JUDGMENT OF THE COURT (Fifth Chamber)
29 October 1998 *

In Case C-114/97,

Commission of the European Communities, represented by Antonio Caeiro, Legal Adviser, and Fernando Castillo de la Torre, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Spain, represented by Santiago Ortiz Vaamonde, Abogado del Estado, of the State Legal Service, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4—6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by maintaining in force Articles 7, 8 and 10 of Law No 23/1992 of 30 July 1992, in so far as those provisions make the grant of authorisation to carry on private security activities, in the case of 'security companies', subject to the requirement of being constituted in Spain and the requirement that their directors and managers should reside in Spain and the requirement that 'security staff' should possess Spanish nationality, the Kingdom of Spain has failed to fulfil its obligations under the EC Treaty, in particular Articles 48, 52 and 59,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida, C. Gulmann, L. Sevón and M. Wathelet, 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 7 May 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 March 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by maintaining in force Articles 7, 8 and 10 of Law No 23/1992 of 30 July 1992, in so far as those provisions make the grant of authorisation to carry on private security activities, in the case of security companies, subject to the requirement of being constituted in Spain and the requirement that their directors and managers should reside in Spain and the requirement that security staff should possess Spanish nationality, the Kingdom of Spain had failed to fulfil its obligations under the EC Treaty, in particular Articles 48, 52 and 59.

Legal background

2 In Spain, private security activities are governed by Law No 23/1992 of 30 July 1992 on private security (hereinafter 'the Law') and Royal Decree No 2364/1994 of 9 December 1994 approving the private security regulation.

3 Under Article 5(1) of the Law, security companies may provide only the following services:

— Surveillance and protection of property, premises, shows, contests or conventions [(a)];

— Protection of specific persons [(b)];

— Depositing, safekeeping, checking and sorting of coins and banknotes, securities and valuables, as well as the transport and disposition thereof [(c) and (d)];

— Installation and maintenance of surveillance and alarm systems [(e)];

— Operation of central control offices for the reception, checking and transmission of alarm signals and their communication to the security forces (*Fuerzas y Cuerpos de Seguridad*), as well as provision of response services in so far as these do not fall within the sphere of responsibility of the security forces [(f)];

— Planning and assistance in connection with the security services covered by the Law [(g)].

4 Under Article 7(1) of the Law, only undertakings which have obtained authorisation from the Ministry of the Interior, in the form of an entry in a register, may provide private security services. Article 7(1)(b) provides that, in order to obtain this authorisation, 'security companies which employ security staff must in any event be Spanish'.

5 Article 8 of the Law also requires the directors and managers of security firms entered on the register referred to in Article 7(1) to be resident in Spain. That condition applies to all security firms, including those which do not employ security staff.

6 According to Article 10(1) of the Law, security staff must first obtain authorisation from the Ministry of the Interior. Article 10(3)(a) makes such authorisation subject to the possession by security staff of Spanish nationality.

7 For the purposes of the Law, 'security staff' means watchmen, persons in charge of security, private bodyguards, private field guards and private detectives. Field guards and private detectives may also pursue their activities in a self-employed capacity, not as members of a security undertaking.

8 Security firms carrying on the activities described in Article 5(1)(e) and (g) of the Law do not require security staff. Other security firms include amongst their personnel both security staff and administrative staff to which the nationality condition does not apply.

Pre-litigation procedure

9 On 4 April 1995 the Commission informed the Spanish Government that the provisions of Spanish law relating to private security were, in its view, contrary to Articles 48, 52 and 59 of the Treaty and formally requested it to submit its observations on this matter.

10 By letter of 21 June 1995 the Spanish Government replied that the nationality and residence conditions imposed by those provisions came under the derogations provided for by Articles 48(3) and 4, 55 and 56 of the EC Treaty.

11 By letter of 11 June 1996 the Commission addressed to the Spanish Government a reasoned opinion in which it concluded that, by maintaining in force legislative provisions making the exercise of private security activities subject to the condition that the security firm be constituted in Spain, that directors and managers of the firm must reside in Spain and, finally, that private security staff must have Spanish nationality, the Kingdom of Spain had failed to fulfil its obligations under Articles 48, 52 and 59 of the Treaty.

12 By letter of 20 September 1996 the Spanish Government repeated the arguments which it had raised in its reply to the formal letter calling upon it to submit its observations.

13 Not satisfied by those explanations, the Commission brought this action for a declaration that the Kingdom of Spain had failed to fulfil its obligations.

The application

Arguments of the parties

14 As regards freedom of establishment, the Commission submits first of all that the rule that a company's directors must reside in the Member State in which it is established entails discrimination on grounds of nationality contrary to Article 52 of the Treaty.

15 Next, the Commission contends that the nationality condition imposed on undertakings by Article 7 of the Law is explicitly discriminatory and entails a restriction on the right of undertakings established in another Member State to pursue their activities in Spain through a branch or agency, in breach of Article 52 of the Treaty.

16 Finally, according to the Commission, the nationality condition laid down in Article 10 of the Law is also contrary to Article 52 in so far as it is applied to security staff working for their own account.

17 As regards freedom to provide services, the Commission contends that the nationality condition relating to undertakings, laid down in Article 7 of the Law, and that relating to directors' residence, laid down in Article 8, which presupposes a permanent establishment, have the effect of excluding any private security activity carried out by undertakings or security staff which are not established in Spain. Such requirements constitute a discriminatory obstacle to the freedom to provide services and are therefore contrary to Article 59 of the Treaty.

18 The Commission adds that the activities in question cannot be excluded from the scope of Articles 52 and 59 of the Treaty on the ground that they are connected with the exercise of official authority. That exception, provided for in the first paragraph of Article 55 combined, where appropriate, with Article 66 of the Treaty, should be interpreted restrictively and limited to what is strictly necessary to safeguard the interests which those provisions allow the Member States to protect. Furthermore, involvement in the exercise of official authority must be direct and specific.

19 The Commission considers, however, that since the protection of property and of private persons meets a purely private need, private security firms and staff are not directly and specifically involved in the exercise of official authority, which, in its view, entails the exercise of powers of constraint. It is clear, on the contrary, from the Spanish legislation that security firms and staff are only involved in a complementary and subordinate way in public security activities.

20 As far as Article 56(1) combined, where appropriate, with Article 66 of the Treaty is concerned, the Commission refers to the case-law of the Court according to which a discriminatory national measure is justified only if it is directed against a genuine and sufficiently serious threat affecting one of the fundamental interests of society (Case 30/77 *Bouchereau* [1977] ECR 1999) and the existence of such a threat must be demonstrated by the Member State on the basis of an assessment of the individual conduct of persons.

21 According to the Commission, the exercise of the activity of detective or field guard in Spain by a national of another Member State does not clearly involve a genuine and sufficiently serious threat. The same applies to discrimination in relation to legal entities. Besides, even if there were such a threat, Member States cannot put a ring fence around an entire sector of activities.

22 As regards freedom of movement for workers, the Commission contends that Article 10(3) of the Law infringes Article 48 of the Treaty since it excludes employed persons who are nationals of other Member States from carrying on private security activities.

23 The Commission adds that the derogation relating to employment in the public service provided for in Article 48(4) cannot be applied to the occupations in question.

24 Similarly, the Commission considers that the nationality condition imposed by Article 10(3) of the Law is not justified on the grounds of public policy, public security or public health, as referred to in Article 48(3) of the Treaty. The Commission stresses the importance of interpreting that provision strictly and points out that the case-law contains no example of a situation in which that derogation has been applied to a Member State's ban prohibiting nationals of other Member States from employment in private undertakings.

25 The Spanish Government does not deny that its legislation impedes the exercise of the freedom of establishment, the freedom to provide services and the freedom of movement for workers within the Community. It considers, however, that those restrictions are justified by the derogations provided for by the Treaty.

26 Thus, the Spanish Government contends, first of all, that private security activities involve the exercise of official authority within the meaning of Article 55 of the Treaty owing to their purpose, which is to maintain public security. In this regard, it enumerates a number of obligations imposed on security firms and security staff which, in its view, demonstrate that a particular relationship of solidarity with the State is necessary. It is with this in view that an administrative authorisation by entry in a register or authorisation from the Ministry of the Interior are provided for.

27 Second, the Spanish Government submits that a threat to public security and public order arises from the nature of the activities carried out by private security undertakings, which demand rigorous controls. The effectiveness of such controls could not be guaranteed if the undertakings or persons concerned did not have Spanish nationality or if they were not established in the Member State in which they carry on their activities.

28 As regards, in particular, Article 48(3) of the Treaty, the Spanish Government states that account must also be taken of the fact that security guards may use arms or other means of defence in providing their services and that in general they must wear a uniform. They are also vested with particular rights which could affect the rights and freedoms of citizens.

29 Third, the Spanish Government considers that the provisions in question are justified for overriding reasons relating to the public interest, consisting of the need, first, to guarantee adequately the security of persons and property and, second, the need to make clear what rights citizens may have to set up or use private security services. In advancing this argument the Spanish Government also points out the underlying reasons on which security services are based, the need to prevent crime and to contribute to the maintenance of public security, the need to prevent any unwarranted assumption of authority and to ensure observance of fundamental requirements, the lack of approval standards, the risk of inadequate training of security guards, the risk of irregularities in the exercise of their functions and of the commission of numerous infringements, the need to ensure that protection of security does not become the occasion for assaults, acts of violence, abuses of rights or interference with the legal or property interests of other persons and the need to protect users of the services and to uphold the social system.

Findings of the Court

30 As the Spanish Government itself recognises, Articles 7, 8 and 10 of the Law entail restrictions on freedom of establishment, freedom to provide services and freedom of movement for workers.

I — The nationality condition (Articles 7 and 10 of the Law)

31 It must be observed first of all that the nationality condition imposed on undertakings by Article 7 of the Law prevents undertakings established in other Member States from carrying on their activities in Spain through a branch or an agency. Secondly, Article 10 of the Law precludes nationals of other Member States from carrying on permanently private security activities in Spain as employed persons or self-employed persons. Finally, those provisions prevent nationals of other Member States from providing private security services in Spain.

32 It is necessary, however, to consider whether those obstacles are justified by the derogations provided for by the Treaty, namely in Article 48(4), the first paragraph of Article 55 and Article 66 of the Treaty, on the one hand, and Articles 48(3), 56(1) and 66 of the Treaty, on the other.

Article 48(4), the first paragraph of Article 55 and Article 66 of the Treaty

33 As far as Article 48(4) of the Treaty is concerned, it must be observed that private security undertakings do not form part of the public service and that this provision is not therefore applicable in this case.

34 As regards the exception provided for in the first paragraph of Article 55 combined, where appropriate, with Article 66 of the Treaty, it must be remembered that, as a derogation from the fundamental rule of freedom of establishment, it must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect (Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 7).

35 According to established case-law, the derogation for which it provides must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45, and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8).

36 In the present case, it is clear from the evidence before the Court that the activity of security undertakings and security staff is to carry out surveillance and protection tasks on the basis of relations governed by private law.

37 However, the exercise of that activity does not mean that security undertakings and security staff are vested with powers of constraint. Merely making a contribution to the maintenance of public security, which any individual may be called upon to do, does not constitute exercise of official authority.

38 Furthermore, as the Advocate General points out in paragraphs 26 and 27 of his Opinion, the Spanish legislation makes a clear distinction between tasks entrusted to security undertakings and security staff and those reserved for the public security forces. Where in very specific situations the former are called upon to assist the latter, the functions they perform are only auxiliary functions.

39 It follows that private security undertakings and private security staff are not directly and specifically involved in the exercise of official authority and that the exception provided for in the first paragraph of Article 55 combined, where appropriate, with Article 66 of the Treaty does not apply in this case.

Articles 48(3), 56(1) and 66 of the Treaty

40 The nationality condition imposed on security undertakings and security staff by Articles 7 and 10 of the Law excludes the exercise, by a person or undertaking possessing the nationality of another Member State, of private security activities.

41 Such a general exclusion from access to certain occupations cannot be justified on the grounds of public policy, public security or public health referred to in Articles 48(3) and 56 of the Treaty.

42 The right of Member States to restrict freedom of movement for persons on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the private security sector from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health (see, as far as public health is concerned, Case 131/85 *Gül* [1986] ECR 1573, paragraph 17).

43 That reasoning applies *a fortiori* as regards the overriding reasons relating to the public interest which the Spanish Government puts forward as justification for the nationality condition.

II — The residence condition (Article 8 of the Law)

44 The rule according to which directors and managers of all security undertakings must reside in Spain constitutes an obstacle to freedom of establishment (see, in this regard, Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32) and to the freedom to provide services.

45 This condition is not necessary in order to ensure public security in the Member State concerned and is not therefore covered by the derogation provided for by Article 56(1) combined, where appropriate, with Article 66 of the Treaty.

46 Recourse to this justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, as far as public policy is concerned, *Bouchereau*, cited above, paragraph 35).

47 Contrary to what the Spanish Government contends, it cannot be argued that this threat would arise from the impossibility for the Spanish authorities, if the rule in question did not exist, to monitor effectively the activities carried on by private security undertakings. Checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its directors. Moreover, the payment of any penalty may be secured by means of a guarantee to be provided in advance (see, to this effect, Case C-350/96 *Clean Car Auto Service* [1998] ECR I-2521, paragraph 36).

48 It follows from all the foregoing that, by maintaining in force Articles 7, 8 and 10 of Law No 23/1992 of 30 July 1992, in so far as those provisions make the grant of

authorisation to carry on private security activities, in the case of security companies, subject to the requirement of being constituted in Spain and the requirement that their directors and managers should reside in Spain and the requirement that security staff should possess Spanish nationality, the Kingdom of Spain has failed to fulfil its obligations under Articles 48, 52 and 59 of the Treaty.

Costs

49 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. Since the Kingdom of Spain has been unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1) Declares that, by maintaining in force Articles 7, 8 and 10 of Law No 23/1992 of 30 July 1992, in so far as those provisions make the grant of authorisation to carry on private security activities, in the case of security companies, subject to the requirement of being constituted in Spain and the requirement that their directors and managers should reside in Spain and the require-

ment that security staff should possess Spanish nationality, the Kingdom of Spain has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty;

2) Orders the Kingdom of Spain to pay the costs.

Jann Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 29 October 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber