OPINION OF ADVOCATE GENERAL LÉGER
delivered on 9 September 2004 [1]

1. In this action, the Commission of the European Communities is applying for a declaration that the Italian Republic has failed to comply with its obligations under Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports [2] ('the Directive').

2. In support of its action, the Commission submits that the Italian Republic has contravened several provisions of the Directive. First, it has failed to prescribe:

— that suppliers of groundhandling services be licensed for a maximum period of seven years, as required by Article 11(1)(d) of the Directive.

Secondly, it has enacted two national provisions contrary to the Directive:

— a social measure incompatible with Article 18 of the Directive;

— interim provisions not permitted by the Directive.

I — Legal context

A — *The Community legislation*

3. According to the fifth recital in the preamble, the Directive's aim is to open up access to the groundhandling market at all

1 — Original language: French.

2 — OJ 1996 L 272, p. 36. Under Article 23(1) of the Directive, Member States must bring into force the laws, regulations or administrative provisions necessary to comply with the Directive no later than one year from the date of its publication in the *Official Journal of the European Communities*

airports located within a Member State, [3] in order to reduce the operating costs of airline companies and to improve the quality of service provided to airport users. This free market access must be achieved gradually. [4]

4. When opening up access to the groundhandling market, Member States may take steps, whilst respecting the Directive's aim, to maintain safety and security safeguards, protect the environment and guarantee an adequate level of social protection. [5]

5. The following terms are defined in the Directive: [6]

'...

(d) "airport user" means any natural or legal person responsible for the carriage of passengers, mail and/or freight by air, from or to the airport in question;

(e) "groundhandling" means the services provided to airport users at airports, as described in the Annex;

(f) "self-handling" means a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; for the purposes of this definition, among themselves airport users shall not be deemed to be third parties where:

— one holds a majority holding in the other; or

— a single body has a majority holding in each;

(g) "supplier of groundhandling services" means any natural or legal person supplying third parties with one or more categories of groundhandling services.'

3 — Article 1(1) of the Directive.
4 — 10th recital.
5 — 11th, 22nd and 24th recitals.
6 — Article 2.

6. However, this opening-up of access to the market in airport services is not absolute: Member States may prescribe exemptions to limit the number of suppliers, or to reserve certain services to a single supplier. [7] Under Articles 6(2) and 7(2) of the Directive, a Member State may reserve, or limit to at least two, the number of suppliers of groundhandling services or self-handling airport users. Under the Directive, such a limit can only apply to 'baggage handling', 'ramp handling', 'fuel and oil handling' and 'freight and mail handling'.

7. Article 9 of the Directive allows Member States to prescribe exemptions from opening up access to the airport services market when specific constraints, in particular of capacity, make it impossible to open up the market as contemplated by the Directive. Member States may limit or reserve the number of suppliers of handling services or self-handling users, or even ban self-handling altogether. Such exemptions are subject to a notification procedure to the Commission.

8. Under Article 11, the Directive provides for a special procedure, based on objective criteria, to license suppliers to provide groundhandling services, where their number is limited following a decision of a Member State in accordance with the above provisions. Under the Directive, suppliers are to be licensed for a maximum period of seven years.

9. The Directive allows Member States to provide for the licensing of the business activity of a supplier of services, or of a self-handling airport user, by a public authority independent of the airport's managing body. [8]

10. Finally, it is worth noting that Article 18 of the Directive provides:

'Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment.'

7 — See Articles 6 and 9 of the Directive.

8 — Article 14 of the Directive stipulates that the criteria set by Member States to obtain such a licence must comply with certain principles: they must be non-discriminatory, they must relate to the intended objective and they must ensure the opening up of access to the market or the ability to self-handle, as required by the Directive.

B — *The national legislation*

11. Legislative Decree No 18 of 13 January 1999 [9] ('LD 18/99') transposes the Directive into Italian law.

12. The Ente nazionale per l'avazione civile (National Civil Aviation Authority, 'NCAA'), a national public authority, is responsible for duly implementing the requirements of LD 18/99.

13. The Italian Republic decided to opt for limiting the number of suppliers under Article 6(2) of the Directive, implementing the special procedure under Article 11 of the Directive for licensing suppliers. [10] LD 18/99 also lays down the requirements for approval of suppliers of groundhandling services.

14. Article 14 of LD 18/99 concerns social protection in particular and provides that:

'1. When guaranteeing free access to the groundhandling market, it is necessary, for 30 months after this decree enters into force, to ensure that existing employment levels are maintained and that labour relations with staff under the previous management are continued.

2. Except where a branch of a company is transferred, any transfer of activity in one or more categories of groundhandling, as set out in Annexes A and B, shall include the transfer of staff, named by those concerned, and in agreement with trade unions, from the previous supplier to the subsequent supplier, in proportion to the volume of traffic or to the scale of the activities being taken over by the subsequent supplier.'

15. Finally, Article 20 of LD 18/99 contains the following interim provision:

'Contractual arrangements for groundhandling staff in force as of 19 November 1998, which include various organisational and contractual schemes, remain in force until the expiry of the relevant contracts, which

9 — GURI (4 February 1999), No 28 (suppl. ord).
10 — Article 4(2) and Article 11(1) of LD 18/99.

shall not be renewed, and in any event for a period not greater than six years.'

II — Pre-litigation procedure

16. Following a detailed complaint received on 29 March 1999 from the Associazione per i diritti deglit utenti e consumatori (Users' and Consumers' Rights Association), the Commission reviewed the relevant provisions of LD 18/99 transposing the Directive. Having noted several infringements of Community law, the Commission addressed a letter of formal notice to the Italian Government on 3 May 2000.

17. Not satisfied with the Italian Government's reply, the Commission sent it a reasoned opinion by letter of 24 July 2001. The Government sent several memoranda, via its Permanent Representative, to the Commission. Subsequently, meetings were organised between representatives of the Commission and experts from the Italian Ministry of Transport, during which the Italian Government proposed modifying the provisions of LD 18/99.

18. A memorandum from the Permanent Representative on 10 May 2002 advised that the Italian authorities reserved the right to notify the Commission of subsequent developments on this issue, and indicated its intention to bring existing infringements to an end. Not having been notified of subsequent developments, however, the Commission lodged the present action on 19 December 2002, based on Article 226 EC.

III — The action

19. In its application, the Commission sets out three complaints against the Member State. It asks the Court to rule that the Italian Republic:

— failed to transpose, in LD 18/99, the maximum period of seven years for licensing suppliers of groundhandling services, as laid down in Article 11(1)(d) of the Directive;

— introduced in Article 14 of LD 18/99 a social measure incompatible with Article 18 of the Directive; and

— enacted in Article 20 of LD 18/99 interim provisions not authorised by the Directive.

20. By a letter of 19 January 2004, the Italian Government notified the Court that Law No 306 of 31 October 2003, amending LD 18/99, finally introduced a direct reference to the maximum period of seven years for licensing suppliers of services.

21. By a letter lodged at the Court Registry on 24 March 2004, the Commission decided to withdraw the first of the complaints in its application. [11] By a letter of 22 April 2004, the Italian Government accepted the partial withdrawal.

22. I will therefore consider the Commission's second complaint first, followed by the third complaint.

11 — The Commission's partial withdrawal took effect before the hearing on 25 March 2004, when the Commission noted its withdrawal. According to the Court's consistent case-law, withdrawal, and especially partial withdrawal, can take effect during the written procedure, or at a later stage: see, in particular, Case C-331/94 *Commission* v *Greece* [1996] ECR I-2675, paragraphs 5 and 6.

A — *The complaint as to the existence of a social measure incompatible with the Directive*

1. Arguments of the parties

23. The Commission alleges that Article 14 of LD 18/99, enacted by the Italian Republic, is incompatible with the Directive and, in particular, with Article 18 thereof. Article 14 requires suppliers of groundhandling services to guarantee the transfer of staff from the previous supplier, in proportion to the scale of the activities being taken over.

24. Such a requirement goes beyond what is allowed by Article 18 of the Directive, and even what is allowed by Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses or undertakings. [12] Article 14 of LD 18/99 requires staff to be

12 — Council Directive of 12 March 2001 (OJ 2001 L 82, p. 16, 'the company transfer Directive'). The measures in Article 14 of LD 18/99 could only be justified as part of implementing the company transfer Directive. In this case, the Commission emphasises, the Italian measures apply to any situation in which a business is being transferred, and are thus of much wider scope than the company transfer Directive. The company transfer Directive strictly circumscribes how a transfer may be implemented. The fact that the services provided are similar does not necessarily mean that the whole economic entity is being transferred. The fact that businesses are similar does not necessarily mean that there is a 'transfer' within the meaning of the company transfer Directive, or that the requirement to maintain workers' rights necessarily applies.

transferred automatically, when a business is transferred; in other words, in every case, and not only where the company transfer Directive requires it.

25. According to the Commission, in the context of opening up the groundhandling market, such a requirement favours established businesses, which do not have to hire staff from another business. Suppliers wishing to penetrate the market cannot, in practice, choose their own staff, since they are bound to hire staff from the previous supplier. The Commission considers that, for any new competitor, such a situation amounts to a restriction on the freedom to supply services.

26. According to the Italian Government, the social protection measures in Article 14 of LD 18/99 do not frustrate the Directive's aim and simply amount to the exercise of a Member State's jurisdiction as contemplated by Article 18 of the Directive. Article 14 of LD 18/99, it adds, is part of a gradual process introduced by the directive.

27. According to the Italian Government, it is appropriate to consider Article 14 in the context of LD 18/99, which was passed at a time of extremely high unemployment in Italy and when airport business is generally regulated by long-standing collective agreements. The Italian authorities submit that in view of the high level of unionisation with its capacity to cause disruption, it was appropriate to phase in the change gradually. In this context, the Italian Government sought to take a moderate approach by enacting an interim measure on workers' rights, which would otherwise no longer enjoy protection under Italian law. [13]

28. According to the Government, the eighth and twenty-fourth recitals to the preamble to the Directive, as well as Article 18, allow Member States to provide additional safeguards to those already provided for in Community law concerning workers' rights. [14] Transposal into domestic law necessarily has to balance the competing fundamental interests of liberalising the groundhandling market and protecting workers' rights. In other words, the Italian authorities dispute the Commission's position, under which liberalisation would be the prevailing objective.

13 — Paragraph 3.2 of the defence, also set out in the Permanent Representative's memorandum (No 8679) of 18 July 2000, as cited by the Commission in its application (paragraph 34)

14 — Paragraph 3.4 of the defence.

29. In a memorandum of the Permanent Representative of 31 October 2001, [15] the Italian authorities proposed to replace Article 14 of LD 18/99 with a requirement to be specified, whose aim would be that any new business wishing to provide groundhandling services would give preference, for a period, to staff from the outgoing business who were still without work. [16]

2. Assessment

30. In order to assess the second complaint, it is necessary to examine the scope of Article 18 of the Directive. Secondly, it must be determined how the scope of this provision should be interpreted. Are the legislative steps taken by Member States subordinate to fulfilment of the Directive's aims, as the Commission maintains? Or should Article 18 be interpreted in accordance with the Italian Government's view, as conferring on Member States a degree of legislative latitude, when implementing the Directive, regarding social protection?

31. I believe (as does the Commission) that these measures should not call into question the aims and practical effect of the Directive. In accordance with interpretative methods upheld by the Court, [17] I will examine the text of Article 18, as well as its context and aims, to determine the scope of the provision in question.

32. As we know, Article 18 provides that: 'Without prejudice to the application of the provisions of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers ...'. This provision must be read together with the 24th recital in the preamble to the Directive, which states that: 'Member States must retain the power to ensure an adequate level of social protection for the staff of undertakings providing groundhandling services'.

33. It is apparent from the above wording that Member States may adopt social protection measures in implementing the Directive. But the wording of these provisions does not confer on Member States unlimited jurisdiction in the area of social protection. The

15 — No 13444.

16 — A proposal which, for the time being, remains to be implemented, as the Commission notes at paragraph 45 of its application.

17 — See, in particular, Case C-128/94 *Hönig* [1995] ECR I-3389, paragraph 9, Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, Case C-372/98 *Cooke* [2000] ECR I-8683, and Case C-341/01 *Plato Plastik* [2004] ECR I-4883.

jurisdiction is effectively governed by three conditions. First, when exercising that jurisdiction, the Member State must not adversely affect the operation of the Directive as a whole. Secondly, it must respect other provisions of Community law. Finally, measures taken under this jurisdiction must be necessary to ensure the protection of workers' rights.

34. As set out in the first condition, when implementing the Directive, Member States must not frustrate the achievement of the Directive's aims (which I consider below). The second condition, set out in Article 18 of the Directive, refers to the obligation to respect other provisions of Community law when Member States decide to adopt social measures. Thus Member States must not infringe the company transfer Directive when implementing the social measures which they decide to adopt. Finally, this provision requires that the national measure be proportionate.

35. A schematic interpretation of the provision on social protection shows where Article 18 stands within the scheme of the Directive. I note that Article 18 is almost one of the final articles. [18] First of all, the Directive prescribes the scope of access to the groundhandling market; the meaning of terms used in the Directive; and the provisions, as a whole, define those Community rules to be applied by Member States in the context of opening up the groundhandling market. There are a number of these provisions, which concern not only the licensing of suppliers, approval and exemptions, but also rules relating to access to the installations themselves.

36. Social protection only features after all the provisions concerning access to the groundhandling market and the importance of Member States' respecting safety and security. [19]

37. In this context, and when considering the scheme of the Directive, the wording of Article 18 is unequivocal. It is appropriate to read this article as a concern: a genuine concern, but one which merely supplements the implementation of the Directive as a whole. This analysis also seems to me consistent with the aims of the text.

18 — The 22nd and 24th recitals in the preamble, which also refer to Member States' power to provide for social protection within the framework of the Directive, are also among the final recitals.

19 — I also note that this article is a standard one which features in other Community legislation as a further consideration to be taken into account by Member States: see, for example, in this context, Article 15 of the Proposal for a directive of the European Parliament and of the Council on market access to port services (COM (2001) 35 final, OJ 2001 C 154, p. 290).

38. The Directive's aim, as the Commission rightly points out, as stated in the recitals in the preamble, is twofold. First, it concerns the gradual liberalisation of access to the market. Secondly, it concerns the introduction of fair and genuine competition in the groundhandling market. [20] I have also noted that the provisions, as a whole, lay down detailed rules on access to the groundhandling market. Factors relating to social protection are, therefore, supplementary. It is not appropriate (contrary to what the Italian Republic wrongly maintains) to allow provisions relating to workers' rights, in the Directive, to prevail over provisions relating to market liberalisation. I believe that the Directive's aim is only concerned with the groundhandling market. Its provisions are framed to guarantee that this market is opened up.

39. I believe that the Directive's aim must not be frustrated by Member States adopting social measures based on Article 18. I consider that Article 14 of LD 18/99 does indeed frustrate this aim.

40. According to explanations by the Italian authorities, the Italian provision does not hinder liberalisation of the groundhandling sector; it is designed only to bring about a gradual transition from the old to the new system, without creating major labour relations difficulties. The Italian Republic disputes the Commission's argument that the legislation in question would distort competition in the airport services market, in favour of businesses already established, to the detriment of potential competitors. It argues that the principle of free competition cannot be invoked by operators as a pretext to avoid the relevant restrictions imposed by social legislation. [21]

41. It may also be recalled that Article 14 of LD 18/99 provides (as an interim measure [22]) that, to ensure that existing employment levels are maintained, and that labour relations with staff under the previous management are continued, 'except where a branch of a company is transferred, any transfer of activity in one or more categories of groundhandling, as set out in Annexes A and B, shall include the transfer of staff, named by those concerned, and in agreement with trade unions, from the previous supplier to the subsequent supplier, in proportion to the share of traffic or scale of undertaking being taken over by the sub-

20 — The fifth recital in the preamble states that the benefits of these two aims should be to reduce operating costs of airline companies and to improve the quality of service offered to airport users. These two aims have, in practice, been achieved, as shown by a study by the Commission under Article 22 of the Directive: http://www.europa.eu.int/comm/transport/air/rules/doc/consultation_groundhandling_en.pdf (paragraph 1.2).

21 — Page 7 of the defence and Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 22.

22 — Article 14(1) limits its application to the first 30 months following the entry into force of LD 18/99.

sequent supplier.' These measures therefore provide social protection over and beyond that laid down by the company transfer Directive. This additional social protection can only be properly based on Article 18 if the conditions set out above are fulfilled.

42. In practice, the national legislative provision requires every new competitor, by way of additional social protection, to hire staff from the previous service provider, in proportion to the volume of traffic and to the scale of undertaking being taken over. I believe (as does the Commission) that such a requirement can frustrate the opening-up of the groundhandling market and prejudice the Directive's practical effect. The Directive aims to open up to competition a market which, in the past, operated as a monopoly. This decision, which must be carried out gradually, is unusual in that it allows new businesses to take over undertakings previously operated by one entity. As the Commission points out, this gradual opening-up streamlines airport infrastructure and reduces costs.

43. By contrast, I believe (as does the Commission) that the Italian measure places potential new businesses at a competitive disadvantage vis-à-vis existing businesses. Businesses otherwise interested in providing groundhandling services are unable to choose their own staff. Given the business activity in question — service provision — the freedom to hire staff is a decisive factor, since it is the staff who actually provide the service. By limiting choice and the freedom to organise staff, the Italian provision imposes restrictions on new businesses wishing to penetrate the newly competitive market, with detrimental consequences for them. These restrictions place such new businesses at a disadvantage, to the benefit of existing businesses. When a factor as fundamental as staff organisation is imposed by a national measure, such a measure reduces new competitors' freedom of manoeuvre.

44. I believe, furthermore, that the Commission is right to assert that the Italian measure goes beyond such steps as may be necessary to protect workers' rights, under Article 18 of the Directive.

45. This measure provides for staff to be automatically hired by the new supplier, albeit in proportion to the business being taken over, but automatically none the less. I believe that such measures are disproportionate. In this respect, it is interesting to note that the Italian Government proposed, in the pre-litigation procedure, to replace Article 14 of LD 18/99 with an 'obligation on

the new business, when seeking to hire staff, to give preference, for a certain period, to employees from the previous business who remain without work.' [23] This alternative to the current provisions of Article 14 of LD 18/99 would have given new competing businesses greater room for manoeuvre.

46. To quote an example cited by the Commission at the hearing, I believe that it is also possible to envisage an alternative national measure which, instead of forcing a new business to hire existing workers, shared the onus and responsibility of protecting the rights of existing workers between the old and new suppliers. Thus the new business, together with the business whose undertakings (and possibly trade unions) it had taken over, could re-deploy certain workers, or offer redundancy. Such a measure would have the advantage of not discouraging new businesses wishing to enter the market newly opened to competition by imposing such a level of social responsibility.

47. Therefore the Commission's complaint that the social measure, when transposed into Italian law, is incompatible with the Directive, must be upheld.

23 — Paragraph 45 of the application.

B — *The complaint based on the enactment of interim provisions not permitted by the Directive*

48. In its application, the Commission argued that the provisions of Article 20 of LD 18/99 infringed the Directive in that they allow businesses with 'different systems of organisation' to operate in the self-handling field at the same time as self-handlers licensed in accordance with the provisions of the Directive. The Commission notes that the Italian authorities relied on the interim nature and lesser importance of these provisions, as well as their intention of repealing that article.

49. The Directive clearly defines categories of groundhandling service operators who may become groundhandling service providers or self-handling operators. Entities which do not satisfy the criteria set by the Directive can operate only as suppliers to third parties. The Directive does not allow Member States to adopt interim measures for businesses with 'different systems of

organisation'. By introducing such interim measures, LD 18/99 enacted provisions contrary to the letter of the Directive.

50. Article 20 of LD 18/99 is, therefore, incompatible with the Directive. The Commission's complaint based on this article is, therefore, well founded.

IV — Conclusion

51. In the light of the observations above, I propose that the Court rule as follows:

(1) By introducing Article 14 of Legislative Decree No 18 of 13 January 1999, an incompatible social measure, the Italian Republic has failed to comply with its obligations under Article 18 of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports.

(2) By enacting, in Article 20 of Legislative Decree No 18 of 13 January 1999, interim provisions not permitted by the Directive, the Italian Republic has infringed the said Directive.

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