OPINION OF ADVOCATE GENERAL LÉGER

delivered on 18 November 1999 *

1. In the present action, the Commission of the European Communities asks the Court to declare that, by making the provision of cleansing, disinfection, disinfestation, rodent-control and sanitation services (hereinafter 'cleansing services') by operators established in Member States other than Italy subject to registration in the registers referred to in Article 1 of Italian Law No 82 of 25 January 1994 [1] (hereinafter 'Law No 82'), in accordance with Articles 1 and 6 of that Law, the Italian Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

I — The provisions of national law in issue

2. Law No 82 is intended to govern the exercise of cleansing activities.

3. Article 1(1) of that Law provides as follows:

'*Registration of cleansing undertakings in the commercial register or the provincial register of small businesses*

1. Undertakings engaged in cleansing, disinfection, disinfestation, rodent-control and sanitation activities, hereinafter referred to as "cleansing undertakings", shall be registered in the commercial register provided for under the single text approved by Royal Decree No 2011 of 20 September 1934, as subsequently amended, or in the provincial register of small businesses provided for under Article 5 of Law No 443 of 8 August 1985 if they satisfy the conditions laid down in the present Law.'

* Original language: French.

1 — GURI No 27 of 3 February 1994, p. 4.

4. Failure to comply with that provision results in imposition of the penalties set out in Article 6 of Law No 82, which provides:

'*Penalties*

1. ...

2. In the case where the cleansing undertaking carries out the activities covered by this Law without being registered in the commercial register or the provincial register of small businesses, or if it carries out those activities despite suspension of its registration or after its registration has been annulled, the owner of the individual undertaking, the agent with control over the undertaking, one of its branches or one of its seats, all of the partners in the case of a partnership, the partners in the case of a limited partnership or a limited partnership with share capital, or the board members in all other types of company, including cooperatives, shall be liable to a prison term of up to six months or to a fine of between ITL 200 000 and ITL 1 million.

3. If the cleansing undertaking entrusts the performance of the activities covered by this Law to undertakings which are in a situation which could give rise to the penalties referred to in paragraph (2), the owner of the individual undertaking, the agent with control over the undertaking, one of its branches or one of its seats, all of the partners in the case of a partnership, the partners in the case of a limited partnership or a limited partnership with share capital, or the board members in all other types of company, including cooperatives, shall be liable to a prison term of up to six months or to a fine of between ITL 200 000 and ITL 1 million.

4. Any person concluding contracts relating to the performance of the activities covered by this Law with cleansing undertakings which are not registered in the commercial register or the provincial register of small businesses, which have been struck off those registers or whose registration has been suspended, or who, in any event, pays for the services of such undertakings, shall be liable to an administrative fine of between ITL 1 million and ITL 2 million. In the case where such contracts are concluded by public undertakings or public bodies, the latter shall be liable to an administrative fine of between ITL 10 million and ITL 50 million.

5. Contracts concluded with cleansing undertakings which are not registered in the commercial register or the provincial register of small businesses, or which have been struck off those registers or whose registration has been suspended, shall be null and void.'

II — Pre-litigation procedure and procedure before the Court

5. By letter of 3 April 1995 to the Italian Government, the Commission set out the reasons why it considered that Articles 1 and 6 of Law No 82 were contrary to Article 59 of the Treaty and put it on formal notice to submit to it its observations within two months of receiving that letter.

6. Receiving no reply, the Commission instituted the pre-litigation procedure provided for under the first paragraph of Article 169 of the EC Treaty (now the first paragraph of Article 226 EC) and, on 12 March 1996, delivered a reasoned opinion to the Italian Government calling on it to adopt the necessary measures of compliance within two months of notification.

7. In the absence of any measures by the Italian Government to comply with that opinion, the Commission brought the present action on 2 October 1998.

8. In its application, the Commission submits that the obligation to register in the register of undertakings and the severe penalties provided for in the event of non-compliance with that obligation are in clear infringement of Article 59 of the Treaty. By imposing penalties such as prison sentences and fines of up to ITL 50 million for non-compliance with Article 1 of Law No 82, Article 6 thereof makes registration in the register of undertakings an essential precondition to carrying out cleansing activities in Italy. Inasmuch as that obligation applies in equal measure to undertakings established in a Member State other than Italy, it prevents the free provision of services or, at the very least, constitutes a barrier to such provision.

9. The Commission adds that Law No 82 also introduces covert discrimination against undertakings established in the other Member States. This condition of registration has the practical effect of dissuading traders established in other Member States from performing in Italy the cleansing activities covered by that Law. According to the Commission, it is hardly likely that a trader from another Member State would be prepared to incur the administrative obligations involved in registration in the registers of undertakings in order to provide services on a more or less occasional and *ad hoc* basis, and in any event in a temporary and non-regular manner.

10. The Commission also notes that registration in the register of undertakings involves payment of a 'duty' known as an 'annual charge', which is governed by

Article 18 of Law No 580 of 29 December 1993 establishing a register of undertakings. [2]

11. The Commission concludes by pointing out that the requirements imposed by the Court in regard to justification for restrictions on the free provision of services have not been satisfied. While the Court accepts that such restrictions may be justified by 'imperative reasons relating to the public interest', it will accept such justification only if 'that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established'. [3] Since the Italian Government failed to reply to either the formal letter of notice or the reasoned opinion, that verification has proved impossible.

12. Even if one were to assume that the obligation laid down by Article 1 of Law No 82 was envisaged as a means of carrying out preventive checks on the trustworthiness, in particular from a criminal point of view, of those responsible for the cleansing undertakings, the Commission notes that this justification would not satisfy the requirements laid down in the Court's case-law because conditions of integrity equivalent to those laid down in Law No 82 are required for carrying out those activities in the other Member States. As the Court held in *Säger*, cited above, [4] such a requirement cannot be regarded as being 'objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of [cleansing] services'. In other words, the Italian Law results in a pointless, and therefore impermissible, accumulation of the guarantees of professional integrity required by the Member State in which the services are provided (Italy) and by the Member State in which the service provider is established. [5]

13. The Commission concludes that Law No 82 infringes the principle of proportionality inasmuch as the measures taken to attain the objective of guaranteeing protection for the recipient of the cleansing services are inappropriate. It points out that less restrictive but equally effective control measures could have been adopted, such as production by the cleansing undertaking established in another Member State of certificates evidencing registration in registers corresponding to the Italian register of undertakings.

14. In its statement of defence, the Italian Government states that provisions are in the process of being drafted for inclusion in a regulation at present being adopted. This regulation is designed to simplify the procedures governing registration, amendments to and removal from the register of undertakings and commercial companies. These provisions should make it clear that cleansing undertakings established in the other Member States are to be exempted from the obligation to register in the

2 — GURI No 7 of 11 January 1994, ordinary supplement No 6.

3 — Judgment in Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15.

4 — Ibid., paragraph 15.

5 — See, *inter alia*, the judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 20.

register of undertakings and to satisfy the conditions required by Law No 82 in order to carry out cleansing activities in cases where they do not establish subsidiaries or local agencies in Italy. The Italian Government does point out, however, that, in practice, undertakings established in other Member States can perform the activities in question without being required to demonstrate compliance with those formalities. For those reasons, the Italian Government hopes that the dispute will shortly serve no purpose and that the Commission will discontinue the present action.

15. In its reply, the Commission points out that the fact that the formalities required by Law No 82 are not, in practice, imposed in regard to cleansing undertakings established in other Member States is not such as to render pointless the proceedings brought against the Italian Government for failure to fulfil obligations. It accordingly calls on the Court to confirm that there has been an infringement of Article 59 of the Treaty and to declare that the Italian Republic has failed to fulfil its obligations under that provision of the Treaty and order it to pay the costs.

16. In its rejoinder, the Italian Government confirms that it has completed drafting the national provisions which will be inserted in the regulation referred to in its reply and that it will inform the Commission and the Court once that text has been definitively adopted.

III — Examination of the failure to fulfil obligations

17. The first paragraph of Article 59 of the EC Treaty required Member States to abolish progressively, during the transitional period, all restrictions on freedom to provide services within the Community in respect of nationals of Member States established in a State of the Community other than that of the person for whom the services were intended.

18. The obligation to eliminate such restrictions has been interpreted by the Court as prohibiting all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided. [6] According to the Court, the principle of equal treatment, of which Article 59 is only a specific instance, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [7]

19. The Court has also ruled that, in the absence of harmonisation of the rules

6 — See, *inter alia*, the judgments in Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 25; Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraph 27; *Webb*, cited above, paragraph 14; and in Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 48.

7 — Judgments in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8, and in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

applicable to services, or a system of equivalence, restrictions on the freedom provided for by Article 59 of the Treaty may arise as a result of national rules which make the *exercise of service-related activities* subject to compliance with or completion of certain statutory formalities, *even if they apply without distinction to providers of services* established in the territory within which the service is provided or in a Member State other than that in which the service is to be provided, *when* they are liable to prohibit or impede the activities of a provider of services established in another Member State where he lawfully provides similar services. [8]

20. The Court has also held that, as a fundamental principle of the Treaty, the freedom to provide services may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which the supplier of the services is subject in the Member State in which he is established.

21. Finally, those restrictions must be objectively necessary to ensure attainment of their objective and in any case cannot go beyond what is strictly necessary to achieve that objective. [9]

22. The Court has thus ruled that, while the principal aim of Article 59 and Article 60 of the EC Treaty (now Article 50 EC) is to enable the service provider to pursue his activities in the Member State where the service is provided without suffering discrimination in favour of the nationals of that State, that does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States. [10]

23. The Court has likewise ruled that the conditions imposed by the Member State in which the service is provided may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the Member State in which the service is

8 — See, in particular, the judgments in Case C-288/89 *Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, paragraph 12; *Säger*, cited above, paragraph 12; Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091, paragraph 16; and Joined Cases C-34/95, C-35/95 and C-36/95 *KO* v *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 51.

9 — Judgments in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; and Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 to 31.

10 — *Webb*, cited above, paragraph 16; judgment in Case C-294/89 *Commission* v *France* [1991] ECR I-3591, paragraph 26.

provided must take into account controls and checks which have already been carried out in the Member State of establishment. [11]

24. Further, in its judgment in *Bellone*, [12] the Court was called on to determine whether the provisions of a Community directive on the coordination of the laws of the Member States relating to self-employed commercial agents constituted a bar to Italian legislation which made the rights of such agents subject to an obligation of entry in the register intended for that purpose. The Court ruled in this regard that 'Although Italian practice appears not to apply the condition of entry in the register to foreign agents, the national provisions at issue in the main proceedings, which are drafted in general terms, nevertheless also encompass agency relationships between parties established in different Member States. They are still capable of significantly hindering the conclusion and operation of agency contracts between parties in different Member States and therefore from that point of view also are contrary to the aims of the Directive'.

25. It seems to me that the same solution should, by analogy, be applied to the present dispute.

26. It is clear, and has not been disputed by the Italian Government, that, by reason of the general tenor of its provisions, Law No 82 applies to every provider of services, whether or not established in Italy, and irrespective of whether or not the provider offers its services in Italy on an occasional or regular basis. In addition, it must be pointed out that this legislation does not exclude from its scope a provider of services established in a Member State other than Italy which, under the domestic legislation of its State of establishment, already satisfies the formal requirements imposed by the Italian Law. The necessary conclusion is therefore that Law No 82 does not satisfy the requirements of Article 59 of the Treaty.

27. The fact that this Law is, in practice, not applied to persons or undertakings providing cleansing services which are established in Member States other than Italy cannot affect that conclusion. The Court has consistently held that 'the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as

11 — *Commission* v *Germany*, cited above, paragraph 47.

12 — Judgment in Case C-215/97 *Bellone* v *Yokohama* [1998] ECR I-2191, paragraph 17.

constituting the proper fulfilment of obligations under the Treaty'. [13]

28. Finally, it should be pointed out that the Italian Republic has not, up to the present date, forwarded to either the Commission or the Court the national provisions which would bring Italian legislation into line with the requirements of Article 59 of the Treaty. Furthermore, even if it should be established that such conformity has been achieved, it follows from settled case-law that a failure to fulfil obligations is established if the Member State in question has still failed to adopt the laws, regulations and administrative provisions necessary to comply with Community-law requirements by the expiry of the period set by a directive [14] or of that which the Commission gave to the Member State in question for compliance with its reasoned opinion. [15]

29. It is clear that, when the period which the Commission had prescribed in its reasoned opinion had expired, the Italian provisions intended to establish compliance had still not been adopted.

30. I accordingly take the view that, since the provisions of the Italian Law in question fail to state clearly that the obligation to be registered in the register of undertakings does not apply to persons or undertakings providing cleansing services which are established in Member States other than Italy, those persons or undertakings find themselves in a position of uncertainty with regard to their legal position and are liable to have unjustified criminal proceedings brought against them.

31. It follows that Law No 82, in particular Articles 1 and 6 thereof, is contrary to the requirements of Article 59 of the Treaty. I accordingly propose that the Court should find in favour of the Commission.

32. 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 has applied for costs and the Italian Republic has been unsuccessful, the Italian Republic must be ordered to pay the costs.

13 — See, *inter alia*, the judgment in Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14.

14 — See, for example, the judgment in Case C-362/98 *Commission* v *Italy* [1999] ECR I-6299, paragraph 7.

15 — Judgments in Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 42, and in Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 32.

Conclusion

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

(1) declare that, by making the provision of cleansing, disinfection, disinfestation, rodent-control and sanitation services by operators established in Member States other than Italy subject to registration in the registers referred to in Article 1 of Law No 82 of 25 January 1994, in accordance with Articles 1 and 6 of that Law, the Italian Republic has failed to fulfil its obligations under Article 59 of the EC Treaty (now, after amendment, Article 49 EC);

(2) order the Italian Republic to pay the costs.