP français face à l'élargissement de l'Europe*, rapport d'information No 28 (2006-2007), Sénat, 18 October 2006 (www.senat.fr).

37 — See, inter alia, *Mazzoleni and ISA*, paragraph 27; *Portugaia Construções*, paragraph 20; and *Wolff & Müller*, paragraph 35.

50. The objective of combating false self-employment could also relate to the objective of preventing unfair competition, which the Court has affirmed as an overriding requirement in the public interest, [38] and more broadly to the objective of preventing social dumping, relied on by the Kingdom of Belgium, [39] to the extent that, as pointed out by the Commission in its pleadings, it contributes to the attainment of the objective of social protection for true employed workers which the false self-employed are.

51. Although it can be acknowledged that the Limosa system reflects overriding reasons in the public interest, such as the protection of the health and safety of self-employed workers and action to combat false self-employment, the restrictions on the freedom to provide services which it involves can, however, be tolerated only to the extent that it is perfectly proportionate, that is to say, appropriate for ensuring attainment of the objectives which it pursues and that it does not go beyond what is necessary to attain them.

3. Requirements disproportionate to the objectives pursued

52. The Commission claims that, in any event and quite apart from its discriminatory character, the Limosa system, by virtue of its philosophy, scope and rules of application, exceeds by far what can be tolerated under European Union law.

53. It points out, firstly, that the Limosa system constitutes an inversion of the rule, namely freedom to provide services, and of the exception to it and that, in the light of its extremely wide and overarching scope and preventive character, it establishes a general presumption of fraud not based on any statistical evidence. Secondly, it doubts the consistency of the Limosa system and whether that system is capable of attaining the objectives declared by the Kingdom of Belgium, since any possibility of unexpected on-the-spot checks is excluded in cases where service providers are either exempt from the obligation to declare or subject only to a simplified declaration. It submits, finally, that, in the light of the obligations of administrative cooperation incumbent on Member States, and in particular those established by Directive 2006/123, the Limosa system is not necessary in order to attain the objective of combating fraud in general and false self-employment in particular.

54. It must, first of all, be pointed out that, on the one hand, the period for the transposition of Directive 2006/123 expired on 28 December 2009, that is, a date subsequent to the date of the reasoned opinion, and, on the other hand, as the Kingdom of Belgium has noted, the mechanism which it establishes has been actually operational only since the entry into force of the practical measures for its implementation. [40] Consequently, that directive cannot be taken into consideration in the assessment of the present action for a declaration of failure to fulfil obligations. The proportionality of the Limosa system will therefore be examined primarily in the light of the Court's

38 — See *Wolff & Müller*, paragraph 41; the Court held that the prevention of unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay could constitute an overriding requirement in the public interest.

39 — See Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive', COM(2011) 20 final (OJ 2011 C 318, p. 109, points 4.4 and 4.11). In the field of transport, see Opinion of the European Economic and Social Committee on 'Road transport - working time of self-employed drivers' (OJ 2009 C 27, p. 49), points 1.4, 3.3, 4.8, and 4.14); Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities (OJ 2009 C 228, p. 78).

40 — Commission Decision 2009/739/EC of 2 October 2009 setting out the practical arrangements for the exchange of information by electronic means between Member States under Chapter VI of Directive 2006/123/EC (OJ 2009 C 263, p. 32).

case-law, while it must be stressed that, although the cooperation mechanism established by Directive 2006/123 may, in appropriate circumstances, be a reference point,[41] it shows, first and foremost, the need to create instruments enabling the Member States to exercise their supervisory powers in strict compliance with, in particular, the principles of freedom to provide services and of proportionality.

55. It should, moreover, be pointed out that the Commission claims that it is the Limosa system in itself, namely its philosophy and operation, which must be characterised as unnecessary and/or disproportionate, and not only specific aspects of it, such as the sanctions to which it is subject or the obligation for the service provider to produce the acknowledgement of receipt proving that the prior declaration formalities have been completed.

56. It must, in that regard, be recalled that the Court has had occasion to find, in a number of cases concerning the posting of employed workers, that a simple prior declaration requirement could constitute a necessary and appropriate means enabling the Member State in whose territory the service is performed to check that the freedom to provide services is not being used for a purpose other than provision of the service concerned or that the situation of the workers concerned is lawful as regards matters such as conditions of residence, work permit and social coverage in the Member State of establishment of the service provider.[42]

57. In this instance, it can, in principle, be accepted that the obligation of prior declaration of the date and place of performance of a service and of the name of the recipient of that service, which the Limosa system imposes on service providers established in a Member State other than the Kingdom of Belgium, is necessary for the performance of checks essential to ensure both compliance with the minimum standards of Directive 96/71 concerning social protection (combating false self-employment) and protection of the terms and conditions of employment and work of self-employed workers (protection of the genuine self-employed). Clearly, in the absence of such information, it is practically impossible for the Member State in which the service is provided to carry out unexpected on-the-spot checks. Furthermore, in the absence of mechanisms of administrative cooperation between Member States and unlike the prevailing situation with regard to self-employed workers established in its territory, it is practically impossible for the Member State in which the service is provided to seek and obtain rapidly the information essential for the performance of such checks.

58. However, the fact that a prior declaration mechanism such as the Limosa system is necessary for the checks essential to ensure compliance with overriding requirements in the public interest is not sufficient for it to be concluded that that system is perfectly compatible with the principle of freedom to provide services. Such a system must, first of all, be appropriate for fully ensuring attainment of the objectives pursued and the obligations which it imposes must not represent an excessive burden for

41 — As, indeed, may the work carried out in connection with the revision of the legislative framework on the posting of workers; see Proposal for a Directive of the European Parliament and of the Council of 21 March 2012 on the enforcement of Directive 96/71/EC (COM(2012) 131 final), and Commission staff working document 'Impact assessment – Revision of the legislative framework on the posting of workers in the context of provision of services' (SWD(2012) 63 final).

42 — See Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 46; Case C-244/04 *Commission* v *Germany*, paragraph 41; and Case C-219/08 *Commission* v *Belgium*, paragraph 16.

the traders concerned in the light of the intended objectives, bearing in mind that it must, in addition, not be possible to attain those objectives by means of less restrictive rules. It must also meet the requirements of clarity and legal certainty [43] and comply with the principle of consistency, [44] an issue which must be examined before anything else.

59. Yet, in the first place, the prior declaration requirement of the Limosa system is subject to a substantial number of exceptions, although neither the reasons justifying them nor the criteria governing their definition are clearly apparent and although the Kingdom of Belgium has not provided, in the light of the objectives pursued, the slightest explanation as to their rationale.

60. However, while the need to ensure the conditions for the possibility of unexpected on-the-spot checks is obvious in the interests of the protection of workers, that requirement should, in principle, apply to all service providers, unless it clearly makes a distinction based on an objective difference arising, for example, from the nature of the services provided.

61. In the absence of any explanation provided by the Kingdom of Belgium in that regard, it is clear that the choices thus made are not consistent with the declared objectives, that the Limosa system does not fully enable those objectives to be attained and that the restrictions on the freedom to provide services which it involves are therefore not in accordance with the principles of necessity and proportionality.

62. Moreover, in the second place, the requirements of the Limosa system are considerably reduced in certain cases, since self-employed service providers carrying out a substantial part of their activities in Belgium are subject, according to the explanations given by the Kingdom of Belgium, only to a simplified declaration, valid for 12 months and not involving a declaration prior to each service, whereas that possibility is excluded for the building and construction sectors.

63. Although, in this respect as well, the Limosa system does not appear to be fully consistent with the objectives pursued, it is also clear that the existence of the simplified declaration casts doubt on the strict proportionality, and even the necessity, of the 'normal' declaration.

64. In the light of the foregoing considerations, I am of the view that the Limosa system, as established by the Programme Law at issue so far as self-employed workers are concerned, is not compatible with Article 56 TFEU and that the application for a declaration of failure to fulfil obligations brought by the Commission must, therefore, be granted.

65. The Kingdom of Belgium must, accordingly, be ordered to pay the costs, in accordance with Article 69(2) of the Court's Rules of Procedure.

43 — Case C-319/06 *Commission* v *Luxembourg*, paragraphs 77 to 82.

44 — As the Court has held many times, legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner; see Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55; Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 53; and Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* [2011] ECR I-6919, paragraph 85. See, as regards the case-law on gaming, point 38 of the Opinion of Advocate General La Pergola in Case C-124/97 *Läärä and Others* [1999] ECR I-6067; also, inter alia, Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 35 and 36; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 62 and 67; and *Placanica and Others*, paragraph 53. In other contexts, see Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraphs 39 and 40; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42; Case C-28/09 *Commission* v *Austria* [2011] ECR I-13525, paragraph 126; and Joined Cases C-357/10 to C-359/10 *Duomo Gpa and Others* [2012] ECR, paragraph 47. On this point, see Mathisen, G., *Consistency and coherence as conditions for justification of Member States' measures restricting free movement*, CMLR, 2010, p. 1021.

V – Conclusion

66. In conclusion, I propose that the Court should:

(1) declare that, by adopting Articles 137(8), 138, third indent, 153 and 157(3) of the Programme Law of 27 December 2006, in the version in force since 1 April 2007, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU;

(2) order the Kingdom of Belgium to pay the costs.