

JUDGMENT OF THE COURT (Fifth Chamber)

31 May 2001 *

In Case C-283/99,

Commission of the European Communities, represented initially by A. Aresu and M. Patakia and subsequently by E. Traversa and M. Patakia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, assisted initially by P.G. Ferri and subsequently by F. Quadri, avvocati dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, by providing that:

- private security work (including surveillance or caretaking of movable property and buildings) may be carried out in Italy, subject to licence, only by ‘private security firms’ holding Italian nationality;

- only Italian nationals possessing such a licence may be employed as ‘sworn private security guards’,

the Italian Republic has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, P. Jann (Rapporteur),
L. Sevón, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: F.G. Jacobs,
Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 July 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by providing that:

- private security work (including surveillance or caretaking of movable property and buildings) may be carried out in Italy, subject to licence, only by ‘private security firms’ holding Italian nationality;

- only Italian nationals possessing such a licence may be employed as ‘sworn private security guards’,

the Italian Republic has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC).

The national rules

- 2 Private security activities are regulated in Italy by the Testo Unico delle Leggi di Pubblica Sicurezza (Consolidated Legislation on Public Security, hereinafter ‘the Consolidated Legislation’), adopted by Royal Decree No 773 of 18 June 1931 (GURI No 146 of 26 June 1931).

- 3 Article 133 of the Consolidated Legislation provides:

‘Public bodies, other collective bodies and individuals may employ private guards to perform surveillance or caretaking duties in respect of their movable property or buildings.

They may also, subject to authorisation by the Prefect, together appoint such guards with a view to employing them jointly to undertake surveillance or caretaking duties in respect of such property.’

- 4 Article 134 of the Consolidated Legislation provides:

‘Bodies and individuals may not, without a licence issued by the Prefect, provide services relating to the surveillance or caretaking of movable property and buildings, carry out investigations or search operations or gather information on behalf of individuals.

Without prejudice to the provisions of Article 11, such a licence may not be granted to persons who do not hold Italian nationality, who are incapacitated or who have been convicted of the intentional commission of a crime.

The licence may not be granted in respect of operations involving the exercise of official authority or the power to restrict the liberty of the individual.'

5 Under Article 138 of the Consolidated Legislation:

'Private guards must meet the following requirements:

1. They must hold Italian nationality;

...'

Arguments of the parties

6 The Commission took the view that the Italian rules governing private security activities were incompatible with Community law, and therefore initiated the procedure for failure to fulfil obligations. On 8 July 1998, having called on the Italian Republic to submit its observations, the Commission issued a reasoned opinion requesting that Member State to take the necessary steps, within two months from notification thereof, to comply with that opinion. Considering the

Italian Government's response to be unsatisfactory, the Commission brought the present action.

- 7 The Commission asserts that the nationality condition laid down in general terms in Article 134 and, more specifically, as regards security personnel, in Article 138 of the Consolidated Legislation, constitutes an obstacle to the free movement of workers, freedom of establishment and freedom to provide services, inasmuch as it prevents workers who are nationals of other Member States and undertakings established in other Member States from engaging in private security activities.

- 8 Relying in particular on the Court's judgments in Case C-114/97 *Commission v Spain* [1998] ECR I-6717 and Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, the Commission maintains that the justifications provided for in Articles 55 and 66 of the EC Treaty (now Articles 45 EC and 55 EC) are not applicable to private security activities, on the ground that private security undertakings and sworn private security guards are not directly and specifically involved in the exercise of official authority. Moreover, that emerges in any event from Article 134 of the Consolidated Legislation itself, inasmuch as that article provides that the licence required for the exercise of private security activities 'may not be granted in respect of operations involving the exercise of official authority'.

- 9 The Italian Government denies the alleged failure to fulfil obligations. Whilst acknowledging that the nationality provisions contained in Articles 134 and 138 of the Consolidated Legislation may involve restrictions on the free movement of workers, freedom of establishment and freedom to provide services, it contends that it may be concluded from the characteristic aspects of the activities in question, especially those of sworn private security guards, that those activities concern the exercise of official authority, and that the nationality criterion is therefore justified under the first paragraph of Article 55 of the Treaty in conjunction, as the case may be, with Article 66 of the Treaty.

- 10 First of all, the activities of private security undertakings and sworn private security guards are thoroughly checked by the public authorities when any licence is to be issued or withdrawn. In addition, in the context of their activities, the persons concerned are under the control of the Questore, or chief of police, who exercises disciplinary powers over them.
- 11 Next, sworn private security guards are required to swear before the judicial authority — the Pretore — an oath by which they undertake to exercise their duties in the public interest and to be loyal to the Italian Republic.
- 12 Lastly, sworn private security guards perform police functions in preventing and restraining the commission of criminal offences; those functions are exercised by them in their own right and do not constitute mere assistance to the forces of law and order. They include the power to arrest persons engaged in the commission of an offence, authority to draw up official reports which count as evidence and an obligation to collaborate with the police authorities.
- 13 The Commission rejects those arguments, claiming, first, that the exercise of control by public authorities and the obligation to swear an oath does not show that the activities in question fall within the ambit of the exercise of official authority.
- 14 Second, the power of sworn private security guards to draw up official reports counting as evidence, and their obligation to collaborate with the police authorities, merely involve the performance of ancillary roles.
- 15 As to the power to arrest persons engaged in the commission of an offence, a distinction must be drawn. When sworn private security guards arrest a person engaged in the commission of a serious offence for which Italian law requires

police officers to arrest the perpetrator, they are not exercising official authority within the meaning of Article 55 of the Treaty but are merely making a contribution to the maintenance of public security, which any individual may be called upon to do (see paragraph 37 of the judgment in *Commission v Spain*, cited above). By contrast, the Commission acknowledges that, when they arrest a person engaged in the commission of a minor offence for which police officers are empowered, but not obliged, to arrest the perpetrator, they are exercising a power which is normally reserved to the police. However, this is something which is on the periphery of the functions which sworn private security guards are normally called upon to perform. Consequently, that power constitutes an aspect which is separable from the professional activities of sworn private security guards as a whole, and cannot justify a situation in which the entire profession is dispensed, under Article 55 of the Treaty, from having to comply with the Treaty provisions relating to freedoms.

- 16 The Italian Government stated at the hearing, without being challenged on the point by the Commission, that sworn private security guards can never pursue their activities on a self-employed basis but must always be in paid employment. Consequently, there are no sworn private security guards carrying on their professional activities on a self-employed basis.

Findings of the Court

- 17 It should be noted at the outset that, as the Italian Government itself acknowledges, the nationality provisions contained in Articles 134 and 138 of the Consolidated Legislation are capable of constituting restrictions on the free movement of workers, freedom of establishment and freedom to provide services, as provided for in Articles 48, 52 and 59 of the Treaty.

*Nationality as a condition for the pursuit of private security activities
(Article 134 of the Consolidated Legislation)*

- 18 First of all, the nationality criterion imposed by Article 134 of the Consolidated Legislation on bodies and individuals providing surveillance or caretaking services, carrying out investigations or search operations or gathering information on behalf of individuals prevents nationals and undertakings from other Member States from engaging in such activities on Italian territory, either by establishing themselves in Italy or by operating from another Member State.
- 19 Nevertheless, the Italian Government has argued, albeit without furnishing any details in that regard, that the activities covered by Article 134 of the Consolidated Legislation fall within the ambit of the exercise of official authority. It is therefore necessary to consider whether the obstacles to the freedoms guaranteed by the Treaty which result from Article 134 of the Consolidated Legislation are justified or not by the derogation provided for in the first paragraph of Article 55 of the Treaty in conjunction, as the case may be, with Article 66 of the Treaty.
- 20 In that regard, it is apparent from the Court's case-law that the derogation in question must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (see, in particular, paragraph 35 of the judgment in *Commission v Spain* and paragraph 25 of the judgment in *Commission v Belgium*, cited above). The Court has also held that the activities of undertakings providing caretaking and security services are not normally directly and specifically connected with the exercise of official authority (*Commission v Belgium*, paragraph 26; see also *Commission v Spain*, paragraph 39).
- 21 The Italian Government has not put forward any evidence to show that the situation in Italy falls to be assessed differently from those with which the abovementioned judgments were concerned. In particular, as regards the arguments relating to the power of sworn private security guards employed by security firms to arrest persons engaged in the commission of offences, suffice it to note that, as pointed out by the Advocate General in paragraph 45 of his Opinion, such guards have no more power to do so than any other ordinary member of the public.

- 22 It must therefore be held that the derogation provided for in the first paragraph of Article 55 of the Treaty in conjunction, as the case may be, with Article 66 of the Treaty, does not apply in the present case. Consequently, the nationality condition laid down in Article 134 of the Consolidated Legislation with regard to private security activities constitutes an unjustified restriction on freedom of establishment and freedom to provide services.

Nationality as a condition of eligibility for employment as a sworn private security guard (Article 138 of the Consolidated Legislation)

- 23 The Italian Government stated at the hearing that sworn private security guards are not permitted to pursue their activities on a self-employed basis but must be employees. It is therefore necessary to consider the nationality condition laid down in Article 138 of the Consolidated Legislation, and possible justification therefor, solely from the standpoint of whether it constitutes an obstacle to freedom of movement for workers.
- 24 In that regard, it should be observed, first of all, that the nationality condition imposed by Article 138 of the Consolidated Legislation prevents workers from other Member States from holding employment in Italy as a sworn private security guard.
- 25 Next, it should be noted that, unlike the Treaty provisions relating to freedom of establishment and freedom to provide services, Articles 48 et seq. of the Treaty, concerning freedom of movement for workers, make no provision for any derogations in respect of activities connected with the exercise of official authority. Article 48(4) merely states that the provisions of that article are not to apply to employment in the public service. As the Advocate General observes in paragraph 26 of his Opinion, the concept of ‘employment in the public service’ does not encompass employment by a private natural or legal person, whatever

the duties of the employee. Thus, it is undeniable that sworn private security guards do not form part of the public service. Consequently, Article 48(4) of the Treaty is not applicable in the present case.

26 Moreover, the Italian Government has not shown the existence of any grounds of public policy or public security capable of justifying, on the basis of Article 48(3) of the Treaty, any derogation from the principle of freedom of movement for workers.

27 In those circumstances, the arguments put forward by the Italian Government regarding the participation of sworn private security guards in the exercise of official authority are of no effect.

28 It follows from all the foregoing considerations that, by providing that:

- private security work (including surveillance or caretaking of movable property and buildings) may be carried out in Italy, subject to licence, only by private security firms holding Italian nationality;

- only Italian nationals possessing such a licence may be employed as sworn private security guards,

the Italian Republic has failed to fulfil its obligations under Articles 48, 52 and 59 of the Treaty.

Costs

- 29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by providing that:

- private security work (including surveillance or caretaking of movable property and buildings) may be carried out in Italy, subject to licence, only by private security firms holding Italian nationality;

— only Italian nationals possessing such a licence may be employed as sworn private security guards,

the Italian Republic has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC);

2. Orders the Italian Republic to pay the costs.

La Pergola

Jann

Sevón

von Bahr

Timmermans

Delivered in open court in Luxembourg on 31 May 2001.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber