JUDGMENT OF THE COURT (First Chamber)

7 October 2004 *

In Case C-189/03,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 5 May 2003,

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

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster, C. Wissels and N.A.J. Bel, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. Rosas, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 May 2004,

after considering the observations submitted on behalf of the parties,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by adopting, in the framework of the Law on private security firms and detective agencies, provisions which require that:

— an undertaking that wishes to provide services in the Netherlands must have a permit, without taking into account the obligations to which the foreign service

provider is already subject in the Member State where it is established, and by charging fees for this permit;

— managers of these security firms have a permit for which a charge is also made;

— members of the staff of these firms seconded from the Member State where they are established to work in the Netherlands have a proof of identity card issued by the Netherlands authorities; and

— members of the staff have a diploma issued by a Netherlands organisation, and that installers of alarms have professional qualifications without taking into account qualifications obtained in another Member State,

the Kingdom of the Netherlands has failed to fulfil its obligations under Article 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/EEC (OJ 1992 L 209, p. 25).

Legal framework

2 The activities of private security firms and detective agencies are governed in the Netherlands by the Wet particuliere beveiligingsorganisaties en recherchebureaus (Law on private security firms and detective agencies) of 24 October 1997 (Staatsblad 1997, p. 500, hereinafter 'the Law of 1997'), the Regeling particuliere beveiligingsorganisaties en recherchebureaus (Implementing Regulation on private security firms and detective agencies) of 3 March 1999 (Stcrt. 1999, p. 60, hereinafter 'the Regulation of 3 March 1999') and the Circulaire particuliere beveiligingsorganisaties en recherchebureaus (Administrative circular on private security firms and detective agencies) of 16 March 1999 (Stcrt. 1999, p. 60).

3 Article 2(1) of the Law of 1997 prohibits the activities of private security firms and detective agencies unless they have been authorised by the responsible minister. Article 2(2) provides further:

'Our minister may grant an exemption from that prohibition to private security firms and detective agencies if the nature of their activities does not require the application of the rules by or under Articles 6 to 10. Such exemption may be subject to conditions'.

4 Under Article 7(1) of the Law of 1997 the engagement of managers by private security firms also requires authorisation by the responsible minister.

5 Article 9(8) of the Law of 1997 requires private security firms and detective agencies to ensure that their staff, when performing the corresponding activities, carry a proof of identity card (legitimatiebewijs) in the form prescribed by the responsible minister. That card certifies, as is clear from the combined provisions of Articles 7(2) of the Law of 1997 and Article 13(2) of the Regulation of 3 March 1999, that the undertaking has obtained the necessary official authorisation to employ the holder of the card.

6 Finally, under Article 8 of the Law of 1997, the responsible minister is also to prescribe, for certain categories, requirements as to the qualifications of the staff of private security firms and detective agencies. Such firms may entrust the performance of their business only to persons who satisfy the relevant qualification requirements. Article 8(2) provides:

'Our minister may grant an exemption from this provision.'

7 The provisions of Article 8 of the Law of 1997 are defined by Articles 5 and 11 of the Regulation of 3 March 1999. Under Article 5(1) of that regulation, private security firms may entrust surveillance activities only to persons holding a particular diploma, the Algemeen Beveiligingsmedewerker Diploma, awarded by two Netherlands organisations, the Stichting Vakexamens voor de Particuliere Beveiligingsorganisaties and the Stichting Ecabo. Article 5(5) recognises a series of other diplomas, all of which are also awarded by Netherlands organisations, as equivalent to that diploma.

8 In addition, Article 11(1) of that regulation provides that private security firms may entrust the installation and maintenance of alarms only to persons who are holders

of a diploma recognised by the responsible minister. Article 11(2) lists a total of four diplomas thus recognised, all of which are awarded by Netherlands organisations.

Pre-litigation procedure

9 Since it considers that the requirements resulting from the national provisions in question are contrary to Article 49 EC and to Directives 89/48 and 92/51, the Commission commenced the procedure for failure to fulfil obligations.

10 Having given the Kingdom of the Netherlands formal notice to submit its observations, the Commission, on 11 December 2001, issued a reasoned opinion requesting that Member State to take the necessary measures to comply with the opinion within two months from notification thereof. Since the Netherlands Government did not act upon that opinion, the Commission brought this action.

The action

11 In support of its action, the Commission made, originally, four complaints concerning the conditions prescribed by the Kingdom of the Netherlands for carrying on private security activities in that Member State.

12 Those complaints were based on the incompatibility with Article 49 EC of, respectively:

— the requirement that private security firms and detective agencies based in another Member State obtain prior authorisation, on payment of a fee, from the Netherlands authorities, without taking into account the obligations to which those undertakings are already subject in their State of origin;

— the requirement for similar authorisation for the managers of such undertakings;

— the requirement that the members of staff of those undertakings be in possession of a proof of identity card ('legitimatiebewijs') issued, against payment of a sum of money, by the Netherlands authorities, without taking into account that the persons concerned must, in any event, be holders of an identity card or passport issued by their Member State of origin;

and on the incompatibility with Article 49 EC and Directives 89/48 and 92/51 of

— the requirement that the members of staff of those undertakings be holders of a diploma issued by a Netherlands organisation and that installers of alarms possess particular qualifications, without taking into account those they have already obtained in their State of origin.

13 At the hearing, the Commission stated that it was abandoning the application in respect of the fourth complaint, whilst maintaining the first three complaints. The alleged failure to fulfil obligations must therefore be examined solely from the point of view of Article 49 EC.

The first and second complaints

Arguments of the parties

14 The Commission submits that, while the protection of recipients of services may possibly justify certain restrictions on the freedom to provide services in that sector, the requirement, first, that the undertakings in question established in another Member State and wishing to provide services in the Netherlands, and, secondly, that their managers have prior authorisation, is not an appropriate measure. In particular, the national legislation in question takes no account of the obligations to which foreign service providers are already subject in the Member State in which they are established (see Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221) and entails unjustified extra expenses (see Case C-43/93 *Vander Elst* [1994] ECR I-3803).

15 The Netherlands Government denies the failure to fulfil obligations on those points. Whilst accepting that the conditions and requirements relied upon by the Commission are capable of constituting obstacles to the free movement of services, it contends that they are justified by the public interest, and in particular, by the need to protect the recipients of the services in question, and the citizenry, from the possible abuses which can be committed by private security firms and detective agencies. Those measures are appropriate and proportional methods of protecting those persons against unlawful and dishonest practices. In that context, it is particularly important to examine the intentions and antecedents of the staff managing security firms and detective agencies, without which any enquiry as to the trustworthiness of the undertakings themselves can be of but little value. In addition, the costs connected to the grant of the various authorisations and certificates is not excessive.

16 Whilst it is true that the Netherlands legislation contains no particular provision expressly stating how the qualifications which a private security firm or its managers have obtained in the Member State where they are established are to be taken into account, it none the less enables them to be so in connection with an application for ministerial exemption, as provided under Article 2(2) of the Law of 1997. In the absence of harmonisation at Community level of the obligations imposed on the undertakings in question, it is in practice very difficult to determine the extent to which the varying obligations imposed by the different Member States are equivalent to the requirements arising from the Netherlands legislation.

Findings of the Court

17 It follows from the Court's settled case-law that national legislation which makes the provision of services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC (see, for example, *Vander Elst*, paragraph 15, and *Commission* v *Belgium*, paragraph 35, both cited above).

18 In connection with rules similar to those covered by the Commission's first complaint, and faced with defence arguments similar to those relied on by the Netherlands Government, the Court has ruled that such a restriction cannot be justified since, by excluding consideration of the obligations to which the trans-frontier service provider is already subject in the Member State in which it is established, it goes in any event beyond what is necessary to attain the objectives sought, namely to ensure close supervision of those activities (*Commission* v *Belgium*, cited above, paragraphs 36 to 38, and Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraph 60). The same conclusion must apply as regards the rules covered by the Commission's second complaint, namely the condition requiring that the managers of the undertakings in question obtain an authorisation.

19 As for the Netherlands Government's argument based on the existence of an administrative practice which takes into account, for the purposes of Article 2(2) of the Law of 1997, the obligations laid down by the Member State of origin, it must be observed that the Netherlands Government was not able to provide sufficient evidence of the existence of that practice. In any event, the Court has consistently held that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the EC Treaty (see, in particular, Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17).

20 It follows that the condition of prior authorisation imposed on private security firms and detective agencies and their managers, as laid down by the Netherlands legislation in force, cannot be justified on grounds of public interest in so far as the obligations to which those undertakings and persons are also subject in their Member State of origin are not taken into account.

21 In those circumstances, the Commission's first two complaints are well founded.

The third complaint

Arguments of the parties

22 The Commission claims that the obligation on members of the staff of private security firms and detective agencies residing in another Member State to be in possession of a proof of identity card issued by the Netherlands authorities is also an

obstacle to those undertakings' freedom to provide services. Such a condition is disproportionate, given that such seconded staff must in any event be holders of an identity card or passport issued by their Member State of origin (see *Commission* v *Belgium*, cited above, paragraph 40).

23 In addition, the Netherlands authorities apply that obligation generally without taking into account prior checks which have already been made in the Member State of origin.

24 The Netherlands Government contends that that obligation is an important guarantee ensuring the quality and professionalism of the services provided by the undertakings in question. Such a guarantee is above all important for members of the general public who encounter the actions of members of staff of such undertakings. The proof of identity card shows, apart from its holder's identity, that that person is authorised to carry out security activities or investigation on Dutch territory, whereas a passport or identity card gives no indication of the powers of the person concerned. Consequently, the proof of identity card alone is an appropriate and proportionate method of protecting citizens against possible unlawful actions.

25 In any event, obtaining ministerial exemption is also possible, under Article 8(2) of the Law of 1997.

26 Moreover, the amounts charged for the issue of a proof of identity card serve only to cover the costs of such issue and are not excessive.

Findings of the Court

27 In that regard, it follows from the Court's case-law that the obligation imposed on the members of staff of a private security firm or detective agency to be in possession of an identity card issued by the authorities of the Member State in which the services are rendered must be regarded as a restriction on the freedom to provide services since the formalities involved in obtaining such a card are likely to make the provision of services across frontiers more difficult (see *Commission* v *Belgium*, paragraph 39).

28 As regards the possible justification for that measure by grounds such as those relied upon by the Netherlands Government, based on the need to protect the general public, the Commission has rightly pointed out that members of staff of the undertakings concerned who go to another Member State must in any event be in possession of an identity card or passport, which is sufficient to enable them to prove their identity (see *Commission* v *Belgium*, paragraph 40).

29 The Netherlands Government also submitted that, apart from its use as identification of the person concerned, the card in question also fulfils a purpose of certification since it certifies the extent of the latter's powers. It cannot be denied that, in that respect, the possession of such a card may be an appropriate measure for the purpose of strengthening the general public's confidence in the staff of private security firms and detective agencies.

30 In that regard, while the proof of identity card is, admittedly, intended to certify the competence and professional integrity of the members of staff of private security

firms and detective agencies coming from other Member States and offering services in the Netherlands, such a requirement is a restriction which goes beyond what is necessary to attain the stated purpose, in so far as it does not take account of the controls or verifications already carried out in the Member State of origin which certify that competence and professional integrity (see, to that effect, *Commission* v *Portugal*, cited above, paragraph 66).

31 As regards the ministerial exemption relied upon by the Netherlands Government in that regard, it is sufficient to state that, as the Advocate General pointed out in paragraphs 54 to 58 of his Opinion, it is not explicitly stated in Article 8(2) of the Law of 1997 that the possibility of exemption, which is left to the authorities' discretion, applies equally and in all cases to the recognition, in connection with the establishment of the proof of identity card in question, of professional qualifications obtained in other Member States. The requirement of possession of such a card cannot therefore be justified on that ground.

32 It follows that the third complaint pleaded by the Commission is also well founded, in so far as, for the requirement in question, the checks to which providers of cross-frontier services are already subject in their Member State of origin are not taken into account.

33 In view of all the foregoing, it must be declared that, by adopting, in the framework of the Law of 1997, provisions which require that:

— undertakings that wish to provide services in the Netherlands and their managers must have a permit, without taking into account the obligations to

which foreign service providers are already subject in the Member State where they are established, and by charging fees for this permit, and

— members of the staff of these firms seconded from the Member State where they are established to work in the Netherlands have a proof of identity card issued by the Netherlands authorities, in so far as the checks to which cross-frontier providers of services are already subject in their Member State of origin are not taken into account for the requirement in question,

the Kingdom of the Netherlands has failed to fulfil its obligations under Article 49 EC.

Costs

34 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 Kingdom of the Netherlands has been essentially unsuccessful in respect of the Commission's first three complaints, the Kingdom of the Netherlands should be ordered to pay the costs thereof. As regards the fourth complaint, which the Commission abandoned at the hearing, the parties have not applied for the costs. It is therefore appropriate, in that respect, to apply the third subparagraph of Article 69(5) of the Rules of Procedure, under which each party is to bear its own costs. It follows that it is appropriate to order the Kingdom of the Netherlands to pay three quarters of the Commission's costs and to decide that, for the rest, each party shall bear its own costs.

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

1. **Declares that, by adopting, in the framework of the Law on private security firms and detective agencies of 24 October 1997, provisions which require that:**

   — **undertakings that wish to provide services in the Netherlands and their managers must have a permit, without taking into account the obligations to which foreign service providers are already subject in the Member State where they are established, and by charging fees for this permit, and**

   — **members of the staff of these firms seconded from the Member State where they are established to work in the Netherlands have a proof of identity card issued by the Netherlands authorities, in so far as the checks to which cross-frontier providers of services are already subject in their Member State of origin are not taken into account for the requirement in question,**

   the Kingdom of the Netherlands has failed to fulfil its obligations under Article 49 EC;

2. **Orders the Kingdom of the Netherlands to pay three quarters of the costs of the Commission of the European Communities. For the rest, each party is ordered to bear its own costs.**

Signatures.