OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 14 September 2010 [1]

1. The European Commission has brought an action under Article 226 EC accusing the Portuguese Republic of infringing Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2] in so far as it has failed to adopt the relevant measures to make it applicable to the profession of notary in Portugal.

2. As in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08, which also concern the profession of notary, in this case it must also be determined first of all whether the first paragraph of Article 45 EC, which provides an exemption for activities which are connected with the exercise of official authority, is applicable here. [3] However, unlike in the aforementioned cases, the Commission is not challenging the existence of nationality clauses, since such a limitation does not, in principle, exist in Portugal. The grounds for these proceedings lie in the existence of a system for access to the profession of notary in Portugal which is the diametric opposite of that required by the Community legislation, in particular Directive 2005/36 concerning professional qualifications.

1 — Original language: Spanish.

2 — OJ 2005 L 255, p. 22.

3 — It should be pointed out here and now that, although the civil-law notary that forms the subject of these proceedings is still the most common in Europe, he coexists in the European Union with other variants that do not fall within the scope of the first paragraph of Article 45 EC. This may be either because the notary is an integral part of the public administration or because the acts he performs do not carry the authority of authentication in the sense in which that term is used here. Finally, the situation in Europe has become even more diverse in recent years as a result of the abolition of the nationality clause in some States which operate a system of civil-law notaries (Italy, Spain).

I — Legal framework

A — *Community law*

3. Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [4] provided for a transposition period which, under Article 12 of the Directive, expired on 4 January 1991.

4. Article 2 of the directive provided:

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall not apply to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by Member States.'

5. The profession of notary has not been regulated by any instrument referred to in the second paragraph of the above article.

6. Directive 89/48 was repealed and codified by Directive 2005/36. The new wording retains the essential content of Directive 89/48 but recital 41, which is a new departure from its predecessor, provides as follows:

'This Directive is without prejudice to the application of Articles 39(4) and 45 of the Treaty concerning notably notaries.'

B — *National law*

7. In Portugal, the profession of notary is regulated by Ministry of Justice Decree-Laws 26/2004 and 27/2004 of 21 April 2004. By Decree 398/2004, also of 21 April 2004, the government adopted the regulation laying down the rules governing the award of the title of notary. That set of provisions liberalised the profession of notary in Portugal, the functions of which had previously been carried out by officials of the administration under a body of rules governed by public law.

8. Article 1 of Decree-Law 26/2004 provides that 'a notary is a lawyer whose written documents, drawn up in the course of his duties, confer authenticity'.

4 — OJ 1989 L 19, p. 16.

9. A notary is simultaneously an official who authenticates legal instruments and an independent professional who acts on a completely independent and impartial basis. The aforementioned Article 1 also states that the public and private characters of the function of notary are inseparable.

10. As Portugal recognised in its defence, authentication is the main activity of the profession of notary. Authentication is an act of delegation by the State to the notary, in whom it vests the power to confer authenticity. According to Article 21 of Decree-Law 26/2004, the symbol of notarial intervention is the seal, or its equivalent number, of which the notary is the sole owner. Notaries intervene on the instruction of parties and guarantee the legality of the instruments they execute for them; they also file and keep those instruments.

11. Under Article 371 of the Portuguese Civil Code, authenticated documents are endowed with confirmed probative force which may be challenged only through extraordinary procedural channels (Article 372 of the Civil Code). Article 46 of the Code of Civil Procedure also states that authentication confers executive force on the document.

12. Under Article 25 of Decree-Law 26/2004, access to the profession of notary is subject to four conditions: the candidate must not be disqualified from performing public duties; he must possess a degree in law recognised by Portuguese legislation; he must successfully complete a period of training; and he must have passed the competition for access to the profession held by the Notarial Council.

13. Although the function of notary is an independent activity, under Article 6 of Decree-Law 26/2004, access to the profession is subject to a *numerus clausus*. Notaries also practise in a defined territorial area, the judicial district, and only on being granted a licence to practise. Notaries' fees are calculated on the basis of scales approved by the Ministry of Justice laying down minimum and maximum amounts, although there is provision for the possibility of freedom on pricing in respect of certain notarial services.

II — Pre-litigation and litigation proceedings

14. On 21 December 2001, the Commission sent Portugal a letter of formal notice stating that Directive 89/48 had not been transposed in respect of the profession of notary. Portugal replied by letter of 17 June 2002 in which it maintained that the government was preparing a reform of the legislation in this area.

15. On 18 October 2006, the Commission sent Portugal a reasoned opinion calling on it to terminate the infringement within a period of two months. Portugal replied to that

opinion by letter of 24 January 2007 stating that Portuguese notaries participate directly and actually in the exercise of official authority and that they are not therefore subject to the freedom of establishment or to the secondary legislation implementing that freedom.

16. The relevant national legislative framework for the purposes of these infringement proceedings is therefore that of 18 December 2006, the date on which the period granted by the Commission to the defendant Member State in the reasoned opinion expired.

17. On 12 February 2008, the Commission brought an action for failure to fulfil obligations before the Court of Justice under Article 226 EC. This was followed by the exchange of statements of defence, reply and rejoinder between the applicant and the defendant Member State respectively. The United Kingdom has also intervened in support of the Commission, while the Czech Republic, Lithuania, Slovenia and Slovakia have intervened in support of Portugal.

III — Forms of order sought by the parties

18. The Commission claims that the Court should:

— declare that, by failing to transpose Directive 2005/36, in particular as regards access to the profession of notary, the Portuguese Republic has failed to fulfil its obligations under that directive;

— order the Portuguese Republic to pay the costs.

19. For its part, the Portuguese Republic contends that the Court should dismiss the action as unfounded and order the Commission to pay the costs.

IV — Admissibility of the action

20. The Slovenian Government, as intervener, raises a plea of inadmissibility by reason of the provisions relied on by the Commission. In its opinion, the Commission accused Portugal of infringing Directive 89/48 during the pre-litigation stage of these infringement proceedings, but now, at the litigation stage, it has accused it of infringing Directive 2005/36, which replaces the previous directive.

21. This plea cannot be upheld.

22. The Court has consistently held that the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. It is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to assess whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached. [5]

23. However, as the Court has repeatedly stated, although the claims as stated in the application cannot in principle be extended beyond the infringements alleged in the operative part of the reasoned opinion and in the letter of formal notice, it is none the less true that, where Community law is amended during the course of the pre-litigation procedure, 'the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a directive, subsequently amended or repealed, and which were maintained in force under the new provisions'. [6]

5 — Order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraphs 17 and 18.

6 — See, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 36, and Case C-145/01 *Commission* v *Italy* [2003] ECR I-5581, paragraph 17.

24. As the Commission has pointed out, a comparative study of those provisions shows that Directive 2005/36 consolidated and codified the provisions of Directive 89/48. Consequently, the majority of the obligations imposed on the Member States under Directive 89/48 remain applicable under Directive 2005/36.

25. It follows that the plea of inadmissibility must be dismissed, since it refers to the obligations arising from Directive 2005/36, which were already applicable under the repealed directive.

V — The plea of infringement

26. In these proceedings, the Commission accuses the Portuguese Republic of having failed to transpose Directive 2005/36 in respect of the profession of notary. For its part, Portugal contends that the first paragraph of Article 45 EC is applicable to that profession and that the aforementioned directive is not therefore applicable to the activities of notaries.

27. I do not consider it appropriate here to reiterate in their entirety the arguments already set out in detail in my Opinion, delivered today, in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08. I

shall therefore confine myself to stating the main lines of argument put forward in that Opinion in order then to apply them to the Portuguese case.

A — *Activities connected with the exercise of official authority within the meaning of Article 43 EC and the first paragraph of Article 45 EC*

28. In so far as Portugal relies on the first paragraph of Article 45 EC in order to justify its failure to transpose Directive 2005/36, it is necessary first of all to examine the content of that provision.

29. Strictly speaking, Article 43 EC and the first paragraph of Article 45 EC constitute a single unit of legislation formed of a rule (freedom of establishment) and an exception (activities connected with the exercise of official authority) which thus define its scope. It is the interplay between those two provisions that will determine the rule by reference to which this case will be resolved. What we have here therefore is not a rule (Article 43 EC) the application of which is simply subject to an *exception* (the first paragraph of Article 45 EC), but a different rule: the rule determining the scope of the freedom of establishment in the context of the exercise of activities *not* connected with participation in the exercise of official authority. That is the scope of the very freedom guaranteed by the Treaty, and it is in this light that the Commission's claim that Articles 43 EC and 45 EC have been infringed must be understood.

30. Once it is concluded that an activity is indeed connected with the exercise of official authority, a proportionality test should be carried out. Within the context of the aforementioned provisions, a proportionality test is carried out, where appropriate, by undertaking an examination similar to that which the Court has employed in its case-law,[7] which considers (1) the impact of the measure adopted, on the one hand, and (2) the degree to which the activity in question is connected with the exercise of official authority. The more direct or immediate the connection is, the greater the range of measures covered by the first paragraph of Article 45 EC will be. The less direct the connection is, the fewer the measures justifiable under that provision will be, in terms of both their quantity and their impact.

31. However, the main difficulty of interpreting Article 43 EC and the first paragraph of 45 EC lies, as is foreseeable, in the precise definition of 'official authority'.

7 — See, among some of the most recent judgments, those in Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 61 et seq., and Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46. On the principle and its role in the determination of the scope of the freedoms, see Tridimas, T., *The General Principles of EU Law*, 2nd ed., Ed. Oxford University Press, Oxford, 2006, p. 193 et seq., and Galetta, D.-U., *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè Editore, Milan, 1998, p. 103 et seq.

32. As I have already explained in my Opinion in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08, the case-law offers little assistance when it comes to analysing the nature or quality of 'official authority' as referred to in the provision at issue. [8]

33. A definition of what constitutes official authority within the meaning of the first paragraph of Article 45 EC [9] must of necessity begin with some *prior understanding* of the concept of official authority as a common component of the theory of the State, which term necessarily includes the European Union in that it is a community of States. [10]

34. In this sense, 'official authority' is, above all, 'authority', that is to say the capacity to impose a form of conduct consistent with an irresistible will. On the basis of a readily accepted understanding of the term, and in its fullest sense, that capacity is held exclusively by the State, that is to say, the institution that is the embodiment of the legal system as the instrument for the administration and organisation of legitimate force. [11] Official authority is, therefore, sovereign power, *qui superiorem non recognoscens in regno suo*.

35. This means that official authority is the supreme source of legitimate force in the State, which it administers either for the benefit of the existence of the State and the achievement of its aims (general interest) or in the service of legitimate expectations of conduct held by certain individuals in relation to others (private interest), in the latter case, always in accordance with the conditions established previously. [12]

8 — See, inter alia, Case 2/74 *Reyners* [1974] ECR 631; Case C-3/88 *Commission* v *Italy* [1989] ECR 4035; Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717; Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221; Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363; Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219.

9 — The various versions of which, moreover, make indiscriminate use of two terms which are in theory capable of conveying different shades of meaning; these are 'official authority' and 'public power'. For example, 'official authority' is used in the French ('l'exercice de l'autorité publique'), English ('the exercise of official authority'), Portuguese ('exercício da autoridade pública'), Romanian ('exercitării autorității publice') and Maltese ('l-eżerċizzju ta' l-awtorità pubblika') versions, whereas the expression 'public power' is preferred in the Spanish ('ejercicio del poder público'), German ('Ausübung öffentlicher Gewalt'), Italian ('esercizio dei pubblici poteri') and Swedish ('utövandet av offentlig makt') versions.

10 — Notwithstanding that the last word on the meaning of the term must lie with European Union law, it being clearly understood that the Court of Justice, as the supreme interpreter of that law, will always take as the starting point for its definition the different ways in which the Member States interpret the term. See, inter alia, M. Schlag, 'Art. 45', *EUI-Kommentar* (J. Schwarze, ed.), 2nd edition, Nomos, Baden-Baden, 2009.

11 — See, inter alia, in an extensive biblgiography, A. Passerin d'Entreves, *La dottrina dello Stato*, Giappichelli, Turin, 1962.

12 — This obviously leaves out of account the force monopolised by another State, which exists harmoniously alongside that of the first State provided that the respective areas of sovereignty defined by international law are observed.

36. Of course, the purpose served by the force monopolised and administered by the State is one of the first criteria to be taken into account when it comes to drawing the dividing line between official authority and individuals.

37. In this regard, the criterion most traditionally used to identify official authority is the capacity of the body exercising official authority to impose its will unilaterally, that is to say without requiring the consent of the person subject to the relevant obligation. An individual, on the other hand, may secure the acceptance of his will by another individual only with the latter's consent.

38. Taking this line of reasoning a step further, it is important to take into account the fact that the modern State is a much more sophisticated form of organisation of authority than those which existed previously. The latter boiled down to the administration of physical coercion through extraordinarily simplified procedures for defining the conditions for its use. Accordingly, in order to define the phenomenon of official authority in all its complexity, it is now all but impossible not to start from an understanding based on the logic of the legal system in which that authority is exercised.

39. In this connection, the legal system is a process for organising the exercise of legitimate force which may, where appropriate, result in the application of that force to a specific situation. That being so, there should be no reason not to accept the proposition that the acts which the system finally adopts (that is to say where the process of legitimate force leads to an act which terminates that process, giving it definitive status) appear to be the fullest expression of the legal order. [13]

40. On that premiss, the decisive criterion for classifying an act as emanating from official authority would then be the nature of its relationship with the legal system operated in the State. More specifically, the nature of an activity would have to be regarded as constituting participation in the exercise of official authority depending on the extent to which that activity forms part of (*belongs to*) the legal system. The criterion, therefore, would not be whether it is merely in conformity with the legal system but whether it is an act integral to that system. [14]

13 — On the view of the legal system as a succession of applications traceable back to an initial provision of positive law constituting the expression of sovereign authority, see, by way of example, H. Kelsen, *Reine Rechtslehre*, 2nd ed., Deuticke, Vienna, 1960.

14 — Accordingly, in order to determine whether or not a specific activity participates in the exercise of official authority, it is not necessary to attribute that activity to one of the three branches of government and/or functions of the State, that is to say the legislature, the executive or the judiciary, in particular the judiciary, as the arguments put forward in these proceedings show.

41. In this respect, the courts may be seen as the most typical expression of official authority. Indeed, their rulings provide a definitive statement of the law and, in this context, become indistinguishable from the legal system itself. [15] By the same token, however, it is also fair to say that official authority is exercised by a body whose acts are capable of enjoying that status without the need for *iurisdictio*. Firstly, the law is executive in its own right, as are provisions adopted by the administrative authorities or orders made by the law enforcement agencies. These acts and provisions are always open to judicial review, but they do not in any event require '*authorisation*' in order to produce immediate effects.

42. It is clear from the foregoing that no individual can create legal acts capable of being imposed on a third party other than through the intervention of official authority. It having been established that individuals may not employ force, it follows that the assertion of individual rights always requires official authorisation. Official authority is not confined in such cases to *reviewing* an act capable of producing in and of itself a binding effect on a third party, such as acts of the administration, the executive or the legislature. On the contrary, in such cases, the body exercising official authority always *establishes* the obligation which the individual wishes to assert against a third party. Such obligations may have arisen from a concurrence of wills (contract/operative principle), but the individual can do nothing to enforce them without the intervention of official authority.

43. It is therefore appropriate to conclude from the foregoing, albeit with the degree of generalisation required here, that, among the features that identify official authority in the various national traditions, regard is to be had to its capacity to define an act, provision or form of conduct as corresponding to the will of the State as formalised through its legal system. That, after all, is a lowest common denominator shared by all those traditions, under which the capacity to define a specific will as corresponding to the general will of the State is regarded as the decisive criterion in drawing the dividing line between the public and the private spheres.

44. The foregoing considerations should make it possible to address with a greater degree of confidence the central question posed by the activities of notaries.

45. In the light of the foregoing considerations, it is appropriate to conclude that, in

15 — A. Merkl, *Die Lehre von der Rechtskraft*, Deuticke, Leipzig, 1923.

performing the function of authentication, notaries in Portugal directly and specifically perform an official activity in the sense that they thus expedite for individuals an authorisation to exercise subjective rights which they would otherwise have to request on a case-by-case basis. Notarial intervention relieves them of the need to seek the intervention of another body exercising official authority in order to assert the fact declared to be authentic by the notary and therefore confers on the authenticated instrument a conclusive value under public law which can henceforth be challenged only before the courts (in the same way, moreover, as any measure of official authority can). Obviously, it is not immunity from judicial review — impossible anyway in a State governed by the rule of law — that determines whether a body acts in the exercise of official authority, but the conclusive presumption of the legitimacy of its own acts and, consequently, some degree of rigour in the conditions necessary for their review.

46. Obviously, notaries do not employ coercion or impose any obligations unilaterally. However, as we have seen, this is not the only criterion for determining whether a body acts in the exercise of official authority. Authentication confers official status on instruments drawn up by individuals, in the sense that it gives them advance legal value which, without notarial intervention, the individuals would of necessity have to seek from an(other) body exercising official authority in order to render those instruments effective in law. This form of official authority is exercised in the sphere closest to that of the private individual, the latter sphere being pre-eminently characterised by free will. However, taking into account its capacity to make what is purely private public and thus to give it the force inherent in official authority, it unquestionably has a public dimension.

47. The fact that, because they have a less 'intimate' connection with the exercise of official authority in the strictest sense of that term (through their connection with the powers of sovereign authority), the activities of notaries may be subject to less strict conditions than are applicable to the authorities most closely involved in the expression of sovereignty is another matter.

48. Consequently, in so far as authentication matches the characteristics of that function, I consider it to be an activity which participates directly and specifically in the exercise of official authority, since it gives a special status to documents, provisions and forms of conduct that would otherwise have no more legal value than the expression of a private will.

49. In so far as authentication constitutes the inseparable core of the functions performed by notaries in the Portuguese Republic, it must therefore be stated that the profession of notary in general and taken as a whole is connected directly and specifically with the exercise of official authority. [16]

B — *The applicability of Directive 2005/36 to the profession of notary*

50. Recital 41 of Directive 2005/36 states that 'this Directive is without prejudice to the application of Articles 39(4) and 45 of the Treaty concerning notably notaries'. The legislature, albeit with all the ambiguity of that statement, seems implicitly to suggest that the answer to the question whether the activities of notaries fall within the scope of the first paragraph of Article 45 EC *will determine* the answer to the question whether the directive is applicable to the profession of notary.

51. In its application, the Commission rightly rules out the possibility that recital 41 of Directive 2005/36 may serve as a parameter for interpreting the first paragraph of Article 45 EC. The statement that the directive makes in this regard is not decisive for the purposes of establishing whether or not the activities of notaries should be classified as exercising official authority. However, the Commission recognises that, where an activity is connected with the exercise of official authority, the recital confirms that Article 43 EC and the first paragraph of Article 45 EC are applicable. The Commission's application therefore shows that, in the event that an activity such as that of notaries, not viewed in the abstract but in the light of the specific circumstances of the case, is connected with the exercise of official authority, the provisions of Directive 2005/36 will not be applicable.

52. For the reasons given in points 45 to 48 of this Opinion, I consider that the profession of notary in Portugal, as it was organised on 18 December 2006, was directly and specifically connected with the exercise of official authority. Consequently, I agree with the Commission and must conclude that Directive 2005/36 was not applicable to the activities of notaries in Portugal at that time.

53. The Republic of Portugal has argued, mainly at the hearing, that the profession of notary has been the subject of various reforms designed to introduce greater competition into the sector. The agent for the Republic of Portugal informed the Court that, in order to achieve that result, the Portuguese legislature has removed the obligation that

16 — See *Reyners*.

previously required a significant number of legal transactions to be executed by notary, it now being possible for these to be executed before other professionals. Where that is the case, this fact might be sufficiently significant in some instances to invalidate the classification of the activities of notaries adopted in this Opinion. However, such changes cannot be considered here, since the relevant date for the purposes of these proceedings is the time-limit laid down by the Commission for termination by the defendant Member State of the infringements referred to in the reasoned opinion. As I said earlier, that date was 18 December 2006.

54. Moreover, the fact that the view is taken in this Opinion that the profession of notary in Portugal is connected with the exercise of official authority does not mean that the issue whether Article 43 EC and the first paragraph of 45 EC are applicable to the activities of notaries in Portugal has been resolved. As I argued in my Opinion in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08 cited above, the finding that an activity is connected with the exercise of official authority calls for a proportionality test in the light of Article 43 EC and the first paragraph of 45 EC. However, the fact that, in the present proceedings, the Commission has raised a claim only in respect of Directive 2005/36 precludes an analysis of the case by reference to that parameter.

55. It is therefore appropriate to dismiss the action.

VI — Costs

56. 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. Since the Commission's claim has been dismissed, it should be ordered to pay the costs, as they have been applied for by the Republic of Portugal.

57. In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the United Kingdom of Great Britain and Northern Ireland and the Slovak Republic, who have appeared as interveners in this dispute, should be ordered to bear their own costs.

VII — Conclusion

58. In the light of the foregoing, I propose that the Court:

(1) dismiss the action;

(2) order the European Commission to pay the costs;

(3) order the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the United Kingdom of Great Britain and Northern Ireland and the Slovak Republic to bear their own costs.