OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 12 July 2007 [1]

1. In these parallel sets of proceedings under Article 226 EC, the Commission submits that Austria and Germany have failed to fulfil their obligation to ensure freedom to provide services by requiring private bodies, approved in another Member State to provide inspection services in the area of organic farming, to have at least a permanent infrastructure in their respective territories in order to provide the same services there.

2. The cases raise issues concerning the extent of Community harmonisation in the field of such inspections and the possible justification of restrictions on the freedom to provide inspection services on the ground either that the services involve the exercise of official authority or that the restrictions embody overriding requirements, in the general interest, in relation to consumer protection.

1 — Original language: English.

Community law

The EC Treaty

3. Article 49 EC prohibits restrictions on the freedom to provide services within the Community 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.

4. By virtue of Article 55 EC, Article 45 EC applies to the freedom to provide services enshrined in Article 49. The first paragraph of Article 45 states:

'The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.'

Regulation No 2092/91

5. Regulation No 2092/91 [2] lays down Community rules on the production, labelling and inspection of organically produced agricultural products and foodstuffs.

6. The preamble explains, in particular, that there should be a framework of such rules in order to protect organic farming, ensure fair competition between producers, give the market for organic products a more distinctive profile and improve the credibility of such products in the eyes of consumers; [3] that, in the interests of producers and purchasers, minimum principles should be laid down; [4] and that all operators and all stages of production and marketing should be subject to regular inspection, meeting minimum Community requirements and carried out by designated inspection authorities and/or by approved and supervised bodies. [5]

7. Articles 1, 2 and 4 of the Regulation list the products covered and indications referring to organic production, and define various terms. Article 3 states that the Regulation is to apply without prejudice to other provisions of, or national provisions in conformity with, Community law. Article 5 lays down conditions for labelling and advertising to refer to organic production methods, while Article 6 sets out the rules of production (defined at greater length in Annex I) which the term 'organic production method' implies.

8. Articles 8 and 9 concern the inspection system. In particular, Article 9 provides:

'1. Member States shall set up an inspection system operated by one or more designated inspection authorities and/or by approved private bodies ...

...

3. The inspection system shall comprise at least the application of the precautionary and inspection measures specified in Annex III.

2 — Council Regulation (EEC) of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1) as amended ('the Regulation'). The applicable consolidated version may be consulted on http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1991/R/01991R2092-20020323-en.pdf.

3 — See the fifth recital.

4 — See the eighth recital.

5 — See the 12th and 13th recitals.

4. For the application of the inspection system operated by private bodies, Member States shall designate an authority responsible for the approval and supervision of such bodies.

5. For the approval of a private inspection body, the following shall be taken into account:

(a) the standard inspection procedure to be followed, containing a detailed description of the inspection measures and precautions which the body undertakes to impose on operators subject to its inspection;

(b) the penalties which the body intends to apply where irregularities and/or infringements are found;

(c) the availability of appropriate resources in the form of qualified staff, administrative and technical facilities, inspection experience and reliability;

(d) the objectivity of the inspection body vis-à-vis the operators subject to its inspection.

6. After an inspection body has been approved, the competent authority shall:

(a) ensure that the inspections carried out by the inspection body are objective;

(b) verify the effectiveness of its inspections;

(c) take cognisance of any irregularities and/or infringements found and penalties applied;

(d) withdraw approval of the inspection body where it fails to satisfy the requirements referred to in (a) and (b) or no longer fulfils the criteria indicated in paragraph 5 or fails to satisfy the requirements laid down in paragraphs 7, 8, 9 and 11.

...

7. The inspection authority and the approved inspection bodies referred to in paragraph 1 shall:

(a) ensure that at least the inspection measures and precautions specified in Annex III are applied to undertakings subject to their inspection;

...

8. Approved inspection bodies shall:

(a) give the competent authority, for inspection purposes, access to their offices and facilities, together with any information and assistance deemed necessary by the competent authority for the fulfilment of its obligations pursuant to this Regulation;

(b) send to the competent authority of the Member State by 31 January each year a list of operators subject to their inspection ...

9. The inspection authority and inspection bodies referred to in paragraph 1 shall:

(a) ensure that, where an irregularity is found regarding the implementation of Articles 5 and 6 or of the measures referred to in Annex III, the indications provided for in Article 2 referring to the organic production method are removed ...;

(b) where a manifest infringement, or an infringement with prolonged effects is found, prohibit the operator concerned from marketing products with indications referring to the organic production method for a period to be agreed with the competent authority of the Member State.

...

11. As from 1 January 1998 and without prejudice to the provisions of paragraphs 5 and 6, approved inspection bodies must satisfy the requirements laid down in the conditions of standard EN 45011. [6]

6 — Which covers requirements for bodies operating product certification systems.

...'

9. Article 10 provides for an indication and/or logo to appear on the labelling of products subject to an inspection scheme; in that regard, Article 10(3) imposes on inspection bodies enforcement obligations equivalent to those in Article 9(9).

10. Article 10a, covering general enforcement measures, provides:

'1. Where a Member State finds irregularities or infringements relating to the application of this Regulation in a product coming from another Member State and bearing indications as referred to in Article 2 and/or Annex V, it shall inform the Member State which designated the inspection authority or approved the inspection body and the Commission there[of].

2. Member States shall take whatever measures and action are required to prevent fraudulent use of the indications referred to in Article 2 and/or Annex V.'

11. Annex III sets out in some detail the minimum inspection requirements and precautionary measures under the inspection scheme laid down by Articles 8 and 9. Annex V lists the indications and logos which may be used on labelling, in different languages.

12. In accordance with Article 9(1) of the Regulation, both Austria and Germany opted to set up an inspection system operated by private bodies.

Austrian law

13. There is currently no legislative requirement that private inspection bodies must be established in Austria in order to carry out their activities there. It is however common ground that, in order to approve such bodies, the Austrian authorities in fact require at least the presence of a branch office with the necessary staff, administrative and technical facilities.[7]

14. In answer to written questions from the Court, Austria explained that the governors

7 — The Commission notes that a current draft law contains an express requirement that, in order to be approved, inspection bodies must be established in Austria.

of the different *Länder* are the competent authorities for the purposes of Article 9 of the Regulation. They are responsible for granting or rejecting applications for approval from potential private inspection bodies, for ensuring that reporting procedures are followed and for supervising approved inspection bodies' activities. They are also empowered to withdraw approval.

15. Approved private inspection bodies do not themselves have power to impose or enforce any penalties. They merely make recommendations to the governors of the *Länder*. They may, however, grant certain individual derogations provided for in the Regulation (again, under the supervision of the governors of the *Länder*).

German law

16. Under the federal system in Germany, implementation of the Regulation is a matter for the individual *Länder*. In 1994 an ad hoc working group (*Arbeitsgemeinschaft*) formed by the *Länder* drew up a set of guidelines to promote uniform application of the inspection system. Although the guidelines were intended to be recommendations, the *Länder* partially transformed them into binding administrative provisions. [8]

17. Points 1 and 2 of the guidelines made the competent authorities of the different *Länder* responsible for the approval and supervision of private bodies to carry out the inspection procedure under Article 9 of the Regulation.

18. Point 2.1 states: [9]

'... An inspection body may be authorised only if it has a business location in the EU. An inspection body which has no domestic establishment may apply for authorisation only if it has appointed a representative who is resident in [Germany] ...

Delegation [of authority] to inspection bodies is possible ...'

8 — See *Schlussbericht* of 4 October 2002 of the *Forschungsinstitut für biologischen Landbau*, Berlin, under point 3.3.1.

9 — I quote the version of 6 April 2001. In its letter of notification the Commission refers to an earlier version with different numbering.

19. On 10 July 2002 Germany adopted the Organic Farming Law [10] ('ÖLG') to implement, inter alia, Regulation No 2092/91. In accordance with Paragraph 15 of the ÖLG, certain provisions came into force on the day following publication, namely on 16 July 2002, and the remainder on 1 April 2003.

20. Of the provisions which were thus in force at the material time in the present case, [11] Paragraph 2(3) empowered the *Länder* to delegate supervision of the observance by producers and operators of the Regulation wholly or in part to inspection bodies or to other natural or legal persons in private law, or to assign them a cooperative (participatory) role in such duties.

21. Of the remainder, it may be noted that under Paragraph 3(1), where the *Länder* have not delegated supervision, inspection bodies are to carry out the inspection provided for in the Regulation 'in so far as the execution of the duties does not involve the exercise of an administrative procedure', and that Paragraph 4(1)(4) renders more express and rigorous the effect of the earlier guidelines by requiring a place of business in Germany as one of the conditions for authorisation of an inspection body.

Case C-393/05

22. In 1999 the Commission received a complaint from a private inspection body established and approved in Germany. It appears that the body had originally been approved for providing services in Austria but that the approval was withdrawn because it had no place of business there.

23. Following two requests for information, the Commission sent Austria a letter of formal notice dated 8 November 2000, setting out its view that the requirement that a private inspection body based and approved in another Member State should have a place of business or an establishment in Austria in order to carry out inspections there contravened Article 49 EC. Austria replied by letter of 25 April 2001. On 16 October 2002, the Commission issued a reasoned opinion.

10 — Gesetz zur Durchführung der Rechtsakte der Europäischen Gemeinschaft auf dem Gebiet des ökologischen Landbaus — ÖLG (Öko-Landbaugesetz) of 10 July 2002 (BGBl. I 2002 47, p. 2558 of 15 July 2002).

11 — In an action under Article 226 EC, the relevant time for assessing whether national provisions are compatible with a Member State's obligations under Community law is the end of the period laid down in the Commission's reasoned opinion (see most recently Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383, paragraph 48). In the present case that period was two months from transmission of the reasoned opinion, dated 16 October 2002.

24. After considering Austria's response of 23 December 2002, the Commission brought the present action on 4 November 2005, asking the Court to declare that, 'by requiring private inspection bodies in the area of organic farming which are located and approved in another Member State to maintain a business location or other permanent infrastructure in Austria in order to carry out their activities there, the Republic of Austria has failed to comply with its obligations under Article 49 EC', and to order Austria to pay the costs.

25. Initially, Austria requested a hearing, but later withdrew that request. No hearing was therefore held.

Case C-404/05

26. By letter of formal notice dated 8 November 2000, the Commission informed Germany of its view that the requirement that a private inspection body based and approved in another Member State should have a place of business or an establishment in Germany in order to carry out inspections there contravened Article 49 EC. Germany replied by letter of 19 February 2001. The Commission issued a reasoned opinion on 16 October 2002.

27. After considering Germany's response of 13 February 2003, the Commission brought the present action on 17 November 2005, asking the Court for a declaration in respect of the Federal Republic of Germany in the same terms as the declaration sought in respect of Austria, and to order Germany to pay the costs.

28. No hearing was requested and none has been held.

Assessment

29. It is common ground that the arrangements in force in Austria and in Germany in fact hinder the provision of services under the Regulation by inspection bodies established and approved in other Member States but without a place of establishment in Austria or Germany, as the case may be. The Commission maintains that the requirement for such a body to have a place of establishment in the host Member State negates its freedom to provide services under Article 49 EC.

30. A preliminary issue concerns the level of harmonisation introduced by the Regulation. Germany argues that the Regulation exhaustively harmonises the inspection system which it puts in place, so that the fundamental Treaty freedoms are no longer the yardstick against which to test the legality of a Member State's domestic law. Austria, in contrast, considers that the Regulation does not harmonise all aspects of the approval and supervision of private inspection bodies, so that both the Treaty provisions on freedom to provide services and the justifications for derogations from those provisions must apply to the aspects which are not harmonised.

31. Next, Austria and Germany raise, essentially, two defences.

32. First, they maintain that the activity of private inspection bodies entails an exercise of official authority within the meaning of the first paragraph of Article 45 EC.

33. Second (and in Germany's case in the alternative), they invoke overriding reasons of general interest [12] to justify the requirement that an inspection body operating within their national territory should also be established there.

The extent of harmonisation effected by the Regulation

34. According to the Court's case-law, where Community legislation exhaustively regulates activities in a harmonised manner, national provisions are to be assessed in the light of the relevant provisions of that legislation rather than articles of the Treaty. [13]

35. Behind that principle lies the (reasonable) assumption that the Council, in putting in place total harmonisation in a given field, will have done so in a way that is compatible with the fundamental freedoms enshrined in the Treaty. For that reason, since total harmonisation has already been achieved, the compatibility of the national legislation in such cases falls to be assessed by reference to the harmonising regulation, rather than the Treaty itself.

12 — As a ground of justification developed in the Court's case-law; see, for example, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

13 — See Case C-221/00 *Commission* v *Austria* [2003] ECR I-1007, paragraph 42, and the case-law cited there.

36. Conversely, while areas excluded from Community harmonisation remain within the competence of Member States to regulate, in doing so they must respect the basic freedoms guaranteed by the Treaty. [14] The Court has already applied this principle to a situation in which Community legislation harmonises certain aspects of inspection procedures but not the place of establishment of inspection bodies, ruling that it is contrary to Article 49 EC for a Member State to require an undertaking to be established in its territory in order to be approved as such a body. [15]

37. In the present case, it seems clear to me that harmonisation of inspection activities is not complete. [16]

38. The use of the terms 'minimum' and 'framework' in the preamble already indicates less than exhaustive harmonisation. In the same vein, Article 9(3) and (7)(a) refer to ensuring that 'at least' the inspection measures and precautions specified in Annex III are applied.

39. Most significantly, however, Article 3 expressly states that the Regulation is to apply 'without prejudice to other Community provisions or national provisions, in conformity with Community law', concerning its subject matter.

40. The Regulation is silent as to the provision of services in one Member State by a private body established and approved in another Member State. I find it difficult to read Article 3 as excluding such services from the scope of Article 49 EC. Austria's and Germany's requirement that inspection bodies should also have a business establishment on their respective national territories therefore falls in my view to be assessed in the light of that article and of any justifications for derogating therefrom which flow from the Treaty or from the Court's case-law.

14 — See Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 24 and the case-law cited, and Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 26.

15 — Case C-257/05 *Commission* v *Austria*, not published in the ECR, paragraph 18 and operative part. The Community legislation in question was Directive 97/23/EC of the European Parliament and of the Council of 29 May 1997 on the approximation of the laws of the Member States concerning pressure equipment (OJ 1997 L 181, p. 1).

16 — It may be added that, as the Commission observes, Regulation No 2092/91 is not based on the second paragraph of Article 45 EC, which allows the Council to rule that the provisions of the chapter on freedom to provide services are not to apply to certain activities.

The problem raised by the Regulation

41. Given the fact that cross-border service provision is not covered in the Regulation, it may be helpful at this juncture to take stock of the legal position.

42. Regulation No 2092/91 lays down certain minimum requirements for produce bearing a Community indication or logo attesting to organic production methods. It requires Member States to set up a system for overseeing the production and labelling of such produce. At the choice of the Member State, that system may be placed in the hands of one or more State inspection authorities and/or of private inspection bodies approved and supervised by a State authority. The inspection system must itself ensure the application of certain minimum measures.

43. Where Member States have opted to place inspection exclusively in the hands of one or more State authorities, questions of cross-border service provision do not arise. By virtue of the decision taken, private bodies will not be competent to carry out inspections in such Member States, whatever their nationality and wherever their place or places of establishment. A State's own authorities, by their very nature, will not be competent to carry out inspections outside their territory.

44. Where private inspection bodies approved in one Member State wish to offer their services in another Member State which has opted to give such bodies responsibility for inspection, the Regulation lays down no rules and provides no guidance. In principle such bodies must none the less be entitled to offer their services, pursuant to Article 49 EC and subject to any limitations on that entitlement which are authorised by the Treaty or by the Court's case-law.

45. However, practical difficulties arise, and it is understandable that Member States should seek to address them.

46. Approved inspection bodies must, inter alia, give the supervisory authority access to their offices and facilities (Article 9(8) of the Regulation). The supervisory authority must, inter alia, ensure that the inspections carried out are objective and verify their effectiveness (Article 9(6)).

47. Compliance with those obligations raises questions if the supervisory authority and the inspection body are in different Member States. May a supervisory authority verify within its own territory the inspections carried out by a body approved by the authority of another Member State? May it require access to the offices and facilities of

an inspection body in another Member State, either where it has itself approved the body or where the body is approved in the other Member State? May it verify the inspections carried out in another Member State by a body which it has itself approved? Is there a danger that an inspection body may escape supervision in respect of services which it provides in a Member State other than that in which it is approved?

48. Austria and Germany, which have both opted for an inspection system carried out by approved private bodies, have answered those questions by requiring permanent establishment (or, in Germany's case — at least under the guidelines — representation, which may be assimilated to establishment [17]) within their territory as a prerequisite for approval for providing inspection services there.

49. However, it would also seem feasible (and proportionate) for any difficulties to be resolved by means of cooperation between Member States' authorities. It is not for this Court to prescribe the means in question — that is the role of the Community legislature — but during the pre-litigation phase of both of the present cases the Commission outlined a possible abbreviated authorisation procedure for that purpose. [18]

50. A general requirement of the kind enforced by Austria and Germany thus appears contrary to Article 49 EC, unless it is justified on permissible grounds. Two such grounds are put forward by Austria and Germany.

Exercise of official authority

51. By virtue of Article 45 EC (read in conjunction with Article 55 EC), Article 49 EC does not apply to activities which are connected, even occasionally, with the exercise of official authority in a given Member State.

17 — See Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21. See also, in a different field, Article 3 of Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (OJ 1988 L 172, p. 1).

18 — The procedure it proposed would take into account elements already duly verified in the home Member State, but the host Member State would be entitled to satisfy itself that the inspection body (i) had qualified personnel, administrative and technical facilities to carry out inspections on its territory and could guarantee its experience, reliability and objectivity; (ii) would carry out adequate supervision in accordance with Article 9(6), and in particular inform the competent authority systematically and efficiently of any irregularities and infringements; (iii) would apply correctly the criteria of the inspection system.

52. As a derogation from a fundamental Treaty freedom, Article 45 must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect. [19] Thus, it covers only activities which in themselves are directly and specifically connected with the exercise of official authority. [20] That excludes functions that are merely auxiliary and preparatory vis-à-vis a body which exercises official authority by taking the final decision. [21] The test which the Court applies to determine whether an activity constitutes the exercise of official authority under Article 45 is whether decisions of a person or entity carrying out that activity are binding. [22]

53. In the present cases, approved private inspection bodies are subject to the supervision and control of the competent authority in their home Member State. The private bodies themselves carry out the necessary inspections under the Regulation. They may apply sanctions, including those listed under Articles 9(9) and 10(3), for infringements by the operators. As Germany points out, they can also grant certain derogations.

54. That said, the system put in place by the Regulation is one in which, essentially, the inspection bodies operate a product certification system under the supervision of the competent authority. [23] A useful parallel, within the Court's Article 45 EC case-law, seems to me to be the duties carried out by the insurance commissioners in *Thijssen*. [24] There, the commissioners were approved and supervised by the Belgian Insurance Inspectorate, a public body. An insurance undertaking was obliged to appoint an approved commissioner, who had to provide the inspectorate with a report on the undertaking and inform it of infringements and any other matter that could prejudice the financial position of the undertaking. The commissioner had power to suspend, for up to eight days, implementation of a decision which might constitute an offence. [25]

55. The Court held that the duties of the commissioners were auxiliary and preparatory to the functions of the inspectorate,

19 — Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 7; Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 34; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45.

20 — Case 2/74 *Reyners* [1974] ECR 631, paragraph 45, and *Servizi Ausiliari Dottori Commercialisti*, paragraph 46 and the case-law cited.

21 — Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22.

22 — See *Reyners*, paragraphs 52 to 53, *Thijssen*, paragraph 21, and Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, paragraph 7.

23 — Indeed, under Article 9(11) of the Regulation they have to comply with EN 45011, which covers requirements for bodies operating product certification systems.

24 — *Thijssen*, cited in footnote 21 above.

25 — *Idem*, paragraphs 11 and 16 to 19. See also the report for the hearing.

which took final decisions. Thus, they did not have a direct and specific connection with the exercise of official authority. That also applied to the power of temporary veto, since the final decision was taken by the inspectorate, which was not bound by the commissioner's veto. [26]

56. On that basis, the Regulation itself does not indicate or imply that the duties carried out by approved private inspection bodies involve the exercise of official authority as understood by the Court.

57. What of the way in which, in practice, the Regulation has been implemented in Austria and Germany?

58. It appears that practice in Germany varies according to the *Länder*. Some *Länder* have opted to delegate powers to private inspection bodies or to assign them a participatory role. In others, private inspection bodies operate exclusively within private law. In all cases, however, the inspection bodies are subordinate to the relevant competent authority.

59. The competence of inspection bodies to impose sanctions varies considerably among the *Länder*. Some can impose, either on their own or in cooperation with the competent authority, some or all of the measures provided for in Article 9(9) and Article 10(3) of the Regulation. In other cases those measures are imposed by the *Länder* authorities. Where authority has been delegated, such competences are administrative. However the measures may also be provided for in the contract between the inspection bodies and the producers, thus coming within private law. The power to enforce sanctions (as well as to sanction certain infringements) is, with few exceptions, reserved to the competent authorities.

60. The position in Austria is more straightforward. It is the governors of the *Länder* who both supervise the approved private inspection bodies and, acting on their (non-binding) advice, sanction infringements.

61. The nearest the approved private inspection bodies come to performing an official act is issuing certificates. In my view, such activity does not constitute the exercise of official authority for the purposes of Article 45 EC. [27]

26 — *Idem*, paragraphs 21 to 22.

27 — See *Thijssen*, referred to in points 54 and 55 above.

62. Moreover, nothing in the present cases suggests that a total restriction on the freedom to provide cross-border private inspection services to a host Member State which has opted to allow such inspection services to be carried out by approved private bodies established on its territory is 'strictly necessary' to safeguard any interests of the Member States concerned. [28]

63. The Regulation does not preclude Member States from delegating administrative powers to inspection bodies; and Austria and Germany are of course therefore free to do so. However, they must not thereby restrict fundamental freedoms.

64. Austria places considerable reliance upon *Van Schaik* [29] (which concerned the issuing of test certificates for cars). Advocate General Jacobs considered that such an activity was not connected with the exercise of official authority. [30] The Court held that 'the grant by the Netherlands State of recognition ... to garages established in other Member States involves the extension outside the national territory of rights and powers pertaining to the exercise of State authority and, consequently, does not fall within the scope of Article [49] of the Treaty.' [31]

65. However, it is unclear whether the exercise of public authority to which the Court there referred was the grant by the Netherlands of recognition to garages in other Member States, or the specific activity of car certification. If the latter, it is surprising that the Court gave no reasoning for its finding (nor even mentioned what is now Article 45 EC) given, first, its own case-law restricting the scope of this derogation and, second, the contrary view expressed by the Advocate General. In my view, *Van Schaik* is therefore not of assistance in deciding the present cases.

66. I conclude that the activities of approved private inspection bodies do not constitute the exercise of official authority within the meaning of Article 45 EC.

Overriding reasons of general interest

67. As an alternative to the Article 45 derogation, both Member States invoke

28 — See point 52 above.

29 — Case C-55/93 [1994] ECR I-4837.

30 — See point 17 of his Opinion.

31 — At paragraph 16 of the judgment.

consumer protection as an overriding interest. They consider that requiring a private inspection body to be established on the national territory is proportionate to that aim, being necessary to ensure objectivity and a high standard of supervision. A supervisory authority's duties under Article 9(6) of the Regulation are continuous. They can be carried out effectively only if the inspection bodies are located in the same country as the competent authority. The procedure under Article 10a whereby other Member States and the Commission are informed of product irregularities cannot be extended by analogy to the inspection bodies. Inspection bodies undertake different tasks according to the obligations placed upon them by their home Member State. Consequently, the level of supervision also differs. A simplified approval procedure, as advocated by the Commission, would therefore be ineffective.

68. According to the Court's case-law, overriding reasons of general interest may justify a restriction imposed by a national measure on the freedom to provide services where that interest is not already protected by Community harmonisation measures [32] or safeguarded by provisions to which the provider of services is subject in the Member State of its establishment. [33] However, such a restrictive measure must apply to all persons or undertakings pursuing an activity in the Member State of destination and may be justified only if it is necessary to protect the interests which it aims to guarantee and that aim cannot be protected by less restrictive means. [34]

69. Consumer protection is capable of constituting an overriding reason relating to the general interest [35] and the establishment requirement in both Austria and Germany applies to all private inspection bodies seeking to provide services.

70. However, while not containing a complete harmonisation of the field of organic farming, [36] the Regulation provides harmonised criteria on the basis of which supervision will conform to the same minimum standards throughout the Community. Consequently, if an inspection body is established in another Member State where its offices and facilities are supervised by the competent national authority, that is sufficient to render unnecessary any duplication of the same supervision by Austria or

32 — Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 12, and *Commission* v *Austria*, cited in footnote 15 above, paragraph 23.

33 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 17, *Gebhard*, cited in footnote 12 above, paragraph 38, and Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 21 and the case-law cited.

34 — *Collectieve Antennevoorziening Gouda*, paragraphs 12 and 15 and the case-law cited, and *Parodi*, paragraph 21.

35 — *Collectieve Antennevoorziening Gouda*, paragraph 14.

36 — See point 40 above.

Germany, as the case may be, and to rule out any justification for a requirement of establishment in the host State. [37]

71. In my view, the defendant Member States' argument based on overriding reasons in the general interest should therefore be rejected.

The form of declaration sought

72. I turn finally to a point of detail, which is not without significance.

73. The declaration sought by the Commission in both cases is to the effect that the Member State has failed to comply with Article 49 EC by requiring inspection bodies located and approved in another Member State to maintain at least a permanent infrastructure in its own territory *in order to carry out their activities* there.

74. However, the practice [38] in both Austria and Germany, as described in the pleadings, is that such bodies are required to maintain at least a permanent infrastructure in the national territory *in order to be approved* there, and that they may not carry out inspection activities there unless they are approved by the national authorities.

75. The case-file thus reveals a more complex situation than that in the declaration sought by the Commission. Since the situation described in the pleadings encompasses the situation described in the declaration sought, there is no obstacle to granting the Commission's application in both cases. The difference does however have repercussions as regards the remedial action which should be taken by the Member States.

76. Essentially, if an inspection body approved in one Member State is to be allowed to provide its services freely, but subject to proper supervision, in another Member State, then the second Member State has two options. It may either approve the body itself, on the basis of the original

37 — See, by analogy, *Commission* v *Austria*, cited in footnote 15 above, paragraphs 26 to 27, a case concerning the freedom of boiler inspectors to provide services. Regulation No 2092/91 is however quite different from the Community legislation at issue in Case C-106/91 *Ramrath* [1992] ECR I-3351, on which Austria relies in its defence. That legislation expressly requires Member States to carry out the relevant assessments in accordance with national law. See *Ramrath*, paragraph 34.

38 — It will be recalled that, at least at the material time for the assessment of the compatibility of the national rules, those rules were embodied essentially in administrative practice rather than legislation.

approval, and then subject the body's activities within its territory to its own supervision, or it may accept the inspection body without further approval and supervise its activities in cooperation with the supervisory authority in the home Member State. Although it is not for the Court to prescribe a particular course of action, and it is regrettable that the legislature has not done so, either approach would seem to me to be acceptable vis-à-vis Article 49 EC.

Costs

77. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. I am of the view that the application should be granted in both cases, and the Commission has applied for costs against both Germany and Austria.

Conclusion

78. I therefore recommend that the Court should:

in Case C-393/05,

— declare that, by requiring private inspection bodies in the area of organic farming which are located and approved in another Member State to maintain a business location or other permanent infrastructure in Austria in order to carry out their activities there, the Republic of Austria has failed to comply with its obligations under Article 49 EC;

— order the Republic of Austria to pay the costs;

and, in Case C-404/05,

— declare that, by requiring private inspection bodies in the area of organic farming which are located and approved in another Member State to maintain a business location or other permanent infrastructure in Germany in order to carry out their activities there, the Federal Republic of Germany has failed to comply with its obligations under Article 49 EC;

— order the Federal Republic of Germany to pay the costs.