JUDGMENT OF THE COURT (First Chamber)

26 January 2006 *

In Case C-514/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 December 2003,

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

applicant,

v

Kingdom of Spain, represented by E. Braquehais Conesa, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues and E. Levits (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration by the Court that:

— by requiring, in the implementing provisions, that private security undertakings and members of their staff possess Spanish nationality;

— by requiring, in connection with the rules applicable to foreign registrations, that private security undertakings:

(a) always be constituted as legal persons,

(b) have a specific share capital, without taking into account the fact that those undertakings are not subject to the same obligations in the country of establishment,

(c) lodge security at the Caja General de Depósitos, without taking into account any payment of security in the Member State of origin,

(d) employ a minimum number of staff;

— by requiring staff of a foreign private security undertaking to obtain fresh specific authorisation in Spain when comparable authorisation in the Member State of establishment of that undertaking has already been obtained,

and by failing to make the professions in the private security sector subject to the Community rules on the recognition of professional qualifications,

the Kingdom of Spain has failed to fulfil its obligations under Articles 43 EC and 49 EC, Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and 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 (OJ 1992 L 209, p. 25).

Legal context

Community legislation

2 Directives 89/48 and 92/51 have as their objective to put in place systems for the recognition of diplomas to enable nationals of Community countries to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training. Whilst Directive 89/48 relates to university diplomas awarded on completion of professional education and training of at least three years' duration, Directive 92/51 applies to diplomas awarded on completion of a post-secondary course of at least one year's duration or of equivalent duration defined in Article 1 of that directive.

3 Article 1 of directive 92/51 provides:

'For the purposes of this directive, the following definitions shall apply: ...

(c) *attestation of competence*: 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;

...

(e) *regulated profession*: the regulated professional activity or range of activities which constitute this profession in a Member State;

(f) *regulated professional activity*: 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. The following in particular shall constitute a mode of pursuit of a regulated professional activity:

— 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 ...

...'

4 Article 8 of Directive 92/51 provides as follows:

'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

5 In Spain, private security activities are regulated by Law No 23/1992 of 30 July 1992 on private security services (BOE No 186, 4 August 1992, p. 27116; 'Law on private security services') and by Royal Decree No 2364/1994 of 9 December 1994 approving the Regulation on private security services (BOE No 8, 10 January 1995, p. 779; 'Regulation on private security services').

6 Article 5(1) of the Law on private security services contains an exhaustive list of six classes of services which can be provided by private security undertakings, namely:

— surveillance and protection of property, premises, shows, contests or conventions;

— protection of specific persons;

— depositing, safekeeping, checking and sorting of coins and banknotes, securities, valuables and dangerous objects, as well as the transport and distribution thereof;

— installation and maintenance of surveillance and alarm systems;

— 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;

— planning and assistance in connection with the security services covered by the Law.

7 Pursuant to Article 7(1) of that law, an undertaking wishing to provide such security services must obtain administrative authorisation in the form of an entry in a register held by the Ministry of the Interior. In order to obtain such registration, the undertaking in question must be constituted as a legal person corresponding to one of the four types of companies defined by national law. In addition, the Regulation on private security services makes the grant of the above authorisation subject to other conditions which vary according to the type of activity or activities carried out by the undertaking in question.

8 Thus the undertaking in question must have a minimum share capital and produce security. The amounts of that capital and that security are graded by reference not only to the type or types of activity carried out by the undertaking, but also to the geographical range of those activities within the national territory. The security must be lodged with a Spanish body, the Caja General de Depósitos.

9 In an annex to the Regulation on private security services, certain particular obligations are imposed on security undertakings according to the types of activities which they undertake. If that activity is the transport and distribution of valuables or dangerous objects or the installation and maintenance of surveillance and alarm systems, the following is required:

'1. Valuables or dangerous objects

(a) ...

(b) Second phase

1.° A team composed of a head of security and at least 30 guards, if the range of the undertaking is national, and 6 guards, plus 3 per province, if the range covers an Autonomous Community.

...

2. Explosives

(a) ...

(b) Second phase

1.º A team composed of at least 2 guards specialising in explosives for each vehicle used by the undertaking for the transport of explosives and a head of security where the number of guards exceeds 15.

...

5. Installation and maintenance of surveillance and alarm systems

...

2.º Second phase

(a) A team composed of at least one engineering technician and five fitters for undertakings whose range of activity is national and of an engineering technician and two fitters for those whose range covers an Autonomous Community.'

10 By application of Article 10 of the Law on private security services, read in conjunction with Article 53 of the Regulation on private security services, each member of private security staff must obtain authorisation from the Ministry of the Interior. To that end, he must be of age, not be older than the age limit set by regulation, have the physical and mental attributes necessary for performance of his work and pass the tests required to show his knowledge and capabilities.

11 With regard in particular to the profession of private detective, Article 54(5)(b) of the Regulation on private security services also requires the persons concerned to hold a private detective diploma. That diploma is awarded on condition that a person has achieved a certain level of training, taken special courses and passed aptitude tests.

12 Directives 89/48 and 92/51 were transposed into national law by, respectively, Royal Decree No 1665/1991 of 25 October 1991 governing the general system for recognition of higher-education diplomas awarded in the Member States of the European Union requiring studies of at least three years' duration (BOE No 280, 22 November 1991, p. 37916) and Royal Decree No 1396/1995 of 4 August 1995 governing the second general system for recognition of professional education and training of the Member States of the European Union and other States signatory to the Agreement on the European Economic Area and supplementing what was established by Royal Decree No 1665/1991 (BOE No 197, 18 August 1995, p. 25657). The annexes to those two decrees contain lists of the regulated professions covered by the procedures for recognition in question. However, the professions covered by the Regulation on private security services do not appear on those lists.

Pre-litigation procedure and written procedure before the Court

13 In 1997, the Commission brought, against the Kingdom of Spain, a first action for failure to fulfil obligations with regard to certain provisions of the Law and Regulation on private security services. In the judgment in Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, delivered on that action, the Court held that, by maintaining in force Articles 7, 8 and 10 of the Law on private security services which limit the grant of authorisation to carry on private security activities to Spanish undertakings and by issuing security staff permits only to Spanish nationals, the Kingdom of Spain had failed to fulfil its obligations under the EC Treaty.

14 By letter of 29 November 1999, the Commission informed the Spanish Government that the national laws and regulations on private security activities remained in breach of Community law.

15 Not having received an answer from the Spanish Government within the period prescribed, on 24 July 2000 the Commission issued a reasoned opinion requesting the Kingdom of Spain to take the measures necessary to end the breaches alleged within two months of notification of that opinion. Taking the view that the observations submitted by the Spanish authorities in answer to that reasoned opinion were not satisfactory, the Commission brought the present action.

16 In its reply, the Commission noted that, following the judgment in *Commission* v *Spain*, the Spanish authorities had amended the Law and the Regulation on private security services by abolishing the nationality requirement. The Commission therefore withdrew the complaint relating to that requirement, whilst maintaining the other complaints.

The action

17 In support of its action, the Commission raises six complaints concerning in essence the conditions prescribed by Spanish legislation for carrying on private security activities in Spain.

18 Those complaints may be stated as follows:

(1) incompatibility with Articles 43 EC and 49 EC of the requirement that private security undertakings must always be constituted as legal persons;

(2) incompatibility with Articles 43 EC and 49 EC of the requirement that such an undertaking have a minimum share capital;

(3) incompatibility with Articles 43 EC and 49 EC of the requirement that such an undertaking lodge security with a Spanish body, the Caja General de Depósitos;

(4) incompatibility with Articles 43 EC and 49 EC of the requirement that such an undertaking employ a minimum number of workers;

(5) incompatibility with Articles 43 EC and 49 EC of the requirement that special authorisation is required for security staff carrying out their work in Spain;

(6) breach of Directives 89/48 and 92/51 as a result of the lack of recognition of professional qualifications.

19 Before considering the substance of each of those complaints, it is appropriate to set out the preliminary arguments put forward by the parties and to recall the general principles laid down in the Court's settled case-law.

General observations

Arguments of the parties

20 The Commission recognises that private security activities have not been harmonised at Community level. However, the restrictive provisions of Spanish law on the subject do not comply with the basic requirements laid down by the Court's established case-law with respect to Articles 43 EC and 49 EC. The Commission disputes in particular the alleged closeness between private security and public security. In its view, the contribution of the undertakings concerned to the maintenance of public security is no different from the contribution which any individual may be called upon to make. In the present case, the Commission claims that the fact of making a foreign private security undertaking subject to the same requirements as those to which Spanish undertakings are subject — without taking into account the obligations, guarantees and requirements which may already have been imposed on the same undertaking in another Member State — constitutes an unjustified obstacle to its establishment on Spanish territory and a highly dissuasive factor in respect of the provision of cross-border services in that sector, particularly with regard to small and medium-sized undertakings.

21 According to the Spanish Government, private security is closely linked to public security, of which it constitutes an extension. Thus, a large part of the activities in that sector involves use of certain means which, normally, are not permitted (in particular weapons). Those activities are also likely to have a serious effect on the free exercise of citizens' rights and freedoms. Consequently, in that sector, a Member State may legitimately have recourse to means of intervention and monitoring which would not be justified in other fields. Since this sector is not harmonised at Community level, its regulation in other Member States may be radically different from that in Spain, hence the necessity of requiring compliance with the particular requirements existing in Spain, in particular those connected with the problem of terrorism.

Findings of the Court

22 In its action, the Commission refers both to Article 43 EC, which guarantees freedom of establishment, and Article 49 EC, which relates to freedom to provide services. In that regard, it should be noted that the key element defining the respective fields of application of those two provisions is whether or not the economic operator concerned is established in the Member State in which it offers the service in question (the host Member State). When it is established there, by either its principal or secondary establishment, its situation falls within the scope of the principle of freedom of establishment within the meaning of Article 43 EC. In the contrary case, it must be classified as a 'cross-border provider of services' and falls under the principle of freedom to provide services pursuant to Article 49 EC (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraphs 25 to 28, and Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 28 to 32). In the context of the present case, the national laws and regulations in question appear to apply without distinction both to private security undertakings established in Spanish territory and to those established in other Member States and active in Spain on an occasional or temporary basis.

23 Private security services are not, to date, harmonised at Community level. However, although it is true that, in such circumstances, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty (see Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31; Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 24; and Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 26).

24 In accordance with the case-law of the Court, Article 59 of the EC Treaty (now, after amendment, Article 49 EC) requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of all restrictions, even if applicable without distinction to national providers of services and to those of other Member States, which are liable to prohibit or render less advantageous the activities of a provider of services established in another Member State, where he lawfully provides similar services (Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14, and Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 29).

25 Furthermore, the Court has already held that Article 59 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*De Coster*, paragraph 30).

26 It should also be noted that any national measure liable to hinder or make less attractive the exercise of those freedoms can be justified only if it fulfils four conditions: it must be applied in a non-discriminatory manner; it must be justified by overriding reasons based on the general interest; it must be suitable for securing the attainment of the objective which it pursues; and it must not go beyond what is necessary in order to attain that objective (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57; and *Mac Quen and Others*, paragraph 26).

27 In general, such a measure, when it involves the imposition of certain conditions on the exercise of the guaranteed rights, may only be justified in so far as the public interest relied on is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established (*Corsten*, paragraph 35). In other words, as the Advocate General observed in point 45 of her Opinion, the authorities of the host Member State must, in principle, take account of the requirements which the economic operators concerned and their employees already satisfy in their country of origin.

28 Finally, with regard to the argument of the Spanish Government concerning the closeness between the field of private security and that of public security, the Court has already held that the exception laid down in Article 46(1) EC authorising the Member States to maintain special regimes for foreign nationals justified on grounds of public safety did not apply to the general system for private security undertakings (*Commission* v *Spain*, paragraphs 45 and 46, and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraphs 28 and 30).

The first complaint, concerning the legal form of the undertaking

Arguments of the parties

29 According to the Commission, the obligation that a private security undertaking be a legal person in almost all cases means that a person established in another Member State and lawfully providing services such as those at issue would be obliged to constitute a legal person in order to be able to carry out those activities in Spain, even on a temporary or occasional basis. That requirement, having, in

principle, no direct connection to the actual activity of the undertaking, is not effective in guaranteeing the protection of recipients of those services or the maintenance of public security. All the conditions imposed by the Spanish legislation could be met effectively without the undertaking being a legal person.

30 The Spanish Government responds that any provision of the services in question by natural persons would not only create a whole series of practical problems but would also be unacceptable from the point of view of public security. Firstly, in order to permit natural persons to provide all the disputed services, it would be necessary to review the existing obligations relating to possession of firearms which, in Spain, are very strict. Secondly, the provision of certain services by a natural person would prevent effective communication between the guard and the company's main office and that communication can be vitally important to the safety of the persons protected and that of the guard himself. Thirdly, there would be a likelihood of confusion because of the variety of staff uniforms. The relaxation of the above rules would generally reduce the guarantees of security considered appropriate by the Spanish authorities.

Findings of the Court

31 It should be remembered at the outset that, with regard to legislation analogous to the Spanish legislation criticised by the Commission, the Court has already held that the requirement that a private security undertaking must be constituted as a legal person in order to be able to carry out its activities constituted a restriction contrary to Articles 43 EC and 49 EC (Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraphs 41 to 44).

32 In the present case, to justify that restriction, the Spanish Government puts forward the protection of the safety of the recipients of the services in question and the remainder of the population. For reasons set out more fully by the Advocate General in point 52 of her Opinion, the requirement of legal personality is not a measure suitable for attaining the objectives pursued. None of the practical problems listed by that government is directly connected to the legal form of the undertaking.

33 In those circumstances, the first complaint is well founded.

The second complaint, concerning the requirement for a minimum share capital

Arguments of the parties

34 The Commission submits that, in order to be able to establish itself in Spain or to supply cross-border services there, a foreign private security undertaking is subject to the requirement for a minimum share capital. Such a requirement cannot be justified either by considerations of public security or on grounds of protection of the recipients of the services concerned. Private security undertakings of other Member States apparently meet those objectives without being required to have a specific share capital.

35 The Spanish Government notes that, since private security services are a sector which is not harmonised at Community level, very great differences may exist between the Kingdom of Spain and the other Member States, particularly as regards the detailed rules for the carrying and use of firearms. Taking into account the particular situation of that Member State with regard to the terrorist threat, it is

justified in adopting stricter requirements than the other Member States. Although it is true that, in Spain, private security undertakings are also subject to two additional guarantees, namely obligatory security and insurance, each of them has a specific function. However, those two guarantees alone are therefore not sufficient to attain the objectives pursued of security and protection of citizens.

Findings of the Court

36 In this regard, the Court has already held that the requirement to have a minimum share capital, imposed on private security undertakings, infringed Articles 43 EC and 49 EC (*Commission* v *Portugal*, paragraphs 53 to 57). The justifications put forward by the Spanish Government, especially the particular terrorist threat existing in Spain, have no direct connection with the amount of the share capital of the undertaking and do not explain the restrictions placed on freedom to provide services and freedom of establishment.

37 Moreover, there are less restrictive means which would permit the attainment of the objective of protection of the recipients of the services in question, such as lodging security or taking out insurance. Even if, as the Spanish Government submits, in certain cases each of those two measures may alone be insufficient, the possibility remains of applying them both cumulatively. The Spanish Government has therefore failed to present arguments to show how the above two measures do not suffice to meet the objectives of security and protection of citizens.

38 In those circumstances, the second complaint is also well founded.

The third complaint, concerning the lodging of security with a Spanish body

Arguments of the parties

39 The Commission understands the main objective of that requirement, which is to keep available to the Spanish authorities sums guaranteeing cover of the risks connected with possible liabilities or when a fine is imposed. However, it claims that that requirement is disproportionate to the aims which it pursues. In particular, the national provisions do not allow account to be taken of payment of security in the Member State of origin of the undertaking, which, in principle, should be sufficient.

40 For the Spanish Government, paying security or taking out insurance are legitimate means of guaranteeing protection of the recipients of the services in question. Indeed, the Regulation on private security services requires the undertakings in question to conclude a contract of civil liability insurance. However, given the economic factors characteristic of the insurance market, that method can offer only a limited safeguard. In other words, the function of the security is complementary but cannot take the place of that of the other two safeguards, namely minimum share capital and insurance.

Findings of the Court

41 It should be noted that the requirement to lodge security with the Caja General de Depósitos, as laid down in Spanish law, is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services within the

meaning of Articles 43 EC and 49 EC. It makes the provision of services or the formation of a subsidiary or secondary establishment in Spain more onerous for private security undertakings established in other Member States than for those established in Spain. It must be determined whether this requirement is justified.

42 The Court has already expressly held that providing security is less of a restriction on the freedom of establishment and freedom to provide services than is the setting of a minimum share capital to ensure the protection of creditors (*Commission* v *Portugal*, paragraph 55).

43 However, it is established case-law that such an obstacle may be justified only in so far as the public interest relied on is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established (see *Corsten*, paragraph 35). The Spanish legislation at issue requires the security to be lodged with a Spanish body, the Caja General de Depósitos, without taking into account any security lodged in the Member State of origin. Furthermore, in the current state of development of the systems for cross-border debt recovery and execution of foreign judgments within the Union, such strictness appears disproportionate. The requirement to lodge security goes beyond what is necessary to ensure adequate protection of creditors.

44 Indeed, it is clear from the observations of the Spanish Government that it has declared itself prepared to take into account securities lodged with financial bodies of the other Member States, provided that sums relating to the activities carried out on Spanish territory are set aside and held at its disposal. In that regard, it should be noted that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation

prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23, and Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8). Moreover, the present case involves a mere declaration by the defendant government and not a concrete legislative or regulatory measure.

45 In those circumstances, the third complaint is well founded.

The fourth complaint, concerning the minimum number of employees

Arguments of the parties

46 According to the Commission, any foreign undertaking lawfully providing private security services in its Member State of establishment but not having the number of employees required by Spanish legislation is required to increase its staff, even if its actual activities do not require it. That requirement has a dissuasive effect, particularly on small and medium-sized undertakings, with regard to the exercise of both the right to set up secondary establishments and the freedom to provide cross-border services. Articles 43 EC and 49 EC prohibit the application of that legislation to an undertaking established in another Member State without the Spanish authorities taking into account obligations which are, if not identical, at least comparable and have already been met by that undertaking in its country of establishment.

47 The Spanish Government points to the undertaking given by the Spanish authorities generally to reduce by 50% the minimum requirements with regard to human, material and technical resources. The legislative requirements relating to the number of employees in the field of transport of explosives, however, are justified by considerations of security linked particularly to the Spanish situation.

Findings of the Court

48 As a preliminary point, it should be noted that the provisions setting a minimum number of persons employed by security undertakings constitute an impediment to freedom of establishment and freedom to provide services in that they make the formation of secondary establishments or subsidiaries in Spain more onerous and dissuade foreign private security undertakings from offering their services on the Spanish market.

49 With regard to the justification for that restriction, the mere fact that one Member State imposes less strict rules than another Member State does not necessarily mean that the stricter rules are disproportionate and incompatible with Community law (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 42; *Mac Quen and Others*, paragraphs 33 and 34; and *Gräbner*, paragraphs 46 and 47).

50 With the exception of the transport of explosives, the Spanish Government has not demonstrated in a detailed manner that the minimum number of employees required by the legislation in force does not go beyond what is necessary in order to attain the objective pursued, namely ensuring the required level of security for transport of valuables and dangerous objects and installation and maintenance of surveillance and alarm systems. To that extent, the fourth complaint must therefore be considered well founded.

51 With regard to the requirement for a minimum number of employees in undertakings active in the transport of explosives, referred to in point 2(b) of the annex to the Regulation on private security services, it must be held that it is

justified. In the light of the security considerations put forward by the Spanish Government, that requirement appears appropriate for the attainment of that objective without going beyond what is necessary to attain it.

52 The fourth complaint must therefore be rejected insofar as that Spanish legislation requires a minimum number of employees for undertakings active in the field of transport or distribution of explosives.

The fifth complaint, concerning the authorisation of staff

Arguments of the parties

53 The Commission notes that, in Spain, the members of staff of a foreign private security undertaking must, in all cases, obtain specific administrative authorisation. However, there is no clause recognising an authorisation already issued in the Member State of establishment of the undertaking in question, even if the requirements in that regard are analogous there to those in force in Spain. That formality constitutes a significant obstacle to the freedom to provide services since a foreign undertaking cannot transfer to Spain staff authorised in its State of establishment.

54 The Spanish Government explains that the national rules require private security staff to have undergone training which is the longest at the European level. Its requirements are therefore very different from those in force in the other Member States, such that in principle there cannot be any 'analogous requirements' permitting comparison of the legal rules.

Findings of the Court

55 The Court has already held that the requirement that members of staff of a private security undertaking must obtain a fresh specific authorisation in the host Member State constitutes an unjustified restriction on that undertaking's freedom to provide services within the meaning of Article 49 EC, in so far as it does not take account of the controls and verifications already carried out in the Member State of origin (*Commission* v *Portugal*, paragraph 66, and Case C-189/03 *Commission* v *Netherlands* [2004] ECR I-9289, paragraph 30).

56 Similarly, with regard to freedom of establishment within the meaning of Article 43 EC, the above requirement may make the formation of a secondary establishment more difficult in the host Member State. It therefore constitutes an obstacle to the exercise by foreign private security undertakings of their freedom of establishment in Spain.

57 With regard to the justification for that obstacle, the Court has held that, in the event of establishment in another Member State, an undertaking is in principle required to meet the same conditions as apply to nationals of the host Member State (*Gebhard*, paragraph 36). That being the case, general application of an administrative authorisation procedure to foreign security undertakings is not of itself contrary to Article 43 EC. However, as the Advocate General rightly observed in points 84 and 85 of her Opinion, the Spanish legislation does not provide for the possibility of taking into account the requirements already met by individual members of the staff of those undertakings in their Member State of origin. Such strictness goes beyond what is necessary to attain the legitimate objective of checking the abovementioned staff.

58 The argument of the Spanish Government that its requirements are very different from those in force in other Member States, such that in principle there cannot be any 'analogous requirements' which permit comparison of the respective legal rules, is irrelevant.

59 In those circumstances, the fifth complaint is also well founded.

The sixth complaint, concerning recognition of professional qualifications

Arguments of the parties

60 The Commission notes that the professions governed by the Regulation on private security services are regulated professions within the meaning of Directives 89/48 and 92/51, to the extent that pursuit thereof is subject to the possession of certain qualifications. However, those professions were not included in the lists annexed to the decrees transposing those two directives into national law and no other provision of Spanish law provides for the possibility of recognition of qualifications obtained in that field in the other Member States. The Commission points out that, because of the permanence of its validity, which is not limited in time, the authorisation required by Spanish legislation does indeed constitute an 'attestation of competence' within the meaning of Directive 92/51.

61 According to the Spanish Government, neither of those directives has been infringed. Neither taking up the professions in the private security sector nor pursuit thereof is made subject to the possession of any 'attestation of competence'. With regard to the training required by national legislation, it is undertaken only after the person concerned is recruited. What is more, and contrary to the Commission's

submissions, the authorisation required by the Law on private security services is limited in time. According to Article 10 of that law, where a member of staff of a private security undertaking 'remains inactive for a period of time greater than two years, he must pass new tests in order to be able to carry out his work'. Consequently, there is no question of an 'attestation of competence' and the situation referred to in the complaint does not fall within the field of application of Directives 89/48 and 92/51.

Findings of the Court

62 At the outset, it must be stated that the Commission alleges failure to fulfil obligations under both Directive 89/48 and Directive 92/51. However, it should be noted that those two directives have different fields of application. In particular, Directive 89/48 relates to higher-education diplomas awarded on completion of professional education and training of at least three years' duration. However, it is not apparent from the application lodged by the Commission that the qualifications which, in Spain, must be held by members of staff of private security undertakings and private detectives require those persons to have completed higher-education training of at least three years' duration. The Commission has therefore failed to show how and why the above professions fall within the field of application of Directive 89/48.

63 With regard to Directive 92/51, the parties agree that the security staff of private security undertakings pursue in Spain a regulated profession within the meaning of Article 1(e) of that directive. However, in order to determine whether that directive is applicable to that activity, it is appropriate to examine whether, according to the Spanish legislation, the grant of an administrative authorisation to private security staff is subject to their holding an attestation of competence within the meaning of Article 1(c) of that directive. As the Advocate General rightly observed in points 96

to 100 of her Opinion, the Commission has not clearly indicated precisely which formal attestations of competence are required by the Spanish authorities in the field of private security. Accordingly, the complaint concerning Directive 92/51 is also unfounded insofar as it relates to that field.

64 However, with regard to the profession of private detective, Article 54(5)(b) of the Regulation on private security services requires that the persons concerned hold a private detective diploma. That diploma is awarded on condition that a person has achieved a certain level of training, taken special courses and passed aptitude tests in accordance with the particular provisions of the regulation. It should be noted that, although that document is not a 'diploma' in the strict sense of the word, since it does not require a training period of at least a year, there is no doubt that it corresponds to the concept of 'attestation of competence' within the meaning of the second indent of Article 1(c) of Directive 92/51, insofar as it is awarded following an assessment of the personal qualities, aptitudes or knowledge which are essential for the applicant to have for the pursuit of the professions in question. The Spanish legislation therefore falls within the field of application of that directive.

65 It must be held that, with regard to the profession of private detective, to date there is in Spain no system of mutual recognition for professional qualifications, contrary to the requirements of Directive 92/51.

66 In those circumstances, the sixth complaint is well founded insofar as it relates to the recognition of attestations of professional competence for the pursuit of the activity of private detective.

Costs

67 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. In the present case, since the Commission applied for the Kingdom of Spain to be ordered to pay the costs and the Kingdom of Spain has been unsuccessful in respect of the first to third and the fifth complaints raised by the Commission, it must be ordered to pay the costs relating to those complaints.

68 With regard to the complaint relating to nationality which was withdrawn by the Commission, each party applied for the other to be ordered to pay the costs. It is therefore appropriate to apply the first subparagraph of Article 69(5) of the Rules of Procedure and the Commission must be ordered to pay the costs, unless it appears justified to order the defendant to pay the costs, having regard to its conduct. As the Advocate General rightly observed in points 109 and 110 of her Opinion, since the Kingdom of Spain only belatedly amended the Regulation on private security services, its conduct led the Commission to bring its action. In those circumstances, it is appropriate to order that Member State to pay the costs relating to the complaint withdrawn.

69 Having regard to the foregoing, and in light of the fact that, in respect of the fourth and sixth complaints, the Commission was only successful in part, it is appropriate to order the Kingdom of Spain to pay three quarters of the Commission's costs and to decide that, for the rest, each party should bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by maintaining in force provisions of Law No 23/1992 of 30 July 1992 on private security services and Royal Decree No 2364/1994 of 9 December 1994 approving the Regulation on private security services which impose a series of requirements on foreign private security undertakings for the pursuit of their activities in Spain, namely the obligation:**

   — **to be constituted as legal persons;**

   — **to have a specific minimum share capital;**

   — **to pay a security to a Spanish body;**

   — **to employ a minimum number of workers, insofar as the undertaking in question carries out its activities in fields other than the transport and distribution of explosives;**

   — **generally, for members of their staff, to hold a special administrative authorisation issued by the Spanish authorities; and**

by failing to adopt the provisions necessary to ensure recognition of attestations of professional competence for the pursuit of the activity of private detective, the Kingdom of Spain has failed to fulfil its obligations under, firstly, Articles 43 EC and 49 EC and, secondly, Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration;

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of Spain to pay three quarters of the costs of the Commission of the European Communities and to bear its own costs;**

4. **Orders the Commission of the European Communities to bear one quarter of its own costs.**

[Signatures]