OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 February 2001 [1]

1. This is the third case in which the Commission has sought a declaration that a Member State has failed to comply with its Treaty obligations by regulating private security activities in such a way as to hinder freedom of movement for workers, freedom of establishment and freedom to provide services. [2] The Italian provisions concerned here are those which require private security firms and private security guards to be of Italian nationality, and the only issue appears to be whether that requirement may be justified on the ground that their activities are connected with the exercise of public authority.

Background and procedure

The Italian law governing private security activities

2. The activities in question are governed in Italy by the Testo unico delle leggi di pubblica sicurezza (consolidated text of the Laws on public security, hereinafter 'the Public Security Law') adopted by Royal Decree on 18 June 1931, and by its implementing regulations. The following provisions in particular are relevant.

3. Article 133 of the Public Security Law allows natural or legal persons or, with the authorisation of the Prefect, associations thereof to employ private guards to guard or protect property. Under Article 134, such services may not be provided without a licence from the Prefect and such licences may not be granted to natural or legal persons not possessing Italian nationality. Article 134 further provides that a licence may not be granted 'for activities involving the exercise of public duties or any restriction of individual freedom'. Under Article 136, the licence may be refused or withdrawn for reasons of public order or security. Article 138 lays down certain specific requirements for security guards, including that of Italian citizenship. Under Article 139, security firms and their agents are required to provide their assistance to the Sicurezza Pubblica (national police) and to comply with all requests from its offi-

1 — Original language: English.

2 — The previous two cases were Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717 and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221.

cials or agents or those of the judicial police.

4. Under Article 250 of the regulation implementing the Public Security Law,[3] as amended, private security guards must swear to be loyal to the Italian Republic and its Head of State, to comply faithfully with its laws and to carry out the tasks conferred on them diligently, conscientiously and solely in the public interest. They are for this reason known as *guardie particolari giurate* (sworn private security guards). Under Article 254 of the same regulation, such sworn guards must wear a uniform or badge approved by the Prefect. Article 255 provides that they may draw up reports concerning the exercise of the duties assigned to them, which are to be considered probative in court proceedings unless disproved. Under Article 256, they may carry arms but must obtain a specific licence for that purpose.

5. A Royal Decree-Law of 26 September 1935 places the activities of private security guards under the direct supervision of the Questore (provincial chief of police), who must approve and may modify the rules and instructions governing the exercise of their duties. Once approved, those rules and instructions are binding, and the Questore may immediately suspend a guard not complying with them.

6. A further Royal Decree-Law of 12 November 1936 regulates private security firms. They too are placed under the supervision of the Questore, who is given disciplinary powers, including suspension and the withdrawal of any arms in their possession, over private guards in their service.

7. Sworn private security guards have been recognised by Italian case-law as having certain powers of arrest going beyond those of ordinary individuals. Article 380 of the Italian Code of Criminal Procedure requires any judicial police officer to arrest an offender found *in flagrante delicto* in the case of certain serious offences and Article 383 authorises any person to make an arrest in the same cases, with an obligation to hand the offender over immediately to the police. In such cases, sworn guards appear to have the same powers as any ordinary individual. However, Article 381 of the same Code also authorises, but does not require, judicial police officers to make arrests *in flagrante delicto* in the case of certain less serious offences. In those cases, ordinary individuals have no power of arrest, but the Corte Suprema di Cassazione (Supreme Court of Cassation) has stated that sworn private security guards do have such a power in the exercise of their duties of guarding private property.

3 — Approved by Royal Decree of 6 May 1940.

The Treaty provisions

8. Article 39 EC requires freedom of movement for workers to be secured within the Community and provides that it is to entail the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work or employment. Limitations may however be justified on grounds of public policy, public security or public health, and the provisions of the article do not apply to employment in the public service.

9. Under Article 43 EC, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited, as are restrictions on the setting-up of agencies, branches or subsidiaries. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as those applied to nationals of the country of establishment.

10. However, under Article 45 EC, that prohibition does not apply to activities which within a Member State are connected, even occasionally, with the exercise of official authority. And under Article 46(1) EC the applicability of provisions entailing special treatment for foreign nationals on grounds of public policy, public security or public health is not prejudiced.

11. Finally — although again subject, by virtue of Article 55, to Articles 45 and 46(1) — Article 49 EC prohibits restrictions on freedom to provide services within the Community, in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended.

The judgment in Commission *v* Spain

12. On 29 October 1998, the Court gave judgment in *Commission* v *Spain*,[4] in which it ruled that, by making the grant to security companies of authorisation to carry on private security activities subject to the requirements that they must be constituted in Spain, that their directors and managers must reside in Spain and that their security staff must possess Spanish nationality, the Kingdom of Spain had infringed what are now Articles 39, 43 and 49 EC.

4 — Cited above in note 2.

13. The Court first dismissed the idea that private security undertakings formed part of the public service, then considered whether there was any exercise of official authority. It pointed out that[5] the exception for activities connected with the exercise of such authority must be limited to what is strictly necessary for safeguarding the interests which it allows Member States to protect, and that the activities must be in themselves directly and specifically connected with the exercise of that authority. Private security undertakings and their staff, it noted, carried out surveillance and protection tasks on the basis of relations governed by private law. They had no powers of constraint but could, like any individual, be called on to contribute to the maintenance of public security. In assisting the public security forces, they performed only auxiliary functions. The exception could thus not apply.[6]

14. The Court also dismissed the argument that the nationality requirement in issue could be justified on grounds of public policy or public security. Such grounds, it stated, could not justify a general exclusion from access to certain occupations. They were intended rather to allow Member States to refuse entry or residence to persons who would themselves constitute a danger to public policy or public security.[7]

15. The Court has since reaffirmed the approach it took to private security activities in that case in its judgment in *Commission* v *Belgium*,[8] a case which involved restrictions based indirectly rather than directly on nationality.

Procedure

16. In 1994, the Commission asked the Italian authorities to provide further information on the rules in issue in the present case. Having received a reply in 1995, it considered that those rules were incompatible with Community law and requested the authorities to submit their observations under the first paragraph of Article 169 of the EC Treaty (now Article 226 EC). In the absence of any timely response to that letter, the Commission sent the Italian Government a reasoned opinion, in accordance with the same provision, to the effect that the nationality requirements in the relevant Italian legislation were contrary to

5 — According to established case-law: Case 2/74 *Reyners* [1974] ECR 631, paragraph 45 of the judgment, Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 7, and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8.

6 — See paragraphs 33 to 39 of the judgment.

7 — See paragraphs 40 to 43 of the judgment.

8 — Cited in note 2.

Community law and called upon it to take the necessary steps to bring that legislation into compliance within two months. Following what it considered to be an unsatisfactory reply, the Commission brought the present proceedings on 29 July 1999.

17. It claims, essentially, that the Italian Republic has infringed Articles 39 EC, 43 EC and 49 EC by providing that private security activities may be carried out only by firms holding Italian nationality and that only Italian citizens may be employed as sworn private security guards.

Analysis

Incompatibility in principle with the Treaty provisions

18. The Italian Republic has not challenged the contention that the nationality requirements in issue are in principle prohibited by each of the three Treaty articles on which the Commission relies. Nor, I consider, is that contention challengeable.

19. It follows directly from the wording of Articles 39 and 43 EC that Member States may not in principle impose a nationality requirement as a precondition for carrying on a particular type of work in an employed or a self-employed capacity. In addition, by prohibiting restrictions on the setting-up of agencies or branches by Community nationals, Article 43 precludes a Member State from enacting any rule which would require companies having the nationality of another Member State to set up a subsidiary in accordance with its own laws.

20. Admittedly, Article 49 appears to prohibit explicitly only restrictions based on the respective places of establishment of the provider and recipient of the service, without reference to nationality, but a moment's reflection is sufficient to establish that any condition as to the nationality of the service provider will have an overwhelmingly restrictive effect on the cross-border provision of services. Moreover, the Court has consistently held that Article 49 prohibits discrimination by reason of nationality. [9]

21. The Italian rules in respect of which the Commission has brought this action also require security firms and guards to be in possession of a licence issued by the Italian

9 — See, for example, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 25 of the judgment, and the 'co-insurance' cases: Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 16, Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 16, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25, and Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 16.

authorities. Such a requirement has also been held by the Court to constitute in principle a restriction on freedom to provide services.[10] The fact that guards are required to swear an oath is of a similar nature and furthermore, since the oath includes an undertaking of loyalty to the Italian State, may constitute an indirect nationality requirement.

Exercise of official authority

22. The Italian Government's defence is based exclusively on the derogation in Article 45 EC with regard to activities 'connected, even occasionally, with the exercise of official authority'.

23. That article, read in conjunction with Article 55, applies to restrictions on freedom of establishment or freedom to provide services, but not to restrictions on freedom of movement for workers.

— Article 39 EC

24. At the hearing, the Italian Government stated, and in reply to a question confirmed, that it was not possible for sworn private security guards to act in a self-employed capacity but that they must always be employed.

25. It thus seems that the 'official authority' defence is not available with regard to the nationality requirement for guards.

26. It is true that in several judgments the Court has interpreted Article 39(4) EC in such a way as to align it with Article 45. In *Commission* v *Italy*,[11] for example, it noted that the exception applied to posts 'which involve participation in the exercise of powers conferred by public law or the safeguarding of the general interests of the State'. However, the fact remains that Article 39(4) is explicitly limited to 'employment in the public service'. The Court has interpreted that phrase as not extending to all public employment. *A fortiori*, therefore, it cannot conceivably cover employment by a private natural or legal person, whatever the duties of the employee.

10 — See, for example, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15 of the judgment; *Commission* v *Belgium*, cited in note 2, paragraph 35.

11 — Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 10 of the judgment; see also Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraphs 10 and 11.

27. It is also true, as appears from Article 5 of the Royal Decree-Law of 12 November 1936, that sworn private security guards may be employed not only by security firms governed by that Decree-Law and other private undertakings or associations but also by public bodies. However, even if the powers or duties of such guards in public employment could be covered by Article 39(4) EC, the nationality requirement in issue is not limited to such cases.

28. I therefore take the view that, regardless of the nature of the powers and duties of sworn private security guards, a nationality requirement which applies to such guards in private employment is contrary to Article 39 EC.

— Articles 43 and 49 EC

29. Even if that were not the case, however, and even if it were to transpire that *guardie particolari giurate* could be self-employed, I still consider that the grounds on which the Italian Government seeks to rely are not such as to demonstrate the existence of any 'exercise of official authority' for the purposes of any of the Treaty articles in issue.

30. The Italian Government stresses, first, the degree of control by the public authorities to which private security guards are subject. A licence must be granted by the Prefect and may be refused or withdrawn on grounds of public security or public order. Security firms which employ private security guards are subject to the supervision of the Questore. The guards themselves must swear an oath of loyalty to the Italian Republic and are again subject to the authority of the Questore.

31. Secondly, sworn private security guards have been recognised by the Corte Suprema di Cassazione as being distinguished by having judicial police functions in the prevention of crime and apprehension of criminals in connection with the protection of the property in their charge, including a power to arrest criminals *in flagrante delicto*, authority to draw up probative reports and a duty to cooperate with the police.

32. The Italian Government emphasises that the oath sworn by private security guards includes an undertaking to pursue only the public interest, that their employers may not place them on other duties and that the Questore may impose on them such obligations as seem necessary in the public interest. A distinction must thus be drawn between guards who act solely within the context of a private-law contract and the guards and firms in issue in the

present case, who are subject to control by the public authorities.

33. Consequently, it considers, the present case must be distinguished from *Commission* v *Spain*, [12] where it was clear that the security personnel in issue merely contributed to the maintenance of public security by virtue of their obligation, shared with any other private individual, to assist the police. Sworn private security guards in Italy have specific judicial police functions which go beyond that general duty.

34. The Commission points out first that operators in various economic sectors are often subject to strict control by the public authorities without thereby exercising official authority themselves; it cites in particular banking, insurance, [13] finance and the legal professions. [14] The same is true, it considers, of private security activities, as confirmed by the Court in *Commission* v *Spain*.

35. As regards the powers and duties of private security guards, the Commission points out that the definition of police powers varies from State to State and that the limits imposed by Article 45 EC on the exceptions to the principle of freedom of establishment are to be interpreted autonomously as a matter of Community law. [15]

36. The duty to assist the police imposed on private security guards in Italy is in the Commission's view exactly comparable to that in issue in *Commission* v *Spain*, which the Court did not accept as constituting the exercise of official authority but rather as a purely auxiliary function which any individual may be called upon to perform.

37. The power to draw up reports having probative value is not comparable, the Commission submits, to that of State or other officials to draw up public or authentic documents. Their probative value is, moreover, relative since it is open to challenge in court proceedings.

38. Finally, as regards the power of arrest, the Commission, citing the judgment in *Reyners*, [16] argues that the exceptions in Article 45 EC must not be given a scope which would exceed the objective for which they were inserted. The exclusion of other Community nationals must be limited to activities which have a direct and specific connection with the exercise of

12 — Cited in note 2, see paragraphs 36 to 38 of the judgment.

13 — Cf. *Thijssen*, cited in note 5, where the Court did not accept that the need to swear an oath and to perform particular duties entailed any exercise of official authority.

14 — Cf. *Reyners*, cited in note 5.

15 — *Commission* v *Greece*, cited in note 5, paragraph 8 of the judgment.

16 — Cited in note 5, paragraphs 43 to 47 of the judgment.

official authority and cannot be extended to a whole profession unless those activities are linked to the profession in such a way that freedom of establishment would require the Member State to allow non-nationals to exercise, even occasionally, functions appertaining to official authority; no such extension is possible when the activities in question are separable from the professional activity taken as a whole. In the present case, the discretionary power of arrest recognised by the Italian courts (and not conferred by legislation) is a separable element of the profession of private security guards, and it would be disproportionate to exclude other Community nationals from the profession on that basis alone.

39. I find the Commission's arguments entirely convincing.

40. As regards the question of control by the public authorities, it is clearly desirable that private security guards and firms should be subject to proper official supervision, particularly where the carrying of arms is involved. That was recognised by the Court in *Commission* v *Spain* [17] and *Commission* v *Belgium*. [18]

17 — Cited in note 2, paragraph 47 of the judgment.

18 — Ibid., paragraphs 32 to 34 and 36 of the judgment.

41. However, the fact that security guards and firms may be given instructions by the Questore does not mean that they exercise official authority in carrying out those instructions. The Court has been given no indication that their powers when assisting the police are any greater than those of any other individual in such circumstances, and the fact that their duty to assist may be more specifically regulated is of no relevance in that regard. To put it more succinctly, submission to official authority is not exercise of official authority.

42. The oath which private security guards are required to take does not appear to confer in exchange any official authority; certainly no evidence has been put forward of any such effect. Again, this is a formality which appears to impose obligations rather than to confer powers. Even those obligations do not appear to set sworn security guards apart from other individuals. A duty to comply with the law and to act diligently and conscientiously in the public interest may I think be assumed for any security guard. The undertaking to act 'solely' in the public interest must be viewed in its context; any security guard whose task is to protect private property must act at least partly in the interest of its owner and will almost certainly be infringing the law — regardless of any oath taken — if in doing so he acts contrary to the public interest.

43. Nor, in my view, can the probative nature of certain reports drawn up by sworn security guards be regarded as evidence of an exercise of official authority. From the terms of the legislation, it appears that their probative nature is only relative — it is conditional upon their not being disproved. That, I consider, is very different from the status of an authentic document whose contents are deemed to be legally proved unless it is found to have been falsified or fraudulently established. The drawing-up of the latter may well involve an exercise of official authority, but the type of reports in issue here appear to have little more than ordinary evidential value.

44. Finally, as regards the powers of arrest enjoyed by sworn security guards, I note that the general power of arrest *in flagrante delicto* in cases of serious offences is conferred by Italian law on 'any person' ('ogni persona') and is thus not regarded as a power to be reserved only to nationals. It involves, moreover, an obligation to hand the offender over to the judicial police forthwith. The power to keep the offender in custody and to take such further steps as are necessary to deal with the offence according to criminal law, which may well be regarded as an exercise of official authority, is thus confined to the police and judicial authorities. The power of arrest, however, seems to fall clearly within the category of 'auxiliary functions' referred to by the Court in *Commission* v *Spain*.[19]

45. When making an arrest in such circumstances a sworn security guard has no more authority than any other individual, and there is no reason under Italian law why a nationality requirement should be imposed. It has not been suggested that the power of arrest *in flagrante delicto* enjoyed by private security guards in the case of less serious offences[20] is any more extensive, and I think it implausible that it might be so. In so far as the power is confined to cases in which the offence is committed against the property guarded and the offender is caught in the act of committing it, and in so far as the guard must hand the offender over to police custody forthwith, I can see no reason for considering that it involves any exercise of official authority.

Public policy and public security

46. The Italian Government has not placed any express reliance on the public policy or public security exceptions which are avail-

19 — Cited in note 2, paragraph 38 of the judgment.

20 — The offences involved need not be listed but, although less serious than those for which any person may make an arrest, are not in any way minor.

able in the context of all three Treaty articles of which a breach is alleged. To the extent that any of its arguments might be interpreted as doing so, however, it is clear that they must fail.

47. As the Court has held, not only in general but also in the specific context of private security activities, those exceptions must be construed restrictively and are intended not to allow Member States to exclude economic sectors from freedom of movement, freedom of establishment or freedom to provide services but to enable them to prevent genuine and serious threats to public security or fundamental interests of society. [21] There is no evidence of any such threat here.

48. It may merely be noted that possession of Italian nationality is not necessary in order for security guards and firms operating within Italy to be required to act in accordance with Italian law or to be subject to proper control by the relevant police or other authorities, that loyalty to the Italian State is not necessary for security guards to carry out their tasks and that for some offences a power of arrest *in flagrante delicto* is conferred by Italian law on all persons, regardless of nationality.

Council Directive 67/43/EEC

49. Finally, mention may be made of Directive 67/43, [22] which concerned the implementation of the general programmes for the abolition of restrictions on freedom of establishment and freedom to provide services during the transitional stage. Article 4 excluded 'activities involving... the exercise of official authority... (b) in Italy: the occupation of sworn watchman *(guardia giurata)*'. The Italian Government referred to that provision during the administrative procedure, but has not relied on it before the Court, so I shall deal with it very briefly.

50. As the Commission has pointed out, the directive was concerned solely with the transitional period, and may not be relied on now that the Treaty articles in question have direct effect. Moreover, the directive has now been repealed, [23] although only after the reasoned opinion was sent in the present case. However, even if the directive

21 — See *Commission* v *Spain*, paragraphs 41 and 42 of the judgment, and *Commission* v *Belgium*, paragraphs 28 and 29 (both cited in note 2).

22 — Council Directive 67/43/EEC of 12 January 1967 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with: 1. matters of 'Real Estate' (excluding 6401) (ISIC Group ex 640) 2. the provision of certain 'Business services not elsewhere classified' (ISIC Group 839), OJ, English Special Edition 1967, p. 3.

23 — By Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ 1999 L 201, p. 77.

were to be scrutinised, it would in any event have to be assessed on the basis of the Court's consistent interpretation of the concept of the exercise of official authority, with results similar to those which I have reached above.

Conclusion

51. In the light of all the above considerations, I am of the opinion that, as requested by the Commission, the Court should:

(1) declare that, by providing that:

— private security activities (including the surveillance or guarding of movable and immovable property) may be carried out in Italy, subject to licence, only by private security firms holding Italian nationality;

— only Italian citizens in possession of the requisite licence may be employed as sworn private security guards;

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

(2) order the Italian Republic to pay the costs.