JUDGMENT OF THE COURT (Fifth Chamber)
29 April 2004 *

In Case C-171/02,

Commission of the European Communities, represented by M. Patakia and A. Caeiros, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent, assisted by J. Calheiros, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that:

1. in view of the fact that, under the system of authorisations issued by the Minister for the Interior, foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal,

* Language of the case: Portuguese.

(a) must have their head office or an establishment in Portugal,

(b) may not rely on evidence and guarantees already presented in their Member State of establishment,

(c) must be constituted as a legal person,

(d) must have a specific share capital;

2. in view of the fact that the employees of foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal must hold a professional certificate issued by the Portuguese authorities;

3. in view of the fact that professions in the private security services sector are not subject to the Community system for the recognition of professional qualifications;

the Portuguese Republic has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC and under Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25).

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, A. Rosas and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur

after hearing the Opinion of the Advocate General at the sitting on 16 September 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 May 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

1. in view of the fact that, under the system of authorisations issued by the Minister for the Interior, foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal,

   (a) must have their head office or an establishment in Portugal,

   (b) may not rely on evidence and guarantees already presented in their Member State of establishment,

   (c) must be constituted as a legal person,

   (d) must have a specific share capital;

2. in view of the fact that the employees of foreign undertakings wishing to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal must hold a professional certificate issued by the Portuguese authorities;

3. in view of the fact that professions in the private security services sector are not subject to the Community system for the recognition of professional qualifications;

the Portuguese Republic has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC and under Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25).

The legal framework

Community legislation

Definitions

2 Under Article 1(c) of Directive 92/51, 'attestation of competence' means 'any evidence of qualifications:

— attesting to education and training not forming part of a set constituting a diploma within the meaning of Directive 89/48/EEC or a diploma or certificate within the meaning of this Directive, or

— awarded following an assessment of the personal qualities, aptitudes or knowledge which it is considered essential that the applicant have for the pursuit of a profession by an authority designated in accordance with the laws, regulations or administrative provisions of a Member State, without proof of prior education and training being required'.

3 In accordance with Article 1(e) of Directive 92/51, 'regulated profession' means 'the regulated professional activity or range of activities which constitute this profession in a Member State'.

4 Under Article 1(f) of Directive 92/51 'regulated professional activity' means 'a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject, directly or indirectly, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence. ... Pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of evidence of education and training or an attestation of competence governed by laws, regulations or administrative provisions' constitutes a 'mode of pursuit of a regulated professional activity'.

Substantive rules

5 Under Article 8 of Directive 92/51:

'Where, in the host Member State, the taking up or pursuit of a regulated profession is subject to possession of an attestation of competence, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as those which apply to its own nationals:

(a) if the applicant holds the attestation of competence required in another Member State for the taking up or pursuit of the same profession in its territory, such attestation having been awarded in a Member State;

or

(b) if the applicant provides proof of qualifications obtained in other Member States,

and giving guarantees, in particular in the matter of health, safety, environmental protection and consumer protection, equivalent to those required by the laws, regulations or administrative provisions of the host Member State.

If the applicant does not provide proof of such an attestation or of such qualifications the laws, regulations or administrative provisions of the host Member State shall apply.'

National legislation

Definitions

6 Under Article 1(3)(a) of Decree-Law No 231/98 of 22 July 1998 (*Diário da República* I, Series A, No 167, of 22 July 1998, hereinafter: 'the Decree-Law' on private security activity), 'private security activity' means, for the purposes of the Decree-Law, 'the provision of services by private undertakings lawfully constituted for that purpose which are intended to protect persons and property and to prevent the commission of criminal offences'.

Substantive rules

7 Article 3 of the Decree-Law on private security activity provides:

'Private security activity may be pursued only by lawfully constituted undertakings authorised to do so in accordance with the provisions of this Decree-Law.'

8 Article 7(2)(b) of the Decree-Law on private security activity provides that one of the specific conditions for the admission of guarding and escort personnel and personal defence and protection personnel is the successful completion of knowledge and physical aptitude tests, the content and duration of which are determined by order of the Minister for the Interior, following an initial training course meeting the requirements of Article 8(2) of the Decree-Law.

9 Article 9(1) of the Decree-Law on private security activity provides that guarding and escort personnel and personal defence and protection personnel must be in possession of a professional certificate which is authenticated by the General Secretary of the Ministry of the Interior, is valid for a period of two years and can be extended for equivalent periods.

10 Under Article 9(2) of the Decree-Law on private security activity, authentication of the professional certificate is subject to evidence, to be furnished to the General Secretary of the Ministry of the Interior, that the conditions set out in Article 7 have been fulfilled.

11 Under Article 21(1) of the Decree-Law on private security activity, private security activity within the meaning of Article 1(3)(a) of the Decree-Law may be pursued only after the person in question has obtained an authorisation issued by the Minister for the Interior.

12 Article 22(1) of the Decree-Law on private security activity provides:

'Undertakings pursuing private security activity within the meaning of Article 1(3)(a) must be constituted in accordance with the legislation of a Member State of the European Union or the European Economic Area, have their head office or a secondary establishment in Portugal and comply with the provisions of Article 4 of the Code of Commercial Companies.'

13 Article 22(2) of the Decree-Law on private security activity provides that the share capital of undertakings pursuing private security activity as defined in Article 1(3)(a) of the Decree-Law must be no lower than the sums laid down, respectively, in Article 22(2)(a), (b) and (c).

14 Article 24 of the Decree-Law on private security activity provides that the application for authorisation to provide security services within the meaning of Article 2 of the Decree-Law must be addressed to the Minister for Internal Administration and accompanied by documentation as specified in Article 24(1)(a) to (g).

15 Article 24(1)(d) of the Decree-Law on private security activity requires that, in the event of an application for authorisation to provide services within the meaning of Article 1(3)(a) of the Decree-Law, such an application must be accompanied by documents showing that the specific conditions laid down in Article 22 of the Decree-Law have been fulfilled.

16 In the event of serious or repeated infringement of the provisions of the Decree-Law on private security activity, the authorisation or the licence for the pursuit of such activity may be revoked, pursuant to Article 27 of the Decree-Law, by decision of the Minister for Internal Administration, on a proposal from the General Secretary of the Ministry of Internal Administration.

17 Article 4(1) of the Code of Commercial Companies reads as follows:

'1. A company which does not have an effective head office in Portugal but wishes to pursue its activity there for more than one year must set up a permanent representation and comply with the provisions of the Portuguese law on the commercial register.

2. A company that does not comply with the provisions of the preceding paragraph is nevertheless bound by the acts performed on its behalf in Portugal and the persons that have performed those acts, as well as the company's managers or administrators, are jointly and severally liable with it.

3. Notwithstanding the provisions of the preceding paragraph, the court may, at the request of any interested party or the public prosecutor's office, order a company that does not comply with the provisions of paragraphs 1 and 2, to cease its activity in the country and order the liquidation of assets situated in Portugal.'

Pre-litigation procedure

18 After giving the Portuguese Republic an opportunity to submit observations, on 29 December 2000 the Commission served on it a reasoned opinion which stated that it considered that some aspects of that Member State's national rules on private security services were incompatible with Community law, in particular with freedom to provide services, freedom of establishment and the acquis communautaire relating to regulated professions, and called on the Portuguese Republic to comply with its obligations under the EC Treaty and Directive 92/51 within two months from the notification of that opinion. Since it was not satisfied by the response given to that reasoned opinion in the letter sent by the Portuguese authorities on 20 March 2001, the Commission decided to bring the present action.

The action

19 In support of its action, the Commission relies on six grounds of complaint concerning the conditions laid down by the Portuguese Republic for the pursuit of a private security activity in that Member State.

20 Those grounds of complaint are based on:

— incompatibility with Article 49 EC of the condition requiring the economic operator to have its head office or a permanent establishment in Portugal;

— incompatibility with Articles 43 EC and 49 EC of the condition requiring the economic operator to be constituted as a legal person;

— incompatibility with Articles 43 EC and 49 EC of the condition requiring the economic operator to have a minimum share capital;

— incompatibility with Article 49 EC of the condition requiring the economic operator to obtain an authorisation from the Portuguese authorities, without account being taken of the evidence or guarantees already presented in the Member State of origin;

— incompatibility with Articles 39 EC and 49 EC of the condition requiring the employees of the economic operator to hold a professional certificate issued by the Portuguese authorities, without account being taken of the controls or verifications already carried out in the Member State of origin;

— infringement of Article 249 EC, in conjunction with Article 10 EC, stemming from an incorrect transposition into national law of Article 8 of Directive 92/51.

21 Before examining in turn the merits of these different grounds of complaint, however, it is necessary to consider an issue underlying most of them, namely the definition of the respective scopes of Articles 49 EC and 43 EC.

Definition of the respective scopes of freedom to provide services (Article 49 EC) and freedom of establishment (Article 43 EC)

Arguments of the parties

22 The Portuguese Government claims that an economic operator that offers its services in the Member State of destination for a certain time is no longer a transfrontier service provider, but, by virtue of that fact alone, becomes an operator established in that Member State. Consequently, a measure that applies only to economic operators that offer their services in Portugal for more than one year cannot breach the principle of freedom to provide services.

23 The Commission considers that, even where services have been provided for a period of more than one year, the freedom to provide services is still being exercised where those services are offered in one Member State from another Member State.

Findings of the Court

24 As regards the definition of the respective scopes of the principles of freedom to provide services and freedom of establishment, it should be noted that the key element is whether or not the economic operator is established in the Member State in which it offers the services in question (see Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22). Where it is established (in a principal or secondary establishment) in the Member State in which it offers the service (Member State of destination or host Member State), it falls within the scope of the principle of freedom of establishment, as defined in Article 43 EC. On the

other hand, where the economic operator is not established in that Member State of destination, it is a transfrontier service provider covered by the principle of freedom to provide services laid down in Article 49 EC.

25 In this context, the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination (see *Gebhard*, paragraphs 25 and 28, and Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21). On the other hand, all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination constitute provision of services within the meaning of Article 49 EC.

26 The Court has thus found that services within the meaning of Article 49 EC may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration. It observed that no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty (Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 30 and 31).

27 Consequently, the fact that an economic operator established in one Member State provides services in another Member State over an extended period is not in itself sufficient for that operator to be regarded as established in the latter Member State.

28 Therefore, even though the contested national measures in the present case apply only to economic operators that offer their services in Portugal for a period of more than one year, they are nevertheless, in principle, capable of restricting freedom to provide services.

First ground of complaint: incompatibility with Article 49 EC of the condition requiring the economic operator to have its head office or a permanent establishment in Portugal

Arguments of the parties

29 The Commission claims that the condition relating to the existence of a permanent establishment in Portugal constitutes a restriction on freedom to provide services.

30 In addition, it asserts that the Portuguese rules cannot be justified by the aim pursued by those rules or are in any case disproportionate.

31 The Portuguese Government claims that the measure in question does not restrict the freedom to provide services.

32 The Portuguese Government adds that, even if it were assumed that the measure in question entailed a restriction on the freedom to provide services, it is justified by reasons in the public interest, such as public security, public policy and consumer protection, and is proportionate with the objectives pursued. Private security activities are pursued in the context of a complementary and collaborative relationship with the national public security system.

Findings of the Court

33 In this respect it need only be stated that, in connection with rules similar to the Portuguese rules criticised by the Commission, and faced with similar defence arguments to those submitted by the Portuguese Government, the Court has ruled that the condition that a security firm must have its place of business in the Member State of destination directly negates the freedom to provide services in so far as it makes it impossible for undertakings established in other Member States to provide services in that State (Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraphs 27 to 30).

34 The fact that private security activities are pursued in the context of a complementary and collaborative relationship with the national public security system cannot in itself justify such a restriction on the freedom to provide services.

35 In those circumstances, the first ground of complaint is well founded.

Second ground of complaint: incompatibility with Articles 43 EC and 49 EC of the condition requiring the economic operator to be constituted as a legal person

Arguments of the parties

36 The Commission considers that the condition that the economic operator must be constituted as a legal person in order to be able to pursue private security activities in Portugal is a restriction on the freedom to provide services.

37 In addition, those Portuguese rules prevent Community operators that are natural persons from exercising their right to a secondary establishment in Portugal.

38 The Portuguese Government claims that the measure in question does not restrict either the freedom to provide services or the right to either a principal or a secondary establishment for operators that are natural persons.

39 Only where an operator that is a natural person wishes to form a company in Portugal — which is a possible way in which freedom of establishment can be exercised — should it be subject to the requisite conditions for the constitution of a company in that Member State. Neither Article 4 nor Article 40 of the Code of Commercial Companies apply to a secondary establishment of operators that are natural persons.

40 In any event, any restrictions are justified by the need to protect creditors. Companies offer much greater security and solvency than individual operators.

Findings of the Court

41 In this respect it should be noted that the condition requiring private security operators to be constituted as a legal person could hamper the activities of transfrontier service providers established in Member States other than the Portuguese Republic, where they lawfully provide similar services, and therefore constitutes a restriction within the meaning of Article 49 EC. Such a condition rules out any possibility for a transfrontier service provider that is a natural person to provide services in Portugal.

42 In addition, such a condition constitutes a restriction within the meaning of Article 43 EC, since it prevents Community operators that are natural persons from setting up a secondary establishment in Portugal (see, to that effect, Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19, and Case 143/87 *Stanton* [1988] ECR 3877, paragraph 11).

43 Such a condition cannot be justified on the ground of protection of creditors. Since there are means of attaining that objective which restrict freedom to provide services and freedom of establishment to a lesser degree, such as setting up a guarantee or taking out an insurance contract, that condition must be regarded as disproportionate.

44 In those circumstances, the second ground of complaint is well founded.

Third ground of complaint: incompatibility with Articles 43 EC and 49 EC of the condition requiring the economic operator to have a minimum share capital

Arguments of the parties

45 The Commission considers that the condition requiring the economic operator to have a minimum share capital in order to be able to pursue private security

activities in Portugal is a restriction both on the freedom to provide services and the freedom of establishment.

46 That condition requires a transfrontier service provider to increase its share capital, even if that share capital is adequate in the light of the requirements of the legislation of its Member State of origin.

47 In addition, that condition prevents an operator established in a Member State other than the Portuguese Republic whose share capital is less than the minimum amount required by the Portuguese rules from setting up a subsidiary or branch in Portugal.

48 The Commission argues that, even if the requirement of a minimum share capital could be justified by reasons in the public interest, it does not constitute a measure capable of guaranteeing the attainment of the objective pursued and goes further than is necessary in order to attain that objective.

49 The Portuguese Government argues that that condition does not restrict either the freedom to provide services or the right to a secondary establishment.

50 According to the Portuguese Government, any restriction of the free right to a secondary establishment is in any case justified by overriding reasons in the public interest, such as the protection of creditors and the need to avoid discrimination against national operators.

51 First, the Government maintains that it is important to guarantee the financial soundness of operators capable of pursuing private security activities and to avert the risk of fraudulent bankruptcy due to the insolvency of operators whose initial capitalisation is inadequate.

52 Secondly, it argues, failure to require an operator wishing to exercise its right to a secondary establishment in Portugal to have, in its Member State of origin, the minimum share capital required by Portuguese law in order to take up private security activities would lead to discrimination against national operators, since they would in any case be required to hold the minimum share capital laid down by Portuguese law.

Findings of the Court

53 In this respect it should be noted that the condition requiring the economic operator to have a minimum share capital might hamper the activities of transfrontier service providers established in Member States other than the Portuguese Republic, where they lawfully provide similar services, and therefore constitutes a restriction within the meaning of Article 49 EC. Transfrontier service providers with a share capital lower than the minimum amount required by the Portuguese rules are prevented from providing their services in Portugal.

54 In addition, such a condition constitutes a restriction within the meaning of Article 43 EC (see Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraphs 100 and 101). It prevents a Community operator whose share capital is lower than the minimum amount required by the Portuguese rules from setting up a subsidiary or branch in Portugal.

55 Such a condition cannot be justified on the ground of protection of creditors, in so far as there are means of attaining that objective which restrict the freedom to provide services and freedom of establishment to a lesser degree, such as setting up a guarantee or taking out an insurance contract.

56 The desire to prevent any attempt to circumvent the national rules cannot justify that condition either. The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment (see Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 27).

57 In those circumstances, the third ground of complaint is well founded.

Fourth ground of complaint: incompatibility with Article 49 EC of the condition requiring the economic operator to obtain an authorisation from the Portuguese authorities, without account being taken of the evidence or guarantees already presented in the Member State of origin

Arguments of the parties

58 According to the Commission, the condition requiring the economic operator to obtain an authorisation issued by the Portuguese authorities in order to pursue private security activities in Portugal, without account being taken of the evidence or guarantees already presented in the Member State of origin, is a restriction on the freedom to provide services.

59 The Portuguese Government claims that that condition does not restrict the freedom to provide services.

Findings of the Court

60 In this respect it need only be stated that, in connection with rules similar to the Portuguese rules criticised by the Commission, and faced with defence arguments similar to those submitted by the Portuguese Government, the Court has ruled that national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC. Such a restriction cannot be justified since, by excluding consideration of the obligations to which the transfrontier service provider is already subject in the Member State in which it is established, it goes in any event beyond what is necessary to attain the objective sought, namely to ensure close supervision of those activities (*Commission* v *Belgium*, paragraphs 35 to 38).

61 In those circumstances, the fourth ground of complaint is well founded.

Fifth ground of complaint: incompatibility with Articles 39 EC and 49 EC of the condition requiring employees of the economic operator to hold a professional certificate issued by the Portuguese authorities, without account being taken of the controls or verifications already carried out in the Member State of origin

Arguments of the parties

62 The Commission argues that the condition requiring employees of the economic operator to hold a professional certificate issued by the Portuguese authorities constitutes an obstacle to the operator's freedom to provide services and to the free movement of its employees.

63 In its view, the professional certificate is a form of authorisation that must be obtained by any employee of a private security undertaking in order to be able to pursue their activity in Portugal. Consequently, the Commission considers that the right to second employees who are authorised to pursue such activity in the Member State of origin of the transfrontier service provider is restricted.

64 In addition, the Commission considers that, even if the condition relating to the need to hold a professional certificate could be justified by reasons in the public interest, it goes further than is necessary in order to attain the objective pursued, if no account is taken of the conditions fulfilled in order to obtain such a licence in the Member State of origin.

65 In the view of the Portuguese Government, the professional certificate makes it possible to verify whether the employees of an undertaking pursuing private security activities fulfil conditions such as completion of the minimum compulsory education, successful completion of knowledge and physical aptitude tests, and the necessary physical robustness and psychological profile in order to pursue private security activities. In a sector whose specificity is recognised, like the private security sector, the supervisory authority of the Member State of destination could and should carry out periodic verifications.

Findings of the Court

66 The condition requiring employees of a private security operator to hold a professional certificate issued by the Portuguese authorities constitutes a restriction within the meaning of Article 39 EC and 49 EC in so far as it does not take account of controls or verifications already carried out in the Member State of origin.

67 In those circumstances, the fifth ground of complaint is well founded.

Sixth ground of complaint: infringement of Article 249 EC, in conjunction with Article 10 EC, stemming from an incorrect transposition into national law of Article 8 of Directive 92/51

Arguments of the parties

68 The Commission essentially argues that, by failing to make professions in the private security sector subject to the Community system for the recognition of professional qualifications, the Portuguese Republic has failed to fulfil its obligation to transpose Article 8 of Directive 92/51 into national law.

69 It considers that the professional certificate is an attestation of competence within the meaning of Article 8 in conjunction with Article 1(c) of Directive 92/51. Private security activities may be pursued in Portugal only by employees who have completed a compulsory training course in accordance with the Portuguese legislation and who have successfully completed knowledge and physical aptitude tests attested by the issue of the professional certificate. Under that legislation, the taking up of those activities is subject to the possession of such a professional certificate by the operator's employees.

70 The Portuguese Government argues that the taking up of private security activities is not subject to the possession of an attestation of competence. There is no certificate or evidence within the meaning of Article 8 of Directive 92/51 attesting to education or training. The Portuguese Republic has not therefore failed to fulfil its obligation to transpose Article 8 of the directive.

Findings of the Court

71 For the reasons given by the Advocate General in points 92 to 95 of his Opinion, the professional certificate cannot be regarded as an attestation of competence within the meaning of Article 8 of Directive 92/51, in conjunction with Article 1(c) of that directive.

72 The condition requiring employees of the private security operator to hold a professional certificate issued by the Portuguese authorities is not therefore contrary to Article 8 of Directive 92/51.

73 In those circumstances, the sixth ground of complaint, alleging inadequate transposition of Article 8 of Directive 92/51 must be rejected.

74 In the light of the foregoing, the Court finds that by requiring, in order for foreign operators to be able to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal, that

— those operators have their head office or a permanent establishment in Portugal,

— those operators be constituted as a legal person,

— those operators have a minimum share capital,

— those operators obtain an authorisation issued by the Portuguese authorities, without account being taken of evidence or guarantees already presented in the Member State of origin, and

— their employees hold a professional certificate issued by the Portuguese authorities, without account being taken of controls or verifications already carried out in the Member State of origin,

the Portuguese Republic has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC.

Costs

75 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 Portuguese Republic has been essentially unsuccessful, the Portuguese Republic should be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that by requiring, in order for foreign operators to be able to pursue surveillance activities in respect of persons and property in the private security services sector in Portugal, that

— those operators have their head office or a permanent establishment in Portugal,

— those operators be constituted as a legal person,

— those operators have a minimum share capital,

— those operators obtain an authorisation issued by the Portuguese authorities, without account being taken of evidence or guarantees already presented in the Member State of origin, and

— their employees hold a professional certificate issued by the Portuguese authorities, without account being taken of controls or verifications already carried out in the Member State of origin,

the Portuguese Republic has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC;

2. Dismisses the remainder of the application;

3. Orders the Portuguese Republic to pay the costs.

Jann Rosas von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President