JUDGMENT OF THE COURT (Second Chamber)

13 December 2007 *

In Case C-465/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 December 2005,

Commission of the European Communities, represented by E. Traversa and E. Montaguti, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 June 2007,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC, by providing that:

— it is obligatory to swear an oath of allegiance to the Italian Republic in order to work as a private security guard;

— private security activities may be pursued only after authorisation has been granted by the Prefetto (provincial governor);

— that authorisation is to be of limited territorial validity and is to be granted subject to consideration of the number and size of security undertakings already operating in the area in question;

— private security undertakings must have a place of business in each province in which they operate;

— the staff of private security undertakings must be individually authorised to undertake security work;

— private security undertakings must have a minimum and/or maximum number of employees in order to obtain authorisation;

— private security undertakings must lodge a guarantee with the local Cassa depositi e prestiti (deposits and loans office);

— the prices for private security services are to be fixed, with the approval of the Prefetto, within the limits of a predetermined margin for variation.

Legal context

2 Article 134 of the Consolidated Law on public security (Testo unico delle leggi di pubblica sicurezza), approved by Royal Decree No 773 of 18 June 1931 (GURI No 146 of 26 June 1931), as amended ('the Consolidated Law'), provides as follows:

'Without a licence granted by the Prefetto, bodies and individuals may not, on behalf of individuals, provide services relating to the surveillance or guarding of movable property or buildings, carry out investigations or search operations or gather information.

Without prejudice to the provisions of Article 11, such a licence may not be granted to persons who do not hold Italian nationality, or the nationality of a Member State of the European Union, who do not have legal capacity or who have been found guilty of intentionally committing an offence.

The citizens of Member States of the European Union may obtain a licence to provide services relating to the surveillance or guarding of movable property or buildings under the same conditions as Italian citizens.

The licence may not be granted in respect of operations involving the exercise of powers vested in the State or the restriction of individual liberty.'

3 Under the fourth, fifth and sixth paragraphs of Article 135 of the Consolidated Law:

'... the aforementioned directors must display, on their premises, in a permanent and visible manner, a list of the services offered, together with the corresponding fee scales.

They shall not carry out operations other than those indicated in the list of services or receive payments in excess of the fees specified in the fee scale or carry out operations or accept commissions with, or from, individuals who are not holders of an identity card, or other photographic identification, issued by the public administration of the State.

The list of services must be endorsed by the Prefetto.'

4 Under the second paragraph of Article 136 of the Consolidated Law, the licence may be refused on account of the number or size of the undertakings already operating.

5 Article 137 of the Consolidated Law provides as follows:

'The grant of the licence is conditional upon the lodging of a guarantee, the value of which is to be set by the Prefetto, with the Cassa depositi e prestiti.

...

In the event of failure to fulfil obligations, the Prefetto shall decide by decree that the amount deposited is to pass, in whole or in part, to the Treasury.

...'

6 Under Article 138 of the Consolidated Law:

'Private security guards must satisfy the following conditions:

(1) they must possess Italian nationality or the nationality of a Member State of the European Union;

(2) they must have reached the age of legal majority and have fulfilled any statutory military service obligations;

(3) they must be able to read and to write;

(4) they must not have been convicted of a criminal offence;

(5) they must enjoy their full civil and political rights;

(6) they must be in possession of an identity card;

(7) they must be registered under the national social insurance scheme, as well as under the national insurance scheme covering accidents at work.

The appointment of individual private security guards must be approved by the Prefetto.

Sworn private security guards, possessing the nationality of a Member State of the European Union, may obtain a licence to carry firearms in accordance with Legislative Decree No 527 of 30 December 1992 and the related implementing rules laid down in Ministerial Decree No 635 of the Minister for the Interior of 30 October 1996. ...'

7 Article 250 of Royal Decree No 635 of 6 May 1940 laying down the detailed rules for the implementation of the Consolidated Law, as amended by Article 5 of Law No 478 of 23 December 1946 ('the Implementing Decree'), provides as follows:

'After establishing that the conditions laid down in Article 138 of the Law are satisfied, the Prefetto shall issue the private security guard with a certificate of approval.

The private security guard shall thereupon swear the following oath before the Pretore [district judge]:

"I swear allegiance to the Italian Republic and to the Head of State, and vow to obey the laws of the State faithfully and to carry out the duties assigned to me diligently and conscientiously, and with the sole intention of serving the public interest."

The Pretore shall certify, at the foot of the approval certificate, that the oath has been sworn.

After swearing the oath the private security guard shall be permitted to take up his duties.'

8 Article 252 of the Implementing Decree provides:

'Save where otherwise provided by special statute, where the property or goods which private security guards are called upon to guard are located in the territory of different provinces, a certificate of approval from the Prefetto of each province shall be necessary.

The swearing of the oath shall take place before one of the Pretori in whose jurisdiction the property or goods are located.'

9 Article 257 of the Implementing Decree provides as follows:

'The application for the licence required under Article 134 of the Law must specify the municipality or municipalities in which the undertaking intends to pursue its activities; the scale of fees for the various specific operations or the subscription charge; details of serving security guards; their remuneration and weekly rest days; the means of providing assistance in the event of illness; working hours; and all operational procedures.

The application must be accompanied by the document proving that the security guards are insured against accidents at work and invalidity, and for old age.

In addition, where an undertaking wishes to carry out, on behalf of individuals, investigations or search operations, the application must specify the operations for which authorisation is sought and be accompanied by the documents proving that the undertaking is fit to carry out those operations.

The authorisation must contain the information compulsorily provided in the application and the approval of the fees, the staff, the remuneration, the working hours and the means of providing assistance in the event of illness.

Any variation or change in the functioning of the undertaking must be approved by the Prefetto.'

10 As regards the administrative acts adopted pursuant to the national legislation, it should be pointed out that many prefectorial authorisations for private security activities provide that the undertakings must have a minimum or maximum number of private security guards.

11 In addition, it follows from an Interior Ministry memorandum that the undertakings cannot pursue private security activities outside the jurisdiction of the Prefetto who granted the authorisation.

Pre-litigation procedure

12 By letter of 5 April 2002, the Commission gave the Italian Republic formal notice to submit its observations on the compatibility of the disputed national legislation with the freedom to provide services and the freedom of establishment.

13 Following the replies provided by the Italian Republic on 6 June 2002, the Commission sent a reasoned opinion to that Member State on 14 December 2004, calling upon it to take the necessary measures to comply with the opinion within two months of the date of receipt. The Commission refused a request from the Italian Republic for an extension of that time-limit.

14 As the Commission was not satisfied with the replies provided by the Italian Republic, it decided to bring the present action.

The action

15 In support of its action, the Commission relies on eight pleas in law regarding, in essence, the conditions imposed by Italian legislation for undertaking private security work in Italy.

16 As a preliminary point, it should be borne in mind that, although it is true that, in sectors which have not yet been fully harmonised at Community level (as is the case with the private security sector, a fact acknowledged at the hearing by both the

Italian Republic and the Commission), the Member States remain competent, in principle, to define the conditions for the pursuit of activities in that sector, the fact remains that, when exercising that competence, they must respect the basic freedoms guaranteed by the EC Treaty (see, inter alia, Case C-514/03 *Commission* v *Spain* [2006] ECR I-963, paragraph 23).

17 In that regard, according to the case-law of the Court, Articles 43 EC and 49 EC require the elimination of restrictions on the freedom of establishment and the freedom to provide services. All measures which prohibit, impede or render less attractive the exercise of those freedoms must be regarded as constituting such restrictions (see Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 22; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 31; and Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341, paragraph 48).

18 The Court has also held that national measures which restrict the exercise of the fundamental freedoms guaranteed by the Treaty can be justified only if they satisfy four conditions: they must apply in a non-discriminatory manner; they must be justified by overriding reasons relating to 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 that objective (see Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57 and the case-law cited, and *Commission* v *Greece*, paragraph 49).

19 It is in the light of those principles that the pleas in law relied upon by the Commission should be examined.

The first plea in law, alleging infringement of Articles 43 EC and 49 EC on account of the obligation to swear an oath

Arguments of the parties

20 The Commission submits that the obligation for private security guards to swear an oath of allegiance to the Italian Republic, which is laid down in Article 250 of the Implementing Decree and which is indirectly based on nationality, constitutes vis-à-vis operators from other Member States working in the private security sector an unjustified impediment both to the freedom of establishment and to the freedom to provide services.

21 In addition, according to the Commission, that obligation cannot be regarded as justified and proportionate in relation to the objective pursued, which is to ensure better maintenance of public order.

22 The Italian Republic maintains that the activities in question, as covered by the Consolidated Law, entail the exercise of official authority within the meaning of Articles 45 EC and 55 EC, and as such fall outside the scope of Chapters 2 and 3 of Title III of Part Three of the Treaty.

23 The Italian Republic thus contends that the activities of undertakings working in the private security sector are, in a great many situations, directly and specifically connected with the exercise of official authority.

24 In that regard, it argues that, by their nature, such activities contribute significantly to public security, for example, through the provision of an armed presence to keep watch over financial institutions or the provision of an escort for vehicles transporting cash and valuables.

25 The Italian Republic also emphasises that the evidentiary value of written testimony from sworn private security guards, acting in the course of their professional work, is higher than that attributable to statements taken from individuals. It adds that those security guards may arrest persons caught committing an offence.

26 In response to that line of argument, the Commission claims that in so far as Articles 45 EC and 55 EC provide for derogations from the fundamental freedoms, they fall to be narrowly construed, in accordance with the case-law of the Court.

27 Moreover, according to the Commission, the points put forward by the Italian Republic do not justify the adoption of an approach any different to that which has led the Court consistently to hold that private security work, consisting in keeping watch or standing guard, is not normally directly and specifically connected with the exercise of official authority.

28 Apart from relying on the application of Articles 45 EC and 55 EC, the Italian Republic also pleads the following grounds of defence.

29 It contends that the obligation to swear an oath can only be criticised by the Commission with respect to the limitation it imposes on the free movement of workers and not on the basis of Articles 43 EC and 49 EC, in so far as private security guards are inevitably paid employees.

30 The Italian Republic also contends that the swearing of an oath — which does not constitute an objectively difficult task — guarantees the proper execution of the delicate tasks that security guards are called upon to undertake in relation to security and which are governed by statutes which admit of no exception. The Italian Republic thus emphasises the causal link between the oath and the strengthening of the preventive approach to protecting public order.

Findings of the Court

31 In view of the consequences arising from the application of Articles 45 EC and 55 EC, it is necessary to determine at the outset whether those provisions apply in the present case.

32 It is clear from the case-law of the Court that the derogation provided for in the first paragraph of Article 45 EC and in Article 55 EC must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (see Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 35; Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 25; and Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, paragraph 20).

33 The Court has also held that the activities of undertakings providing surveillance and protection services are not normally directly and specifically connected with the exercise of official authority (see *Commission* v *Belgium*, paragraph 26, and Case C-283/99 *Commission* v *Italy*, paragraph 20).

34 Moreover, at paragraph 22 in Case C-283/99 *Commission* v *Italy*, the Court held that the derogation provided for in the first paragraph of Article 55 of the EC Treaty (now the first paragraph of Article 45 EC) did not apply in that case.

35 It is therefore necessary to examine whether the factors relied upon by the Italian Republic in the present action — relating to the actual wording of the Consolidated Law and the Implementing Decree — can lead to a finding in respect of the situation in Italy which is different from that which gave rise to the case-law cited at paragraphs 33 and 34 of the present judgment.

36 According to Article 134 of the Consolidated Law, bodies acting in the field of private security are in principle engaged in activities, undertaken on behalf of individuals, consisting in keeping watch or standing guard over movable property or buildings, and carrying out search operations or investigations.

37 Although, as the Italian Republic confirmed at the hearing, private security undertakings can, in certain cases and by way of exception, be called upon to assist the forces of law and order of the State, for example in the transportation of cash and valuables or by keeping watch over certain public places, that Member State has not shown that this involves the exercise of official authority.

38 For the rest, the Court has already held that merely making a contribution to the maintenance of public security, which any individual may be called upon to do, does not constitute exercise of official authority (see Case C-114/97 *Commission* v *Spain*, paragraph 37).

39 In addition, Article 134 of the Consolidated Law sets out strict limits for the performance of surveillance activities, that is to say, it provides that those activities may never involve the exercise of powers vested in the State or the restriction of individual liberty. Accordingly, private security undertakings are granted no powers of coercion.

40 Therefore, the Italian Republic cannot validly claim that, in the course of their activities, private security undertakings conduct operations to maintain public order which may be assimilated to the exercise of official authority.

41 Moreover, as regards the line of argument relating to the evidentiary value of written testimony from sworn private security guards, it must be pointed out that, as the Italian Republic itself accepts, that testimony does not constitute incontrovertible evidence, by contrast with statements drawn up in the full exercise of official authority, notably by police officers from the Criminal Investigation Department (polizia giudiziaria).

42 Lastly, as regards the argument regarding the possibility for sworn security guards to arrest persons caught committing an offence, that argument was already submitted by the Italian Republic in the case which gave rise to the judgment in Case C-283/99 *Commission* v *Italy*. On that occasion, the Court held, at paragraph 21 of the judgment, that sworn security guards have no more power to do so than any other ordinary member of the public. That finding must be maintained in the context of the present case.

43 It follows from the foregoing that in Italy, as the applicable legislation currently stands, private security undertakings do not share, directly and specifically, in the exercise of official authority. Their private security activities cannot be assimilated to the duties falling within the remit of the public forces of law and order.

44 Consequently, the derogations provided for in Articles 45 EC and 55 EC do not apply in the present case.

45 Next, as regards specifically the requirements laid down in Article 250 of the Implementing Decree, it is clear from the Italian legislation that, for the provision of private security services, undertakings may use only security guards who have sworn an oath of allegiance to the Italian Republic and to the Head of State, before the Prefetto and in the Italian language.

46 In that regard, even though that rule applies to operators from other Member States wishing to pursue their activities in Italy in exactly the same way as it applies to operators established in Italy, it none the less constitutes, for any operator not established in Italy, an impediment to the pursuit of its activities in that Member State, which impairs its access to the market.

47 By comparison with operators from other Members States wishing to pursue their activities in Italy, it is easier for operators established in an Italian province to have staff available to them who will agree to swear the oath required under Italian legislation. It is obvious that, on account of its symbolic significance, such a solemn promise of allegiance to the Italian Republic and to the Head of State will be more acceptable to citizens of Italy or to people who are already installed in that State. As a result, foreign operators are placed at a disadvantage as compared with Italian operators established in Italy.

48 It follows that the disputed obligation to swear that oath, imposed on the employees of private security undertakings, constitutes an obstacle to the freedom of establishment and to the freedom to provide services for operators not established in Italy.

49 As regards the subsidiary ground relied upon by the Italian Government to justify that obstacle to the freedoms guaranteed by Articles 43 EC and 49 EC and relating to the maintenance of public order, it should be borne in mind that the concept of 'public order' comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society. Like all derogations from a fundamental principle of the Treaty, the exception relating to public order must be narrowly construed (see *Commission* v *Belgium*, paragraph 28 and the case-law cited).

50 It cannot be held that private security undertakings, established in Member States other than the Italian Republic, could create a genuine and serious threat affecting one of the fundamental interests of society by exercising their right to freedom of establishment and freedom to provide services and by using staff who have not sworn allegiance to the Italian Republic and the Head of State.

51 It follows from the foregoing that the obligation under the Italian legislation to swear an oath is contrary to Articles 43 EC and 49 EC.

52 The first plea in law relied upon by the Commission in support of its action is therefore well founded.

The second plea in law, alleging infringement of Article 49 EC on account of the obligation to hold a licence of limited territorial validity

Arguments of the parties

53 According to the Commission, the obligation under Article 134 of the Consolidated Law to obtain prior authorisation valid only for a specific area of Italian territory, simply in order to provide occasional private security services, constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

54 Such restrictions are justifiable only to the extent that they meet overriding needs relating to the public interest and where, in particular, the public interest is not safeguarded by the rules to which the service provider is already subject in the Member State where it is established.

55 The Italian Republic contends as its principal argument that the derogations provided for in Articles 45 EC and 55 EC are applicable.

56 In the alternative, the Italian Republic contends that, in so far as the sector in question is not harmonised, and as no system of mutual recognition applies, the administration of the host Member State retains the power to make undertakings established in other Member States subject to internal authorisation.

57 Lastly, the Italian Republic adds that, in any case, in order to determine whether or not authorisation can be granted, the competent administrative authority does, in practice, take account of the obligations to which the service providers are already subject in their Member State of origin.

Findings of the Court

58 According to settled case-law, national legislation which makes the provision of certain 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, inter alia, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15; *Commission* v *Belgium*, paragraph 35; Case C-189/03 *Commission* v *Netherlands* [2004] ECR I-9289, paragraph 17; and Case C-134/05 *Commission* v *Italy* [2007] ECR I-6251, paragraph 23).

59 In addition, the limitation of the territorial scope of the authorisation, which obliges the service provider, under Article 136 of the Consolidated Law, to request

authorisation in each of the provinces where it intends to operate (bearing in mind that Italy is divided into 103 provinces) further complicates the exercise of the freedom to provide services (see, to that effect, Case C-298/99 *Commission* v *Italy* [2002] ECR I-3129, paragraph 64).

60 It follows that legislation such as that at issue in the present case is in principle contrary to Article 49 EC, and as such prohibited thereunder unless it can be justified by overriding reasons relating to the public interest and on condition, moreover, that it is proportionate to the objective pursued (see, to that effect, Case C-134/05 *Commission* v *Italy*, paragraph 24).

61 It must first be noted that the requirement that administrative authorisation or a licence be obtained before private security activities may be undertaken is, of itself, likely to meet the need to protect public order, account taken of the specific nature of those activities.

62 However, it is established case-law that such an obstacle may be justified only in so far as the public interest relied on is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established (Case C-514/03 *Commission* v *Spain*, paragraph 43).

63 Thus, a measure introduced by a Member State, which in effect duplicates supervision which has already been carried out in the Member State where the service provider is established, cannot be considered necessary to attain the objective pursued.

64 In the present case, by not providing for account to be taken in the licensing procedure of obligations to which the cross-border service provider is already subject in the Member State of establishment, the Italian legislation goes beyond what is necessary to attain the objective sought by the national legislature, which is to ensure close supervision of the activities in question (see, to that effect, *Commission* v *Belgium*, paragraph 38; Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraph 60; *Commission* v *Netherlands*, paragraph 18; and Case C-134/05 *Commission* v *Italy*, paragraph 25).

65 As regards the Italian Republic's argument that there is an administrative practice under which, for the purposes of deciding on applications for authorisation, the competent authority takes into account the obligations laid down in the Member State of origin, it must be observed that no proof of such a practice has been produced. In any case, it is settled case-law 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 valid fulfilment of obligations under the Treaty (see, inter alia, *Commission* v *Netherlands*, paragraph 19).

66 Finally, as has been stated at paragraph 44 of this judgment, the derogations provided for in Articles 45 EC and 55 EC do not apply in the present case.

67 Consequently, the second plea in law, alleging infringement of Article 49 EC on account of the obligation to hold a licence of limited territorial validity, is well founded, failing express provision in the Italian legislation requiring account to be taken of obligations imposed in the Member State of establishment.

The third plea in law, alleging infringement of Articles 43 EC and 49 EC on account of the limited territorial validity of the licence and the taking into account, for the purposes of granting a licence, of the number and size of the undertakings already operating in the territory in question

68 As has been stated at paragraph 59 of this judgment, it is clear from Article 136 of the Consolidated Law that the fact of being a licence holder allows operators to carry out private security activities only in the area of territory for which that licence has been granted.

69 It is a matter for the Prefetto, moreover, to assess whether it is appropriate to grant licences, account taken of the number and size of the undertakings already operating in the territory in question.

Arguments of the parties

70 According to the Commission, those provisions constitute an unjustified and disproportionate restriction on the freedom of establishment and, by reason of the licence itself, on the freedom to provide services.

71 Furthermore, the Commission stresses the lack of legal certainty for operators from other Member States as a result of the fact that the Prefetto must assess the extent to which the presence of an excessive number of undertakings active in the private security sector in a given territory may entail a risk for public order. What is more, according to the Commission, it has not been demonstrated that otherwise there would be a genuine and serious threat to public order and public security.

72 The Italian Republic asserts that such a territorial limitation is not contrary to Article 43 EC and that it is directly linked to the assessment relating to the protection of public order which determines whether or not the Prefetto grants a licence. That assessment is necessarily based on factors wholly specific to territory, such as knowledge of organised crime in a given area.

73 The Italian Republic contends, lastly, that it is necessary to ensure that private security undertakings do not usurp the role of the public authorities.

Findings of the Court

74 The Italian Republic does not dispute that the territorial limitation of the licence constitutes a restriction on both the freedom of establishment and the freedom to provide services, within the meaning of the case-law of the Court as cited at paragraph 17 of this judgment. By way of defence, it invokes principally the protection of public order and public security, emphasising in that regard that private security activities must be carried out safe from infiltration by local criminal organisations.

75 As regards the public order grounds relied upon by the Italian Republic to justify that restriction, and in the light of the settled case-law of the Court as referred to at paragraph 49 of this judgment, even if it were accepted that there is a risk of infiltration by such organisations, the Italian Republic neither contends nor establishes that the system of territorial licences is the only way to eliminate that risk and to ensure that public order is maintained.

76 It has not been shown by the Italian Republic that it is necessary, in order not to compromise the implementation of effective supervision of private security activities, to grant an authorisation for each provincial jurisdiction where an undertaking from another Member State intends to carry out those activities in exercise of the freedom of establishment or the freedom to provide services; and, in that regard, it should be borne in mind that those activities are not inherently likely to disturb public order.

77 Indeed, measures less restrictive than those imposed by the Italian Republic — such as the establishment of regular administrative checks — could, in tandem with the requirement of a territorially unlimited prior authorisation, ensure a similar outcome and guarantee the supervision of private security activities. That authorisation could, moreover, be suspended or withdrawn in cases where a security undertaking fails to fulfil its obligations or disturbs public order.

78 Nor, lastly, is it possible to accept the argument that it is necessary to prevent an excessive number of foreign undertakings from establishing themselves with a view to carrying out private security operations or to offering their services on the Italian private security market, so that those undertakings do not usurp the role of the public authorities. That argument fails, in particular, because the activities in question are not the same as those falling within the remit of the public authorities, as was stated at paragraph 40 of this judgment.

79 Consequently, the restrictions on the freedom of establishment and the freedom to provide services which arise as a result of the disputed legislation are not justified.

80 The third plea in law, alleging infringement of Articles 43 EC and 49 EC on account of the limited territorial validity of the licence, is therefore well founded.

The fourth plea in law, alleging infringement of Article 49 EC on account of the obligation to have a place of business in each of the provinces where the private security activities are carried out

81 It follows from the implementation of the Consolidated Law and the Implementing Decree that private security undertakings are obliged to have a place of business in each province within whose jurisdiction they intend to pursue their activities.

Arguments of the parties

82 The Commission submits that that obligation is a restriction on the freedom to provide services which is not justified by any overriding reason relating to the public interest.

83 The Italian Republic — which does not dispute the prefectorial practice in question, or the restriction on the freedom to provide services to which it gives rise — contends that the obligation to have such a place of business or premises is designed to guarantee, in particular, a degree of reasonable proximity between the field of operation of sworn private security guards and the exercise by the licence holder of management, command and supervisory responsibilities.

Findings of the Court

84 It must be observed, at the outset, that it is settled case-law that the requirement that a private security undertaking have its place of business in the Member State in

which the service is provided runs directly counter to the freedom to provide services in so far as it makes it impossible for service providers established in other Member States to provide services in that State (see, inter alia, *Commission* v *Belgium*, paragraph 27, and Case C-134/05 *Commission* v *Italy*, paragraph 43 and the case-law cited).

85 It is common ground that the practice in question in the present case constitutes an obstacle — which is in principle prohibited — to the freedom to provide services guaranteed under Article 49 EC.

86 Such a restriction on the freedom to provide services would be unjustifiable, if it failed to satisfy the conditions set out at paragraph 18 of this judgment because the requirement relating to the place of business went beyond what is necessary to attain the objective pursued, which is to ensure effective supervision of private security activities.

87 The supervision of private security activities is in no way dependent upon the existence of a place of business in each of the provinces of the State within whose jurisdiction the undertakings intend to carry out their activities in exercise of the freedom to provide services. As has been stated at paragraph 62 of this judgment, provided that the conditions to be satisfied in order to obtain an authorisation do not duplicate the equivalent conditions which have already been satisfied by the provider of cross-border services in the Member State of establishment, an authorisation system with concomitant obligations is sufficient, in that context, to attain the objective of supervision of private security activities (see, to that effect, Case C-496/01 *Commission* v *France* [2004] ECR I-2351, paragraph 71).

88 It must therefore be held that, by obliging service providers to have a place of business in each of the provinces where they carry out private security activities, the Italian Republic has failed to fulfil its obligations under Article 49 EC.

89 As a consequence, the fourth plea in law must be upheld.

The fifth plea in law, alleging infringement of Article 49 EC on account of the authorisation requirement for members of the staff of private security undertakings

90 Pursuant to Article 138 of the Consolidated Law, the occupation of sworn private security guard is subject to a certain number of conditions. In addition, the appointment of individual guards must be approved by the Prefetto.

Arguments of the parties

91 For the Commission, such a system for the authorisation of the staff of private security undertakings established in other Member States is contrary to Article 49 EC, to the extent that the national legislation does not take account of the controls to which each sworn private security guard is subject in the Member State of origin.

92 The Italian Republic contends that that plea in law can be examined only with respect to the free movement of workers. In addition, it reiterates the defence already put forward on the basis of Article 55 EC regarding its contention that the persons concerned share in the exercise of official authority.

Findings of the Court

93 The Court has already held that the requirement that members of the staff of a private security undertaking must obtain a fresh specific authorisation in the host Member State constitutes an unjustified restriction on that undertaking's freedom to provide services within the meaning of Article 49 EC, in so far as it does not take account of the controls and verifications already carried out in the Member State of origin (*Commission* v *Portugal*, paragraph 66; *Commission* v *Netherlands*, paragraph 30; and Case C-514/03 *Commission* v *Spain*, paragraph 55).

94 That is the position in the case of the Consolidated Law. Accordingly, as has already been shown, in so far as the contention of the Italian Republic concerning the applicability of Article 55 EC is irrelevant, the fifth plea in law is also well founded.

The sixth plea in law, alleging infringement of Articles 43 EC and 49 EC on account of the setting of conditions relating to staffing levels

Arguments of the parties

95 According to the Commission, Article 257 of the Implementing Decree provides for the possibility that minimum and/or maximum limits may be set as regards the number of sworn private security guards to be employed by each private security undertaking.

96 The Commission also relies on three authorisations granted by the Prefetti of different provinces, which specify the number of guards to be employed by private security undertakings.

97 The Commission maintains that a very heavy constraint is thus placed on the management of private security undertakings, in so far as, first, the exact number of security guards in each provincial place of business is a compulsory element in the information to be provided in the application for a licence and, second, every change in the number of security guards has to be authorised by the Prefetto. Such a constraint constitutes an unjustified and disproportionate impediment both to the exercise of the right of establishment and to the exercise of the freedom to provide services.

98 The Italian Republic contends that the only obligation imposed by the legislation is the need to communicate to the Prefetto details of the various security guards on the staff of the undertaking, so that the public law-enforcement authority can be informed of the number of armed personnel who are providing security services in a given area, for the purposes of carrying out the necessary supervision.

99 The Italian Republic adds that the prefectorial authorisations produced as examples by the Commission take into account only the number of security guards declared by the management of the private security undertakings themselves and do not, of themselves, impose any obligation.

Findings of the Court

100 It is not disputed that Article 257 of the Implementing Decree lays down the requirement that any variation or change in the functioning of an undertaking, in particular a change in the number of security guards employed, must be brought to the attention of the Prefetto and authorised by him. The prefectorial authorisation necessary for the carrying out of private security activities is thus granted in the light, inter alia, of the list of security guards employed.

101 Ultimately, such a requirement may indirectly prevent an increase or decrease in the number of staff employed by private security undertakings.

102 That is likely to affect the access of foreign operators to the Italian market in private security services. In view of the limitations thus imposed on the economic operator's powers of organisation and management and given their consequences in terms of costs, foreign private security undertakings may be deterred from setting up secondary offices or subsidiaries in Italy or from offering their services on the Italian market.

103 As regards the grounds relied upon by the Italian Republic in justification of that impediment to the freedoms guaranteed by Articles 43 EC and 49 EC, it must be stated that the obligation for each change in the functioning of the undertaking to be subject to prefectorial authorisation cannot be regarded as prima facie inappropriate for attaining the objective entrusted to the Prefetto of effective supervision of the activities concerned (see, to that effect, Case C-134/05 *Commission* v *Italy*, paragraph 59).

104 However, the Italian Republic has not shown to the requisite legal standard that supervision of the fixing of staffing levels, as required by the legislation in force, is necessary to attain the objective sought.

105 As a consequence, the sixth plea in law must be upheld.

The seventh plea in law, alleging infringement of Articles 43 EC and 49 EC on account of the obligation to lodge a guarantee with the Cassa depositi e prestiti

106 Under Article 137 of the Consolidated Law, private security undertakings are required to lodge a guarantee, the amount of which is to be set by the Prefetto, with the department of the State's provincial exchequer, in favour of the Cassa depositi e prestiti, in each of the provinces where they are authorised to pursue their activities. That guarantee must be sufficient to cover payment of any administrative penalties in the event of failure to comply with the conditions governing the grant of the licence.

Arguments of the parties

107 The Commission maintains that that condition imposes an extra economic burden on undertakings which do not have their principal place of business in Italy, to the extent that the Italian legislation does not take account of any identical obligation which may already exist in the Member State of origin.

108 The Italian Republic notes that the private security sector has not been subject to Community harmonisation and maintains that, in consequence, account can be taken only on a case-by-case basis of the fact that an undertaking established in another Member State may already have had to lodge an adequate guarantee in the Member State of origin, with credit institutions similar to the Cassa depositi e prestiti.

Findings of the Court

109 The Court has already ruled that, in the private security sector, the obligation to lodge a guarantee with a deposits and loans office is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services within the meaning of Articles 43 EC and 49 EC, in so far as it makes the provision of services or the formation of a subsidiary or secondary establishment more onerous for private security undertakings established in other Member States than for those established in the Member State of destination (see Case C-514/03 *Commission* v *Spain*, paragraph 41).

110 It should be noted that, in the present case, the obligation to lodge a guarantee must be complied with in each of the provinces where the undertaking wishes to pursue its activities.

111 An obstacle such as that can be justified only to the extent that the general interest relied upon — namely, the general interest in ensuring that the Italian authorities have at their disposal the amounts necessary to guarantee payment of any public law debts imposed under the national legislation in force — is not already safeguarded by the rules to which the service provider is subject in the Member State where it is established.

112 In that regard, the disputed Italian legislation requires the lodging of a guarantee regardless of any guarantee already lodged in the Member State of origin.

113 However, it is clear from the observations of the Italian Republic that, in practice, the competent prefectorial authorities take into account, on a case-by-case basis, the guarantees lodged with financial bodies in other Member States which are similar to the Cassa depositi e prestiti.

114 By dint of that practice, the Italian Republic itself acknowledges that the lodging of a new guarantee in each province where an operator from another Member State intends to pursue its activities in exercise of the freedom of establishment and freedom to provide services is not necessary to attain the objective pursued.

115 The seventh plea in law is therefore well founded.

The eighth plea in law, alleging infringement of Article 49 EC on account of the administrative control over pricing

116 Under Article 257 of the Implementing Decree, the Prefetto is responsible for approving the fee scales applied by undertakings for all the various private security services offered. Any amendment of those fee scales must be authorised under the same conditions.

117 It follows, furthermore, from Memorandum No 559/C. 4770.10089. D of the Ministry of the Interior of 8 November 1999 that the Prefetti set a legal fee scale for each type of service, together with the related rate of variation, expressed as a percentage, within the limits of which each undertaking is free to choose its own fee scale for all services.

118 The Prefetti must satisfy themselves that the proposed fee scales are within those limits before approving them. If the limits are not complied with, the undertaking's management must justify the setting of non-standard fees, it being for the Prefetti to confirm whether the undertakings may operate on that basis. If that cannot be established with total certainty, the scales are not approved and, as a consequence, the licence cannot be granted.

Arguments of the parties

119 The Commission maintains that that legislation is not compatible with the freedom to provide services. In view of the pricing controls thus operated, the fee scales in Italy prevent a service provider established in another Member State from entering the Italian market or from offering its services at more advantageous prices than those of its competitors in Italy, or, ultimately, from proposing services which, albeit more costly, represent added value, that is to say, services which are for that reason more competitive.

120 Such legislation, according to the Commission, constitutes a measure likely to impede access to the market in private security services by preventing effective price competition.

121 The Italian Republic contends that the disputed legislation is justified by the need to prevent the provision of services at excessively low prices, which inevitably leads to a drop in the quality of the service, which is likely to compromise, in particular, the protection of fundamental interests related to public security.

Findings of the Court

122 According to settled case-law, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (see Case C-134/05 *Commission* v *Italy*, paragraph 70).

123 As regards compulsory minimum fees, the Court has already held that legislation which unconditionally prohibits derogation, by agreement, from the minimum fees set by a scale for legal services consisting in court services, on the one hand, and services reserved to lawyers, on the other, constitutes a restriction on the freedom to provide services laid down in Article 49 EC (see Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 70, and Case C-134/05 *Commission* v *Italy*, paragraph 71).

124 In the present case, Memorandum No 559/C. 4770.10089. D, referred to at paragraph 117 of this judgment, attributes to the Prefetti the power to decide on the reference level of the fee scale and on the approval of fees proposed by operators. Failure to have the fees approved precludes the grant of a licence.

125 The limitation thus imposed on the freedom to set fees is likely to restrict access to the Italian private security services market for operators, established in other Member States, wishing to offer their services in Italy. In the first place, the effect of that limitation is to deprive economic operators established in other Member States of the opportunity to compete more effectively — by quoting fees lower than those fixed by the imposed scale — with the economic operators traditionally established in Italy, which have greater opportunities than economic operators established abroad to build up their clientele (see, to that effect, Case C-134/05 *Commission* v

Italy, paragraph 72 and the case-law cited). Secondly, that limitation is likely to prevent operators established in other Member States from incorporating in the fees for their services certain costs that operators established in Italy do not have to bear.

126 Lastly, the margin for variation is unlikely to offset the effects of the limitation thus placed on the freedom to set fees.

127 Clearly, therefore, that limitation is a restriction on the freedom to provide services as guaranteed by Article 49 EC.

128 As regards the grounds put forward to justify that restriction, the Italian Republic has not provided evidence which shows the positive consequences of the fixed fees scheme for both the quality of the services provided to the consumer and for public security.

129 It must therefore be held that the eighth plea in law is well founded.

130 In the light of the foregoing, it must be held, in relation to the Consolidated Law, that:

— by providing that it is obligatory to swear an oath of allegiance to the Italian Republic in order to work as a private security guard, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;

— by providing that private security activities may be pursued by service providers established in other Member States only after authorisation of limited territorial validity has been granted by the Prefetto, without requiring account to be taken of the obligations to which those service providers are already subject in the Member States of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;

— by providing that that authorisation is to have limited territorial validity and that the granting of such authorisation is to be subject to consideration of the number and size of security undertakings already operating in the area in question, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;

— by providing that private security undertakings must have a place of business in each province in which they operate, the Italian Republic has failed to fulfil its obligations under Article 49 EC;

— by providing that the staff of those undertakings must be individually authorised to undertake private security work, without requiring account to be taken of the controls and verifications already carried out in the Member State of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;

— by providing that private security undertakings must have a minimum and/or a maximum number of employees in order to obtain authorisation, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;

— by providing that those undertakings must lodge a guarantee with the local Cassa depositi e prestiti, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC; and

— by providing that the prices for private security services are to be fixed, with the approval of the Prefetto, within the limits of a predetermined margin for variation, the Italian Republic has failed to fulfil its obligations under Article 49 EC.

Costs

131 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. As the Commission has applied for costs against the Italian Republic and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that, in relation to the Consolidated Law on public security (Testo unico delle leggi di pubblica sicurezza), approved by Royal Decree No 773 of 18 June 1931, as amended:

— by providing that it is obligatory to swear an oath of allegiance to the Italian Republic in order to work as a private security guard, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;

— by providing that private security activities may be pursued by service providers established in other Member States only after authorisation

of limited territorial validity has been granted by the Prefetto, without requiring account to be taken of the obligations to which those service providers are already subject in the Member States of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;

— **by providing that that authorisation is to have limited territorial validity and that the granting of such authorisation is to be subject to consideration of the number and size of security undertakings already operating in the area in question, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;**

— **by providing that private security undertakings must have a place of business in each province in which they operate, the Italian Republic has failed to fulfil its obligations under Article 49 EC;**

— **by providing that the staff of those undertakings must be individually authorised to undertake private security work, without requiring account to be taken of the controls and verifications already carried out in the Member State of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;**

— **by providing that private security undertakings must have a minimum and/or a maximum number of employees in order to obtain authorisation, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;**

— **by providing that those undertakings must lodge a guarantee with the local Cassa depositi e prestiti, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC; and**

— **by providing that the prices for private security services are to be fixed, with the approval of the Prefetto, within the limits of a predetermined margin for variation, the Italian Republic has failed to fulfil its obligations under Article 49 EC;**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]