OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 10 October 2002 [1]

I — Introduction

1. The present infringement proceedings concern advantageous charges for admission to public museums, monuments, galleries, archaeological digs and memorial parks and gardens in Italy granted to Italian nationals and residents within the territory of the administrative authority running the cultural site in question and who are aged over 60 or 65 years. The Commission considers this to infringe Articles 12 EC and 49 EC.

II — Legal framework: national law

2. Decree No 507 of the Ministry for Cultural Heritage and Cultural Events of 11 December 1997 (hereinafter 'the Decree') [2] enacted the Regulations providing for the introduction of admission tickets for national memorials, museums, galleries, ancient archaeological sites and memorial parks and gardens.

3. Article 1 of the Decree provides *inter alia* as follows:

'1. Admission to national memorials, museums, galleries, ancient archaeological sites and parks and gardens shall normally require the purchase of a ticket, whose validity need not depend on the date of issue.'

4. Article 4 of the Decree provides *inter alia* as follows:

'3. Admission shall be free to:

...

(e) Italian nationals who are aged less than 17 years or 61 years or over. Persons under 12 years old may not be admitted unaccompanied;

1 — Original language: German.

2 — *Gazetta ufficiale della Repubblica Italiana* of 12 February 1998, p. 13.

...'.

5. The only Article of Decree No 375 of the same Ministry of 28 September 1999, entitled Regulations amending Ministerial Decree No 507 of 11 December 1997 providing for the introduction of admission tickets for national memorials, museums, galleries, ancient archaeological sites and memorial parks and gardens,[3] provides *inter alia* as follows for national sites but not for regional or local ones:

'Article 4 of Decree No 507 of 11 December 1997 is amended as follows:

(a) Sentence 1 of Paragraph 3(e) is replaced by the following: "Citizens of the European Union who are aged less than 17 years or 61 years or over".

...'

3 — *Gazetta ufficiale della Repubblica Italiana* of 27 October 1999.

III — Preliminary procedure and procedure before the Court

6. Following numerous complaints concerning advantageous admission charges for persons aged over 60 or 65 years for the Doge's Palace in Venice and for local museums in Padua, Treviso and Florence, the Commission undertook various investigations and concluded that advantageous charges were granted only to Italian nationals or Italian residents. Because it did not receive any response to its repeated requests, the Commission commenced infringement proceedings by letter of formal notice dated 1 July 1999. The Italian Republic replied by a letter dated 5 October 1999. Since the Commission regarded that reply as inadequate, it delivered a reasoned opinion to the Italian Republic on 2 February 2000. The Commission sent further letters to the Italian Republic on 13 November 2000 and on 2 April 2001, by which it asked for more detailed information. The Commission did not receive any answer, and therefore brought an action before the Court which was registered in the Registry on 8 October 2001.

7. By its action, the Commission applies for the Court:

— to declare that, by maintaining in force discriminatory charges for admission to public museums, monuments, galleries, archaeological digs, parks and gardens in Italy, granted by local or

decentralised authorities, which only favour Italian nationals or residents within the territory of the administrative authority running the cultural sites in question and who are aged over 60 or 65 years, to the exclusion of tourists who are nationals of other Member States or of persons who are not resident in such areas, despite fulfilling the same age requirement, the Italian Republic has failed to fulfil its obligations under Articles 12 EC and 49 EC;

— to order the Italian Republic to pay the costs.

8. The Italian Republic applies for the Commission's action to be dismissed.

IV — Cause of action

A — *Submissions of the parties*

9. The *Commission* is of the view that the provision for advantageous admission charges infringes Articles 12 EC and 49 EC. Its reason was that the freedom to provide services included freedom of tourists to go to a foreign country and to enjoy services under the same conditions as residents. That was the reason the Court declared discriminatory charges for Spanish museums to be incompatible with the EC Treaty. [4]

10. Granting advantageous admission charges only to Italian nationals constituted a restriction on the right to have access to services to which were entitled tourists visiting Italian archaeological and cultural sites.

11. The granting of advantageous admission charges to certain categories of visitors, in this case to those aged over 60 or 65 years, on the basis of their residence within the municipality in which the cultural site was located, constituted indirect discrimination on grounds of nationality since in the end it affected mainly non-Italian Community tourists, whose exclusion from benefiting from the lower charges constituted the disguised objective.

12. The Commission submitted that purely economic considerations could not provide grounds of general interest justifying the measure. The Court recognised the need to safeguard the cohesion of the tax system only where there was a direct link between the advantageous admission charges for Italian nationals and the taxes they paid. [5]

4 — Case C-45/93 *Commission* v *Spain* [1994] ECR I-911.

5 — Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249.

The Italian Republic had proved neither necessity nor proportionality. Nor had it submitted that granting advantageous admission charges to all citizens of the European Union would impair the cohesion of the tax system. Moreover, the only taxpayers who benefited were those who actually claimed the advantageous admission charges. Finally, it was inconsistent to rely on the argument as to the cohesion of the tax system while enacting Decree No 375/99 extending the advantage to all citizens of the Union for national sites.

13. The Commission also pointed out that the amendment made by Decree No 375/99 applied only to national sites and not to other sites, whereas the Italian Republic was also responsible for sites other than national ones.

14. Ministerial Order No 1560 of 11 March 1998, on which the Italian Government relied in arguing that Italian law complied with the Treaty, was not sufficient for that purpose since the grant of the reduction was at the discretion of the sites' operators, and in practice this discretion had not been consistently exercised.

15. The Commission therefore concluded that the advantageous prices granted by local museums infringed Articles 12 EC and 49 EC.

16. The *Italian Government* first pointed out that cultural sites belonged to the State or to local authorities and that it was for their owners to determine conditions of admission, in particular the tariff structure.

17. The Italian Government submitted that the Commission based its allegation of discrimination against citizens of the Union on the difference between treatment of persons resident within the territory of the local authority which owned the cultural site and treatment of other persons. This assessment was general and abstract, since the prices charged depended on whether it was economically justifiable to give free admission.

18. According to the Italian Government, cultural sites cannot be operated without financial resources. The fact that Italian nationals contributed to such public expenditure through the taxes they paid had to be taken into account. A tariff which depended on characteristics of visitors to cultural sites was the expression of a particular social policy.

19. The Italian Government also pointed out that the Commission's allegations related to local sites, for example the Doge's Palace in Venice, for which the central Government was not responsible. That followed from Article 47 of the Decree of the President of the Republic No 416 of 24 July 1977.

20. As regards the reduction available to residents, a distinction had to be drawn between State and local museums, namely that the latter were likewise not the responsibility of the Government.

21. As regards State-owned sites, and in particular memorial parks and gardens, the exemption from the admission fee was provided for by a framework agreement between the Ministry of Cultural Heritage and Culture and the Ministry of Finance (Inter-Ministerial Decree of 6 June 1992), which provided for financial compensation. It followed that there was consideration for the free admission.

22. It was therefore impossible to see where there might be any discriminatory treatment within the meaning of Community law. It followed that the Commission's action should be dismissed.

B — *Analysis*

23. On the basis of the Commission's application, what must be examined is whether the Italian tariff provisions are compatible with Articles 12 EC and 49 EC, that is to say with the general prohibition on discrimination and the freedom to provide services. Since Article 49 EC contains a specific prohibition on discrimination, the Italian provisions are to be assessed against it first.

24. In order to make that assessment, the first thing to be considered is whether the measures concerning sites owned by local authorities are to be attributed to the Member State (the Italian Republic). Then, the question as to whether those national provisions constitute a restriction within the meaning of Article 49 EC is to be considered. If they do, then the question arises as to whether there is any justification for the measures.

1. Decentralised bodies

25. As the Court has consistently held,[6] Member States are accountable not only for

6 — Case 239/85 *Commission* v *Belgium* [1986] ECR 3645 and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839 (which concerned an Italian local authority). See Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24 and Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 27.

measures of the central State and the bodies it governs, but also for measures of local or regional authorities (including bodies legally separate from but none the less governed by such authorities).

26. In the present case, this means that the Italian Government is responsible also for measures laid down by local authorities or by separate bodies to be attributed to those authorities.

2. Restriction on the freedom to provide services

27. The next question is whether the Italian tariff provisions attacked by the Commission restrict the freedom to provide services. In this connection, there must be borne in mind the case-law of the Court and the related academic literature [7] regarding the scope of this fundamental freedom in the context of tourism.

28. The Court has held that the freedom to provide services includes the freedom for the recipients of services, 'to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists, among others, must be regarded as recipients of services'. [8]

29. As regards the meaning for tourists of the freedom to provide services, the Court has held that the freedom to provide services includes the freedom for the recipients of services, including tourists, 'to go to another Member State in order to enjoy those services under the same conditions as nationals... [T]hat right relates not only to access to services envisaged in the EEC Treaty but also to all the ancillary advantages which affect the conditions under which those services are provided or received.' [9]

30. As regards the museum sector, which the present case also concerns, the Court

7 — See Rofes i Pujol, M.I., 'Las prestaciones de servicios de los museos de los Estados miembros y la libre circulación de los touristas', *Cuadernos europeos de deusto* 1995, pp. 175 ff.; Tichadou, E., 'Der Schutz der Touristen in der Rechtsprechung des Europäischen Gerichtshofs', *Zeitschrift für europarechtliche Studien* 2002, pp. 299 ff.

8 — Case 186/87 *Cowan* [1989] ECR 195, paragraph 15; see also Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

9 — *Commission* v *Spain* (cited above, footnote 4), paragraph 5.

has held that, 'visiting museums is one of the determining reasons for which tourists, as recipients of services, decide to go to another Member State' and that there is therefore 'a close link between the freedom of movement which they enjoy under the Treaty and museum admission conditions'. [10]

31. Moreover, the Court concluded that, 'discrimination with regard to admission to museums may have an effect on the conditions under which services are provided, including the price thereof, and may therefore influence the decision of some persons to visit a country'. [11]

32. In some instances, for example in Venice and Treviso, the Italian tariffs refer to nationality and thus appear to constitute direct discrimination, whereas in others, for example in Florence and Padua, the tariffs refer to residence and the discrimination therefore appears to be indirect. As the Court has consistently held, Community law prohibits indirect discrimination as well. The Court's reason for this is that, 'national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners.' [12]

33. According to the Court's case-law, even a provision which refers to residence in a particular part of a Member State cannot be justified by the fact that domestic nationals are also disadvantaged by it. [13]

34. The Decree the Italian Government referred to amending the rules in respect of national sites is likewise not a sufficient basis for the proposition that the tariff provisions are compatible with Community law, because the amendments do not apply to regional or local sites. For, according to the Court's case-law, 'the maintenance of a provision incompatible with the Treaty gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of

10 — *Commission* v *Spain* (cited above, footnote 4), paragraph 6.

11 — *Commission* v *Spain* (cited above, footnote 4), paragraph 7.

12 — Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14; see Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraph 29.

13 — Case C-281/98 *Angonese* [2000] ECR I-4139, paragraphs 38 ff.

uncertainty as to the possibilities available to them of relying on Community law'. [14]

3. Possible justification for the discrimination

35. It is first to be observed that discriminatory national provisions cannot be justified on the ground of so-called general interest, that is to say for reasons not provided for expressly in primary law such as Article 30 EC: only provisions which apply without distinction may be justified in this way. This principle applies also to the freedom to provide services, which is what the present case concerns.

36. However, even if the Court were to accept in a case such as the present that in principle the measures could be justified by reasons in the general interest, aims of a purely economic nature cannot constitute such reasons. [15]

37. As regards the Italian Government's argument concerning the cohesion of the tax system, it is to be observed that the link the Court's case-law requires between the particular persons on whom the advantage is conferred and their contribution to the tax take is absent. [16]

38. There being thus no justification for the discriminatory price reductions, the Italian Republic has infringed Articles 12 EC and 49 EC.

V — Costs

39. Under Article 69(2) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission has applied for the Italian Republic to be ordered to pay the costs, and the latter has been unsuccessful, the Italian Republic is to be ordered to pay the costs.

14 — Case 159/78 *Commission* v *Italy* [1979] ECR 3247, paragraph 22.

15 — Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48.

16 — *Bachmann* (cited above, footnote 5), paragraphs 21 ff. and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraphs 14 ff.

VI — Conclusion

40. Following the foregoing analysis, it is submitted that the Court should declare:

(1) By maintaining in force discriminatory charges for admission to public museums, monuments, galleries, archaeological digs, parks and gardens in Italy, granted by local or decentralised authorities, which only favour Italian nationals or residents within the territory of the administrative authority running the cultural sites in question and who are aged over 60 or 65 years, to the exclusion of tourists who are nationals of other Member States or of persons who are not resident in such areas, despite fulfilling the same age requirement, the Italian Republic has failed to fulfil its obligations under Articles 12 EC and 49 EC.

(2) The Italian Republic is ordered to pay the costs.