# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 7 July 2005 [1]

## I — Introduction

1. In the present Treaty infringement proceedings the Commission complains that the Kingdom of Spain has not brought its laws, regulations and administrative provisions on private security services into line with the rules on the freedom of establishment and the freedom to provide services and has infringed the provisions of Community law on the mutual recognition of attestations of professional competence.

2. The question in this context is essentially whether the operation of foreign security services in Spain may be made conditional on their being constituted as legal persons, having a specific minimum share capital, providing security and employing a minimum number of staff and whether the security staff of a foreign security service may be required to obtain a separate licence for their activities in Spain even though they already have a comparable licence in the country of establishment.

3. The legal proceedings follow on from Case C-114/97, in which the legislation of the Kingdom of Spain on private security services was found to be inconsistent with the Treaty. [2] The case is also related in substance to a number of other Treaty infringement proceedings concerning the activities of private security services, in which the Court of Justice has ruled against the Kingdom of Belgium, [3] the Italian Republic, [4] the Portuguese Republic [5] and the Kingdom of the Netherlands. [6]

1 — Original language: German.

2 — Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717.

3 — Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221.

4 — Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363.

5 — Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645.

6 — Case C-189/03 *Commission* v *Netherlands* [2004] ECR I-9289, with my opinion of 22 June 2004.

## II — Legislative background

### A — *Community law*

4. The background to this case in Community law is formed by Articles 43 EC and 49 EC and by Directive 92/51; [7] the Commission also relies on Directive 89/48. [8]

5. The first paragraph of Article 43 EC reads:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

6. The first paragraph of Article 49 EC is worded as follows:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

7. According to Article 1(c) of Directive 92/51, 'attestation of competence' is '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

7 — 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), last amended by Directive 2001/19/EC (OJ 2001 L 206, p. 1); hereinafter 'Directive 92/51'.

8 — 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), last amended by Directive 2001/19; hereinafter 'Directive 89/48'.

or administrative provisions of a Member State, without proof of prior education and training being required.'

8. According to Article 1(e) of Directive 92/51, a 'regulated profession' is 'the regulated professional activity or range of activities which constitute this profession in a Member State'.

9. The first sentence of Article 1(f) of Directive 92/51 defines a 'regulated professional activity' as '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'.

B — *National law*

10. The Spanish legislation applicable to private security services comprises Law No 23/1992 on private security services (*'Ley de Seguridad Privada'*; hereinafter 'Law on private security services') [9] and Royal Decree No 2364/1994 approving the Regulation on private security services (*'Reglamento de Seguridad Privada'*; hereinafter 'Regulation on private security services'). [10]

11. Article 5(1) of the Law on private security services concludes by listing the services which can be provided by security undertakings. They relate to the usual forms of protection of property and persons.

12. According to Article 7 of the Law on private security services, an undertaking wishing to provide such security services requires administrative authorisation in the form of an entry in a register kept by the Ministry of the Interior.

13. Such registration presupposes inter alia that the undertaking is a company limited by shares, a limited liability company, a *'sociedad anónima laboral'* [11] or a cooperative (Article 7(1)(a) of the Law on private security services in conjunction with Article 5 of the Regulation on private security services).

9 — *Ley* 23/1992 of 30 July 1992 (*Boletin Oficial del Estado* No 186/1992, p. 27116).

10 — *Real Decreto* 2364/1994 of 9 December 1994 (BOE No 8/1995, p. 779).

11 — A company limited by shares established by its own employees.

14. In addition, the annex to the Regulation on private security services sets out further requirements to be satisfied by undertakings wishing to provide security services. It refers, on the one hand, to minimum amounts of share capital, which differ according to the nature of the undertaking's activities and, in certain cases, are graded according to the geographical range of those activities. On the other hand, it must be shown that security has been provided in an amount which similarly varies according to the nature and geographical range of activities; this security is to be lodged with Spain's *Caja General de Depósitos.*

15. A further requirement in the case of security services wishing to engage in the transport of valuables, dangerous objects or explosive substances is that they use a minimum number of guards and armoured vehicles; in addition, provision must be made for a minimum number of technicians and fitters for the installation and maintenance of alarm and security systems (see also the annex to the Regulation on private security services).

16. The security staff of private security services require authorisation from the Ministry of the Interior (Article 10 of the Law on private security services in conjunction with Article 53 of the Regulation on private security services). Applicants for such authorisation must be of age, they must not be older than a maximum age specified, where appropriate, by administrative regulation, they must have passed an examination attesting to the knowledge and skills required for the activity concerned, and they must have the physical and mental aptitudes necessary for the performance of their tasks.

17. For the activity of private detective, Article 54(5)(b) of the Regulation on private security services also requires the persons concerned to have a specific diploma for private detectives, [12] for which certain courses and examinations must have been taken in accordance with further administrative provisions of the Ministry of Justice and the Interior. [13]

18. Originally, only Spanish undertakings were permitted to provide private security services, and their security staff also had to

12 — In Spanish: 'diploma de detective privado'.

13 — In addition, Article 54(5)(a) of the Regulation on private security services requires a certain level of education, which can be demonstrated by various school-leaving certificates ('titulo de bachillerato unificado polivalente, bachiller, formación profesional de segundo grado, técnico de las profesiones o cualificaciones que se determinen, u otros equivalentes o superiores'). However, as the Commission makes no further reference to those school-leaving certificates in its application — except in the context of the legislative background — it must be assumed that it did not intend to make this aspect the subject of the current proceedings. It will not therefore be discussed further below. In any case, to be admissible, an action requires more than a mere reference, without comment, to such legislation in the context of the legislative background to the case, with no legal appraisal of any kind being made (see Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319, paragraph 21).

be Spanish nationals. [14] These rules have meanwhile been amended, however. [15] The nationality of a Member State of the European Union or the European Economic Area is now enough.

19. As regards the recognition of professional qualifications, the relevant Spanish legal measures are Royal Decree No 1665/1991, which transposed Directive 89/48 into Spanish law, and Royal Decree No 1369/1995, which transposes Directive 92/51. Both decrees list the occupations which they cover. What they do not list, however, are the activities in the private security sector of interest here.

## III — Facts of the case and pre-litigation procedure

20. In 1997 various provisions of the Law on private security services and the Regulation on private security services had already prompted the Commission to initiate Treaty infringement proceedings against the Kingdom of Spain, which resulted in the Court of Justice finding against the latter in 1998. [16] The judgment stated inter alia that the Kingdom of Spain had failed to fulfil its obligations under the EC Treaty by restricting authorisation to undertake activities of private security services to Spanish undertakings and by making the authorisation of the security staff of those undertakings conditional on their having Spanish nationality.

21. Prior to the present proceedings the Commission informed the Spanish Government by letter of 23 November 1999 that the relevant Spanish laws, regulations and administrative provisions continued to be inconsistent with Community law, namely Articles 43 EC and 49 EC, and, as regards the recognition of attestations of professional competence, with Directives 89/48 and 92/51.

22. The Commission's main objections were that any activity in the private security services sector was conditional on Spanish nationality and that, if foreign security services wished to operate in Spain, they had to be constituted as legal persons, to have a certain share capital irrespective of divergent legislation in the State in which they had their registered offices, to provide security irrespective of securities in their

14 — See *Commission* v *Spain* (cited in footnote 2), paragraphs 4 and 6.

15 — Even before the current Treaty infringement procedure was initiated, the Law on private security services was amended by *Real Decreto-Ley* No 2/1999 of 29 January 1999 (BOE No 26/1999, p. 4327). During the pre-litigation procedure in the current case the Regulation on private security services was also amended by *Real Decreto* No 1123/2001 of 19 October 2001 (BOE No 281/2001, p. 43034).

16 — *Commission* v *Spain* (cited in footnote 2).

country of origin and to employ a minimum number of staff. It also complained that the staff of a foreign security service were required to obtain separate authorisation for their activity in Spain even if they had comparable authorisation in the country of establishment and that activities in the context of private security services were not subject to the Community system for the recognition of professional qualifications.

23. After the Spanish Government had failed to respond within the prescribed period, the Commission issued, on 24 July 2000, a reasoned opinion, in which the criticisms were reiterated, and called on the Kingdom of Spain to take the necessary measures.

24. By letter of 15 November 2000 the Spanish authorities proposed various amendments to the legislation. To this the Commission replied on 31 January 2001 that the proposals were inadequate and called for a further revision of the rules.

25. In May 2001 the Spanish authorities initially forwarded to the Commission no more than the draft of a royal decree, which would merely remove the requirement of Spanish nationality from the Regulation on private security services. A short time later they announced that further changes to the legislation were planned. On 1 August 2001 the Commission then called for a specific draft law and a timetable. As there was no response, the Commission dispatched a final letter dated 7 January 2002, in which it summarised the situation and referred to the still outstanding draft law and timetable. In October 2001, however, the changes relating to nationality which had been announced had been implemented by Royal Decree No 1123/2001. [17]

26. On 19 June 2002 the Spanish authorities sent to the Commission a letter in which they reiterated their proposals, which the Commission had already judged to be inadequate, and referred to the end of 2003 as the earliest time for the implementation of the legislation.

27. As this answer did not seem adequate to the Commission, it initiated the present action against the Kingdom of Spain on 8 December 2003 pursuant to the second paragraph of Article 226 EC.

17 — See point 18 of this Opinion.

## IV — Arguments of the parties

28. The Commission originally claimed that the Court should:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 43 EC and 49 EC and Directives 89/48 and 92/51

— by providing in the implementing legislation that private security services and their staff must have Spanish nationality,

— by requiring in the provisions on the registration of foreign undertakings that private security services

(a) be legal persons in all relevant cases,

(b) have a certain share capital even if they were not subject to this obligation in the State in which they were established,

(c) lodge security with the *Caja General de Depósitos* whether or not security had been lodged in the country of origin,

(d) employ a minimum number of staff,

— by stipulating that the staff of a foreign security service in Spain must obtain special authorisation even if they already had comparable authorisation in the State in which the undertaking concerned was established and that professions in the private security sector were not governed by the Community provisions on the recognition of professional qualifications,

(2) order the Kingdom of Spain to pay the costs of the proceedings.

29. During the written procedure before the Court of Justice the Commission withdrew its then first complaint, concerning the

nationality of security services and their staff, by written pleading of 3 May 2004.

30. The Commission thus now claims that the Court should:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 43 EC and 49 EC and Directives 89/48 and 92/51

— by requiring in the provisions on the registration of foreign undertakings that private security services

(a) be legal persons in all relevant cases,

(b) have a certain share capital even if they were not subject to this obligation in the State in which they were established,

(c) lodge security with *Caja General de Depósitos* whether or not security had been lodged in the country of origin,

(d) employ a minimum number of staff,

— by stipulating that the staff of a foreign security service in Spain must obtain special authorisation even if they already had comparable authorisation in the State in which the undertaking concerned was established and that professions in the private security sector were not governed by the Community provisions on the recognition of professional qualifications,

(2) order that the Kingdom of Spain pay the costs of the proceedings.

31. The Kingdom of Spain contends that the Court should:

(1) dismiss the action,

(2) order the Commission to pay the costs of the proceedings.

It reiterated these proposals even after the partial withdrawal of the action by the Commission.

## V — Admissibility of the action

32. Before the Commission's various complaints in the matter can be examined, the admissibility of the action must be considered.

33. According to Article 21(1) of the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure of the Court of Justice, every application must contain the subject-matter of the proceedings and a summary of the pleas in law. For an action brought pursuant to Article 226 EC for failure to fulfil obligations under the Treaty this means, according to settled case-law, that the Commission must indicate the specific complaints on which the Court is called upon to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. [18]

18 — Case C-202/99 *Commission* v *Italy* (cited in footnote 13, paragraph 20), Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 35, first sentence, Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17, and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28.

The wording of the application in general

34. In the present case the Commission makes the general proposal that the Court should declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 43 EC and 49 EC and Directives 89/48 and 92/51 by requiring private security services and their staff to satisfy certain requirements. Although these requirements are then listed in greater detail, it is not clear from the form of order sought by the Commission as such [19] which of the complaints voiced relates to an infringement of Articles 43 EC and 49 EC and which relates to an infringement of Directives 89/48 and 92/51. Such wording of forms of order sought by the applicant shows a remarkable lack of clarity and transparency.

35. It is only when the form of order sought by the Commission is read in conjunction with the arguments relied on and interpreted in the light thereof that it becomes clear that only the first to fifth of the Commission's remaining complaints claim that Articles 43 EC and 49 EC have been infringed, while only the sixth and final complaint [20] concerns an infringement of Directives 89/48 and 92/51. [21] Thus, despite the unclear

19 — The order sought by the Commission is reproduced in paragraph 30 of this Opinion.

20 — Last clause of the second indent of paragraph 1 of the amended order sought by the Commission (reproduced in paragraph 30 of this Opinion).

21 — Paragraphs 25 to 60 of the application refer only to Articles 43 EC and 49 EC, while paragraphs 61 to 71 mention only the two directives.

description, the various complaints can be related to Articles 43 EC and 49 EC on the one hand and Directives 89/48 and 92/51 on the other. With regard to the overall presentation of the form of order sought by the applicant, there are therefore — despite its lack of clarity — no serious doubts about admissibility.

The sixth complaint in particular

36. Doubts about admissibility arise, however, when the sixth and final complaint is then subjected to a closer examination. In it the Commission claims that both Directive 89/48 and Directive 92/51 have been infringed.

37. Although it is in principle conceivable for a Member State to infringe both directives at once, [22] to have the Court of Justice rule to this effect, the Commission would have to provide detailed and substantiated evidence in its application of the extent to which the legal situation or the application of the law in that Member State infringed both directives at once. [23] For even though the two directives are closely linked and based on the same principles and contain *mutatis mutandis* the same rules, [24] with the result that they create a general system of mutual recognition of professional qualifications, each has its own sphere of application: while Directive 89/48 concerns higher-education diplomas awarded on completion of professional education and training of at least three years' duration, Directive 92/51 essentially concerns attestations of professional competence based on a shorter period of education or training.

38. In an action brought under the second paragraph of Article 226 EC it is therefore far from enough simply to cite the two directives, 89/48 and 92/51, together and to claim in general terms that both have been infringed. This, however, is precisely what the Commission has done yet again in the present case. [25]

39. In its application the Commission has presented nothing to indicate that the qualifications to be demonstrated, as appropriate, by security staff and private detectives in Spain require at least three years of higher education or training or fall within the scope of Directive 89/48 in some other way. It is thus totally impossible to gauge how far the Kingdom of Spain has allegedly infringed

22 — See only the recent judgments in Case C-55/03 *Commission* v *Spain* (not published in the European Court Reports, paragraph 33), and Case C-198/04 *Commission* v *France* (not published in the European Court Reports, paragraph 11).

23 — Thus also, analogously, Case C-55/03 *Commission* v *Spain* (cited in footnote 22, especially paragraph 29).

24 — See the fifth recital of the preamble to Directive 92/51.

25 — See, in the past, for example, the order sought by the Commission in *Commission* v *Netherlands* (cited in footnote 6, paragraph 12, last indent).

that directive. To the extent, then, that a complaint is made about an infringement of Directive 89/48, the Commission's application lacks an adequate description of the factual and legal particulars on which its complaint is based. [26]

40. To summarise, it can therefore be said that the Commission's action must be dismissed as inadmissible to the extent that it claims that Directive 89/48 has been infringed. Otherwise, there can be no serious doubts about the admissibility of the action, despite its lack of transparency.

## VI — Substance of the action

41. Of the Commission's remaining complaints, the first and parts of the second and fifth concern issues which the Court has already considered in the past. [27] On the other hand, complaints such as the third, fourth and sixth have not yet as such been the subject of judgments of the Court.

### A — *Introductory comments*

#### The distinction between the freedom to provide services and the freedom of establishment

42. The starting point for these Treaty infringement proceedings is independent activities of private security services and detective agencies performed in Spain for consideration by undertakings with registered offices in other Member States. If such activities are performed temporarily, i.e. without stable and continuous integration into the Spanish economy, the freedom to provide services is applicable to them (Articles 49 EC and 50 EC in conjunction with Articles 48 EC and 55 EC); otherwise — as in the case of the setting up of branches and subsidiaries — the freedom of establishment is relevant (Article 43 EC in conjunction with Article 48 EC). [28]

26 — Where Directive 92/51 is concerned, on the other hand, the Commission states in its application — albeit in extremely concise terms — that, in its view, the activities of private security services and private detectives in Spain are regulated professions, that evidence of qualifications should be produced for these professions, but that there is no system of recognition within the meaning of that directive. The minimum requirements for a proper application have thus been satisfied. Everything else is a question of substance.

27 — For the first and second complaints see in particular *Commission* v *Portugal* (cited in footnote 5, paragraphs 41 to 44 and 53 to 57); for the fifth complaint see, in particular, *Commission* v *Netherlands* (cited in footnote 6, paragraphs 17 to 20 and 31); similarly, *Commission* v *Belgium* (cited in footnote 3, paragraphs 35 to 38) and *Commission* v *Portugal* (cited in footnote 5, paragraphs 60 and 61).

28 — For the distinction between the freedom of establishment and the freedom to provide services see, in particular, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraphs 25 to 28, Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 27 to 33, and *Commission* v *Portugal* (cited in footnote 5, paragraphs 24 to 27).

The absence of harmonisation at Community level

43. On a number of occasions the Kingdom of Spain defends the laws, regulations and administrative provisions criticised by the Commission by referring to the absence of harmonisation at Community level and emphasises that stricter requirements may therefore apply in Spain than in other Member States.

44. In response to this it can be said that the fundamental freedoms are based on the principle of mutual recognition. Mutual recognition in no way presupposes that the Community legislature has set common standards for a given sector of the economy. In fact, this principle also applies especially in areas for which *no* harmonisation has been undertaken and to which, therefore, not even common minimum standards apply. [29]

45. Where common standards do not exist, the Member States, though in principle authorised to specify substantive conditions and procedural requirements to be met by such activities as those of the security staff of private security services and also to proceed from different levels of protection in this context, [30] must always exercise their powers with due respect for the freedom to provide services and the freedom of establishment. [31] This extends to taking account of the requirements which foreign security staff already satisfy in their country of origin. [32]

The derogations provided for in Articles 45 EC and 46 EC

46. In so far as the Kingdom of Spain refers to the activities of private security services in the context of the derogations relating to public security and order and the exercise of public authority, it has already been declared that the first paragraph of Article 45 EC and Article 46(1) EC do not apply to cases such as the present one. [33]

29 — Settled case-law since the '*Cassis de Dijon*' judgment in Case 120/78 *Rewe-Zentral* [1979] ECR 649, paragraph 8. For a more recent judgment see Case C-496/01 *Commission* v *France* [2004] ECR I-2351, paragraph 55, with further references. To the same effect, see Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 28.

30 — The mere fact that one Member State adopts less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law; see Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 42, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraphs 33 and 34, and Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraphs 46 and 47.

31 — Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31, and *Commission* v *France* (cited in footnote 29, paragraph 55).

32 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 16, and *Corsten* (cited in footnote 31, paragraph 35).

33 — Case C-114/97 *Commission* v *Spain* (cited in footnote 2), paragraphs 37 to 39, 42, 45 and 46, Case C-355/98 *Commission* v *Belgium* (cited in footnote 3), paragraphs 24 to 26 and 28 to 30, and Case C-283/99 *Commission* v *Italy* (cited in footnote 4) paragraphs 20 to 22.

B — *The first complaint: incompatibility with Articles 43 EC and 49 EC of the requirement that security services be constituted as legal persons*

47. The Commission's first complaint concerns the requirement in Spain that private security services be constituted as legal persons in one of the legal forms referred to in Article 7(1)(a) of the Law on private security services. [34]

48. The requirement that private security services have the legal form of legal persons may impede the cross-border operations of service providers established outside Spain in other Member States and legally providing such services there, since such a requirement prevents natural persons resident abroad from providing their services in the private security service sector in Spain. It therefore constitutes a restriction of the freedom to provide services within the meaning of Article 49 EC. [35]

49. Furthermore, such a rule also constitutes a restriction of the freedom of establishment within the meaning of Article 43 EC, since it hinders economic operators from other Member States who are natural persons in the setting up of branches in Spain. [36]

50. To justify the restriction referred to above, the Kingdom of Spain relies on the protection of service recipients and the rest of the population. To this end, it argues, it is necessary for private security services to satisfy special requirements regarding the possession of weapons, communications within the undertaking and the training of security staff, in the form of regular shooting practice, for example.

51. It is settled case-law, however, that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty are admissible only if four conditions are fulfilled: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. [37]

34 — See point 13 of this Opinion.

35 — *Commission* v *Portugal* (cited in footnote 5, paragraph 41).

36 — *Commission* v *Portugal* (cited in footnote 5, paragraph 42); see also Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19, and Case 143/87 *Stanton* [1988] ECR 3877, paragraph 11.

37 — See *Gebhard* (cited in footnote 28, paragraph 37), *Corsten* (cited in footnote 31, paragraph 39), *Schnitzer* (cited in footnote 28, paragraph 35), Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-140/03 *Commission* v *Greece* [2005] ECR I-3177, paragraph 34.

52. In the present case the requirement that private security services be constituted as legal persons is in no way suitable for securing the attainment of the objectives pursued. As the Commission rightly points out, the choice of an undertaking's legal form may have an effect on the means available to its shareholders to exercise influence internally and on the financial interests of shareholders and third parties. However, none of the aspects of the protection of service recipients and the rest of the population cited here by the Kingdom of Spain depends on the legal form of the undertakings concerned. In this respect, all that matters is that the various undertakings, and especially the natural persons employed by them, actually satisfy the requirements to which security services are subject; for example, certain rules apply to the use and safekeeping of weapons, communications within undertakings must, where appropriate, be adjusted to reflect the dangerous nature of the activities undertaken, and security staff must attend the necessary training courses. In this context, the Kingdom of Spain, on which the onus of proving the need for a derogation from the fundamental freedoms concerned would fall, has not presented any grounds to show that a legal person is better able to satisfy such requirements than, say, a one-man business.

53. The first complaint should therefore be allowed.

C — *The second and third complaints: incompatibility with Articles 43 EC and 49 EC of the requirements that private security services have a certain share capital and that they lodge a specific security*

54. The Commission's second and third complaints concern the requirements that, to obtain authorisation to operate in certain areas of activity in Spain, private security services must have a minimum share capital, the amount of which is specified, and lodge security with Spain's *Caja General de Depósitos*, the amount of which is similarly specified.

The second complaint: minimum share capital

55. The requirement that private security services have a minimum share capital graded according to the nature and geographical range of their activities is likely to hamper the cross-border operations of service providers established outside Spain in other Member States and already legally providing similar services there, since foreign service providers whose share capital is less than the minimum amount required in Spain will be prevented from offering their services in Spain. This constitutes a restriction of the freedom to provide services within the meaning of Article 49 EC. [38]

38 — See *Commission* v *Portugal* (cited in footnote 5, paragraph 53).

56. A condition of this kind also constitutes a restriction of the freedom of establishment within the meaning of Article 43 EC, [39] since it hinders Community economic operators whose share capital is less than the minimum amount required for the activity concerned in Spain in the setting up of branches or subsidiaries in Spain.

57. As the Court has already ruled, such a condition cannot be justified with considerations of creditor protection, in so far as there are other means of attaining that objective which restrict the freedom to provide services and the freedom of establishment to a lesser degree, such as lodging security [40] or taking out an insurance contract. [41]

58. The same considerations can be applied to the argument presented by the Kingdom of Spain that the minimum share capital is intended as an additional safeguard for the recipients of services and as protection for the interests of the rest of the population. Here again, it can be said that the provision of security or the conclusion of an insurance contract would suffice and would hinder operators from other Member States less.

39 — *Commission* v *Portugal* (cited in footnote 5, paragraph 54) and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraphs 100 and 101.

40 — See also the comments in points 61 to 65 of this Opinion.

41 — *Commission* v *Portugal* (cited in footnote 5, paragraph 55).

59. While it may be true that — as the Kingdom of Spain argues in its defence — appropriate insurance cannot be obtained in certain cases, the private security services concerned always have the option in such circumstances of lodging security. In any case, the Spanish legislation goes beyond what is necessary to attain the objectives pursued when it prescribes evidence of a certain minimum share capital as an imperative requirement, without permitting such alternative means as insurance contracts or securities.

60. The second complaint should therefore be allowed.

The third complaint: provision of security

61. The aforementioned requirement that security be provided can similarly be said to impose a restriction on the freedom to provide services and the freedom of establishment (Articles 49 EC and 43 EC), since it makes it more expensive and therefore less attractive for private security services from other Member States to provide their services in Spain or to set up subsidiaries or branches in Spain.

62. The question which therefore arises is whether this restriction is justifiable. It should be pointed out in this context that the Court has already explicitly ruled that requiring the provision of security is a less stringent means of protecting creditors than specifying a minimum share capital. [42]

63. According to the Spanish legislation here at issue, the security is intended in particular to ensure that any fines imposed for breaches of the law by private security undertakings can be collected. The ultimate aim, then, is to protect Spanish public agencies as creditors in the case of any fines imposed.

64. The Commission does not complain generally about the requirement that such a security be provided, but about the fact that it must be lodged with the *Caja General de Depósitos*. By requiring that the security always be lodged with a certain *Spanish* institution, the Spanish legislation makes it impossible for account to be taken of securities set up in other Member States, especially the country of origin of the private security service.

65. A requirement of this kind goes beyond what is necessary to protect creditors. Although it is legitimate for the authorities of the host State to determine whether security provided in the country of origin is *sufficient in scale* to ensure the protection of creditors in the host State as well, there is no justification for not taking account of such securities from the outset or for requiring that an additional, separate security be provided for each Member State in which the undertaking wishes to operate.

66. Although the Kingdom of Spain has declared its willingness in the future to recognise securities set up with other credit institutions in the Community, albeit only after the expiry of the periods set by the Commission, [43] whether or not the Treaty has been infringed must be determined by reference to the situation prevailing in the Member State on the expiry of the period set in the reasoned opinion. [44] No subsequent changes can be taken into account by the Court of Justice. [45] Purely as a precaution, it should also be pointed out that binding legislation is needed to remedy an infringe-

42 — *Commission* v *Portugal* (cited in footnote 5, paragraph 55). Similarly, Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraph 36.

43 — Letters of 15 November 2000, 9 July 2001 and 19 June 2002 from the Spanish Government to the Commission. However, the Spanish Government still requires private security services to set up a separate security for their operations in Spain.

44 — Settled case-law; see no more than Case C-63/02 *Commission* v *United Kingdom* [2003] ECR I-821, paragraph 11, Case C-313/03 *Commission* v *Italy*, not published in the European Court Reports, paragraph 9, and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 33.

45 — Case C-482/03 *Commission* v *Ireland*, not published in the European Court Reports, paragraph 11, and *Commission* v *Germany* (cited in footnote 44, paragraph 33).

ment of the Treaty and that a mere (new) administrative practice, which the administration can change at will and which is not sufficiently well-known, could not be regarded as the legally effective fulfilment of obligations arising from the EC Treaty. [46]

67. Consequently, the third complaint, too, is well founded.

D — *The fourth complaint: incompatibility with Articles 43 EC and 49 EC of the requirement that a minimum number of workers be employed*

68. The Commission's fourth complaint is that paragraphs I.4.1(b), I.4.2(b) and I.5.2(a) of the annex to the Regulation on private security services prescribe a minimum number of guards for the activities referred to therein associated with the transport of valuables, dangerous goods and explosive substances and a minimum number of technicians for the installation and maintenance of alarm and security systems.

69. In the grounds given for bringing the action [47] the Commission also describes the requirement in Spain that a minimum number of armoured vehicles be held for the transport of dangerous goods and valuables as incompatible with Article 49 EC. As, however, it remarkably does not propose a ruling against the Kingdom of Spain in this regard, [48] this aspect is not considered further below and the examination of the fourth complaint will be confined to the requirement that a minimum number of staff be employed.

70. The aforementioned minimum numbers constitute a restriction of the freedom to provide services (Article 49 EC) because they prevent foreign private security services with fewer staff from offering services in the Spanish market. Furthermore, as those minimum numbers make it more expensive and therefore less attractive for foreign private security services to set up branches or subsidiaries in Spain, they constitute a restriction of the freedom of establishment (Article 43 EC).

71. These restrictions seem justified to me as far as they apply to the *transport of explosive substances*, since, in the absence of

46 — See inter alia Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17, and *Commission* v *Netherlands* (cited in footnote 6, paragraph 19).

47 — Paragraphs 51 to 55 of the Commission's application.

48 — See, in this respect, the order sought by the Commission, reproduced in point 30 of this Opinion.

harmonisation at Community level, the Member States have some discretion with regard to the level of protection which they seek to achieve in their territory. [49] In the present case the Kingdom of Spain refers convincingly to the dangers which the transport of explosive substances may pose for the general public, not least because of the increased threat of terrorism, especially in Spain. It argues that explosive substances cannot therefore be transported in Spain by one person, that a minimum of two guards is needed [50] and that transport staff must have some knowledge of handling such substances. The Commission has failed to refute this line of argument with substantiated arguments of its own. Its fourth complaint should therefore be dismissed where this aspect is concerned.

72. Although the Spanish legislature also enjoys some discretion in all *other spheres* with regard to the level of protection to be attained, it is for the Kingdom of Spain, on which the onus of proving the need for derogations from the fundamental freedoms concerned falls, to demonstrate with substantiated arguments that the minimum numbers of staff currently applicable in Spain are suitable for attaining that level of protection and do not go beyond what is necessary for the attainment of that objective. It has failed to do so in the present case. Indeed, the Kingdom of Spain itself has declared its willingness to reduce the aforementioned minimum numbers of staff by 50% in each case. It thus also admits that the requirements currently laid down in the Spanish legislation are not necessary for the attainment of the objective pursued of ensuring safety when valuables and dangerous goods are transported and when alarm and security systems are installed.

73. It would also be for the Kingdom of Spain to demonstrate with substantiated arguments how justifiable the future, halved minimum numbers of staff are by reference to overriding requirements in the general interest. For the purposes of the current Treaty infringement proceedings, however, the examination of this aspect can be left aside, since the existence of a Treaty infringement must be determined by reference to the situation prevailing in the Member State on the expiry of the period set in the reasoned opinion. No subsequent changes can be taken into account by the Court of Justice. [51] Mere announcements of future amendments to national legislation are certainly not enough.

74. Consequently, the fourth complaint should be allowed in so far as foreign private security services are required to employ a

49 — See point 45 of this Opinion and the case-law cited in footnote 30, according to which the mere fact that rules vary in their strictness in different Member States does not mean that the stricter rules are disproportionate and hence incompatible with Community law.

50 — Paragraph I.4.2(b) of the annex to the Security Services Regulation requires that any vehicle used for the transport of explosive substances have a crew of at least two guards who specialise in this activity.

51 — See point 66 of this Opinion and the settled case-law cited therein.

minimum number of staff in Spain where the latter are employed to transport valuables and dangerous goods or to install and maintain alarm and security systems.

76. The Court of Justice has already ruled that national legislation which makes the provision of certain services by an undertaking established in another Member State subject to the issue of an administrative licence constitutes a restriction of the freedom to provide services. [52] Equally, the requirement that an administrative licence be obtained for the staff employed by such an undertaking restricts that undertaking's freedom to provide services. [53] However, it can also be made more difficult for foreign security services, for example, to set up a subsidiary or branch in Spain if they have to obtain an administrative licence for the security staff they employ; consequently, the Spanish legislation also constitutes a restriction of the freedom of establishment.

E — *The fifth complaint: incompatibility with Articles 43 EC and 49 EC of the requirement that special authorisation be obtained for the activities of security staff in Spain*

75. In its fifth complaint the Commission objects to the requirement that the staff of a private security service from another Member State need a special administrative licence for activities in Spain, no account being taken of whether they have already obtained similar authorisation in the Member State in which their undertaking has its registered office.

77. According to settled case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty are admissible only if four conditions are fulfilled: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. [54]

52 — See, for example, *Säger* (cited in footnote 32, paragraph 14), *Vander Elst* (cited in footnote 32, paragraph 15), *Commission* v *Belgium* (cited in footnote 3, paragraph 35), *Commission* v *Portugal* (cited in footnote 5, paragraph 60) and *Commission* v *Netherlands* (cited in footnote 6, paragraph 17).

53 — *Commission* v *Netherlands* (cited in footnote 6, paragraphs 17, 18 — last sentence — and 20), which concerned the need to obtain a licence for the *managers* of private security services; for the other employees of an undertaking see also *Vander Elst* (cited in footnote 32, paragraph 15) and Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraphs 23, 24 and 30.

54 — See the case-law cited in footnote 37.

78. As I have already commented on another occasion, there are, given the particular dangers associated with the activity of private security services, no objections in principle to the requirement of preventive monitoring of such undertakings and their staff by government agencies. Such monitoring may take the form of an administrative licensing procedure. [55] Nor does this seem to be a matter of dispute between the Commission and the Kingdom of Spain in the present case.

79. There is, however, disagreement on the extent to which authorities of the host State must take account of the requirements to which security staff are already subject in their country of origin. The answer to this question presupposes that a distinction is made not least as to whether the freedom of establishment (Article 43 EC) or the freedom to provide services (Article 49 EC) is affected.

80. Thus a *service provider* who operates no more than temporarily in another Member State cannot be required to satisfy all the conditions for establishment in that Member State, because the freedom to provide services would otherwise be deprived of all its practical effectiveness. [56] A restriction of the freedom to provide services is only ever conceivable where a legitimate interest is not already safeguarded by the rules to which the provider of such a service is subject in his country of origin. [57]

81. Where, then, an administrative licence has already been obtained in the country of origin for the security staff of a private security service, the freedom to provide services requires the host State to take that fact into account. A further administrative licensing procedure in the host State can then be justified only by way of exception, where the examination already made of the security staff in the country of origin was not essentially equivalent. [58]

82. By requiring that the security staff of private security services always and without exception require authorisation from a *Spanish* authority in order to operate in Spain, the Spanish legislation makes it impossible for account to be taken of the obligations to which the security staff are already subject in other Member States and

55 — See points 32 to 34 and 44 of my Opinion in *Commission* v *Netherlands* (cited in footnote 6). To the same effect, for example, the judgment in *Commission* v *France* (cited in footnote 29, paragraph 70), in which it is recognised that the protection of the public in sensitive areas — health and ensuring the quality of medical services in that case — may justify preventive monitoring in the form of authorisation procedures.

56 — *Säger* (cited in footnote 32, paragraph 13), *Vander Elst* (cited in footnote 32, paragraph 17), and *Corsten* (cited in footnote 31, paragraph 43).

57 — *Corsten* (cited in footnote 31, paragraph 35, with further references); in the same spirit, *Commission* v *France* (cited in footnote 29, paragraph 71) and *Commission* v *Luxembourg* (cited in footnote 53, paragraph 35).

58 — See also points 38 and 53 of my Opinion in *Commission* v *Netherlands* (cited in footnote 6).

is thus inconsistent with the freedom to provide services. [59]

83. On the other hand, an undertaking must, in the event of its *establishment* in another Member State through, for example, the setting up of a subsidiary or branch, in principle satisfy the same conditions as apply to nationals of the host State. [60] A private security service establishing itself in Spain must therefore, as a general rule, obtain the necessary authorisations for taking up and pursuing its activities, including any licences needed for the security staff which it employs in Spain. This presupposes, of course, that the provisions concerned are applied in a non-discriminatory manner; are justified by overriding requirements in the general interest; are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it. [61]

84. In the present case there are no fundamental doubts about the justification of an administrative licensing procedure. However, it is conceivable that a foreign private security service setting up a subsidiary or branch in Spain intends to employ foreign security staff (or security staff licensed abroad). The freedom of establishment then obliges the host State to take account during the procedure for the issue of the appropriate licences of the requirements which the individual members of the security staff already satisfy in their respective countries of origin and to examine them for equivalence. [62] If, then, it has already been found in an essentially comparable procedure in the country of origin of the person concerned that he meets the requirements for the activities in question, the undertaking concerned must be able to rely on this fact in Spain. [63]

85. To the extent that the Spanish legislation makes it impossible to take into account the requirements which individual members of the security staff already satisfy in their respective countries of origin, it thus infringes the freedom of establishment. [64]

86. Even with account taken of the special dangers associated with the activities of private security services, the Spanish legal situation cannot therefore be justified in its

59 — To the same effect, *Commission* v *Belgium* (cited in footnote 3, paragraph 38); similarly, *Commission* v *Portugal* (cited in footnote 5, paragraph 66).

60 — *Gebhard* (cited in footnote 28), paragraph 36, first sentence.

61 — See point 77 of this Opinion.

62 — This is reflected — in relation to professional qualifications — by settled case-law; see Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16 et seq., Case C-232/99 *Commission* v *Spain* [2002] ECR I-4235, paragraph 21, Case C-313/01 *Morgenbesser* [2003] ECR I-13467, paragraph 57, and Case C-255/01 *Markopoulos and Others* [2004] ECR I-9077, paragraph 63. For the procedural requirements see also *Kraus* (cited in footnote 37, paragraphs 38 to 41).

63 — See also point 53 of my Opinion in *Commission* v *Netherlands* (cited in footnote 6).

64 — To the same effect, *Commission* v *Belgium* (cited in footnote 3, paragraph 38); similarly *Commission* v *Portugal* (cited in footnote 5, paragraph 66).

current form. It goes beyond what is necessary for the attainment of the objective pursued of ensuring strict monitoring of the security staff of private security services. [65]

87. The fifth complaint should therefore be allowed.

F — *The sixth complaint: infringement of Directives 89/48 and 92/51 consisting in the failure to recognise attestations of competence*

88. The Commission's sixth complaint is, as has been shown above, [66] admissible only in so far as it concerns Directive 92/51.

89. In this final complaint the Commission claims that the Spanish legislation on the recognition of foreign attestations of competence refers neither to the general areas of activity of private security services nor to the activities of private detectives, although under Spanish law authorisation to work in a private security service depends on the possession of various knowledge and skills and a special diploma is required for work as a private detective. The Commission argues that the Kingdom of Spain has thus failed to comply with its obligation to transpose Directive 92/51.

The activities of the security staff of private security services

90. First and foremost, the applicability of Directive 92/51 presupposes that the activities of the security staff of private security services in Spain constitute a *regulated profession*.

91. According to Article 1(e) in conjunction with Article 1(f) of Directive 92/51, a regulated profession consists of one or more professional activities the taking up or pursuit of which is governed, directly or indirectly, by laws, regulations or administrative provisions. The taking up or pursuit of a profession must be regarded as governed directly by law when the host Member State's laws, regulations or administrative provisions contain rules by which the professional activity concerned is explicitly reserved to persons who fulfil certain conditions,

65 — To the same effect, *Commission* v *Belgium* (cited in footnote 3, paragraphs 35 to 38), and *Commission* v *Portugal* (cited in footnote 5, paragraph 66).

66 — Points 32 to 40 of this Opinion.

whereas access to that activity is prohibited to those who do not fulfil those conditions. [67]

92. Article 53 of the Regulation on private security services requires inter alia that the members of the security staff of private security services be of age and physically and mentally suitable for their activity and, in particular, that they not be suffering from a disease which would impede them in the performance of their work. As the Commission comments rightly and without being challenged, the security staff of private security services in Spain thus pursue a regulated profession within the meaning of Article 1(e) in conjunction with Article 1(f) of Directive 92/51.

93. Merely stating that a regulated profession is concerned is not enough in itself, however, for Directive 92/51 to apply in a case such as this. What also needs to be considered is whether the security staff of private security services are required to produce attestations of competence within the meaning of that directive.

94. The concept of *attestation of competence* is extremely wide and embraces, according to Article 1(c) of Directive 92/51, not only any evidence of qualifications attesting to education and training not forming part of a set constituting a diploma but also any evidence of qualifications awarded following an assessment of the applicant's personal qualities, aptitudes or knowledge.

95. Contrary to what the Commission appears to assume, [68] however, the determining factor in the present case is not whether the *decision on access to the profession* ultimately taken by the Spanish authorities (licence pursuant to Article 10 of the Law on private security services in conjunction with Article 53 of the Regulation on private security services) is an attestation of competence, but rather whether attestations of competence are required of the persons concerned *as a prerequisite* for the issue of such a licence.

96. The Kingdom of Spain disputes that the issue of licences for the security staff of private security services depends on the presentation of such attestations of competence.

97. This being the case, it should have been for the Commission to show conclusively what attestations are specifically required, in

67 — Case C-164/94 *Aranitis* [1996] ECR I-135, paragraphs 18 and 19, Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraphs 16 and 17, Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraphs 31 and 32, Case C-402/02 *Commission* v *France*, not published in the European Courts Report, paragraph 30, and *Morgenbesser* (cited in footnote 62, paragraph 49).

68 — See the Commission's written pleading of 3 May 2004, and especially paragraphs 53 and 56.

its opinion, by the Spanish authorities and enable Directive 92/51 to be applied in the present case. For, according to settled case-law, it is for the Commission in the context of a Treaty infringement procedure to prove the existence of the alleged Treaty infringement; it must present to the Court of Justice the necessary evidence to enable the latter to consider the existence of that Treaty infringement; and it must not base that evidence on assumptions. [69]

98. The action brought by the Commission does not satisfy these requirements.

99. Article 53(c) of the Regulation on private security services, to which the Commission refers in its action, merely says that the security staff of private security services *must have* the physical and mental aptitudes necessary for the pursuit of the profession. [70] The form in which the said conditions are examined before the issue of the administrative licence for the security staff cannot, however, be inferred from the Commission's pleading. In particular, the latter does not reveal whether the Spanish authorities require the presentation of any *attestation* confirming the existence of those personal qualities, aptitudes or knowledge — only then would Directive 92/51 be applicable — or whether this is considered *informally* during the procedure for the issue of the licence for the person concerned. The Commission does not even state whether in Spain itself such attestations are issued to persons wishing to work as security staff of a private security service. [71]

100. Consequently, the Commission has in no way shown conclusively that Directive 92/51 is applicable in the present case. In these circumstances the Court cannot rule that the Kingdom of Spain has not fulfilled its obligation to transpose Directive 92/51 in respect of the security staff of private security services.

101. Merely to complete the picture, it should be pointed out that, irrespective of the applicability of Directives 89/48 and 92/51, the Member States are, of course, under an obligation stemming directly from the fundamental freedoms (Articles 39 EC, 43 EC and 49 EC) to consider qualifications

69 — Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37, Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 31, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 22, Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 35, and Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27.

70 — According to Article 53(a) of the Regulation on private security services, the persons concerned must also be of age. Besides setting this age criterion and requiring mental and physical aptitudes, Article 53 of the Regulation on private security services lays down a number of other requirements relating to a clean record and further prescribes that employees may not have pursued certain professions or activities in the previous two years. As the Commission made none of these requirements the subject of the proceedings, they will not be discussed further in the following.

71 — The Commission does not spare a word in the arguments relied on for Article 110 of the Law on private security services. The mere mention of such a provision in the description of the legislative background to the case is not a sufficient basis for a complaint in the Treaty infringement procedure (to that effect, Case C-202/99 *Commission* v *Italy*, cited in footnote 13, paragraph 21).

acquired abroad for equivalence and, where appropriate, to recognise them. Equally, the Member States have an obligation to take account of any aptitude tests to which the persons concerned have already submitted themselves in other Member States. [72]

The activity of private detectives

102. As regards the activity of private detectives, Article 54(5)(b) of the Regulation on private security services makes the issue of the appropriate administrative licence conditional on the possession of a 'diploma' for private detectives, which is awarded in accordance with the applicable administrative provisions of the Ministry of Justice and the Interior after appropriate courses have been attended and an examination has been passed.

103. The activity of a private detective in Spain is thus a regulated profession within the meaning of Article 1(e) in conjunction with Article 1(f) of Directive 92/51. [73]

104. The aforementioned 'diploma' also falls within the scope of Directive 92/51. Although it is not, according to the information available, a *diploma* within the meaning of Article 1(a) of Directive 92/51, since training of at least one year's duration is not required, the wording of Article 54(5)(b) of the Regulation on private security services shows it to be a *certificate* within the meaning of Article 1(b), provided that the courses required constitute *professional training* within the meaning of the directive, or at least an *attestation of competence* within the meaning of the first indent of Article 1(c) of Directive 92/51 if the courses do not achieve the quality of training.

105. Directive 92/51 is therefore applicable to the activity of private detectives in Spain. Depending on whether what is required by Article 54(5) of the Regulation on private security services is a certificate or an attestation of competence within the meaning of Directive 92/51, a system for recognition pursuant to Article 6 of that directive or a special system for recognition of other qualifications pursuant to Article 8 of that directive is necessary.

106. As, according to the undisputed information provided by the Commission, there are for the profession of private detective in Spain no systems for recognition within the meaning of Directive 92/51, the Treaty has been infringed in this respect within the meaning of Article 228(1) EC.

72 — See the comments in points 76 to 86 of this Opinion.

73 — For the various requirements see point 92 of this Opinion.

Interim conclusion

107. In these circumstances, the Commission's sixth complaint should be allowed inasmuch as the Kingdom of Spain has not created a system for the recognition of the profession of private detective which satisfies the requirements of Directive 92/51. This complaint is, however, otherwise unfounded, and the action should be dismissed.

## VII — Costs

108. As regards the withdrawal of what was originally the Commission's first complaint, [74] each of the two parties has proposed that the other should be ordered to pay the costs of the proceedings. [75] According to the first subparagraph of Article 69(5) of the Rules of Procedure of the Court of Justice, the applicant is to be ordered to pay the costs unless ordering the defendant to do so appears justified by its conduct.

109. In the present case the Kingdom of Spain did not amend the requirement in its Regulation on private security services concerning Spanish nationality until after the expiry of the period set by the Commission in its reasoned opinion. [76] As, however, the existence of a Treaty infringement is to be assessed by reference to the situation prevailing in the Member State on the expiry of the period set in the reasoned opinion, [77] what was originally the Commission's first complaint, viewed summarily, might well have succeeded. As a result of the belated amendment of the Regulation on private security services the Kingdom of Spain thus gave the Commission cause to bring an action. In these circumstances, ordering the Kingdom of Spain to pay the costs of the proceedings in respect of the withdrawn complaint is justified.

110. As, however, the Commission's action should be fully allowed only with regard to four of the remaining six complaints, while it only partly prevails with two complaints, the Court of Justice should order that the costs be shared pursuant to the first subparagraph of Article 69(3) of the Rules of Procedure.

111. This being the case, the Kingdom of Spain should be ordered to pay its own costs and three quarters of the Commission's costs. The Commission should otherwise bear its own costs.

74 — What was originally the first complaint concerned the requirement that private security services and their security staff be of Spanish nationality. It was withdrawn by the Commission in paragraph 8 of its written pleading of 3 May 2004; see point 29 of this Opinion.

75 — See in this respect the written pleadings of the Commission of 3 May 2004 and of the Kingdom of Spain of 1 July 2004, in which each party maintained unchanged its proposal that the other party should be ordered to pay the costs.

76 — See point 25 of this Opinion.

77 — See the settled case-law cited in footnote 44.

## VIII — Conclusion

112. In view of the foregoing I propose that the Court should:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 43 EC and 49 EC by prescribing in Law No 23/1992 on private security services and the Regulation on private security services approved by Royal Decree No 2364/1994

(a) that private security services from other Member States must

— be constituted in the form of legal persons,

— have a certain share capital, even if they are not subject to this obligation in the State in which they are established,

— lodge security with Spain's *Caja General de Depósitos* irrespective of any security provided in their State of origin and

— employ a minimum number of staff if they engage in the transport of valuables and dangerous goods or in the installation and maintenance of alarm and security systems, and

(b) that the members of the security staff of private security services from other Member States must possess a special new licence in Spain even if they already have a comparable licence in the State in which the undertaking concerned is established;

(2) declare that the Kingdom of Spain has failed to fulfil its obligation to transpose 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 by omitting to create for the activity of private detective a system for the recognition of attestations of professional competence which satisfies the requirements of that directive;

(3) dismiss the action as to the remainder;

(4) order the Kingdom of Spain to bear its own costs and to pay three quarters of the Commission's costs and as to the remainder order the Commission to bear its own costs.