Judgment of the Court (Fifth Chamber) of 9 March 2000

Commission of the European Communities v Kingdom of Belgium

Failure of a Member State to fulfil its obligations - Free movement of workers - Freedom of establishment - Freedom to provide services - Private security activities - Requirement of prior authorisation - Obligation for legal persons to have their place of business in national territory - Obligation for managers and employees to reside in national territory - Requirement of an identification card issued in accordance with national legislation

Case C-355/98

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In Case C-355/98,

Commission of the European Communities, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, General Adviser in the Legal Directorate of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services, provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

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

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet and P. Jann (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 29 September 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by

adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services (Moniteur Belge of 29 May 1990, p. 10963; the Law), provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

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

Legal background

2 Article 1 of the Law provides:

1. For the purposes of this Law, a security firm shall be taken to mean any natural or legal person carrying on an activity which consists in supplying to third parties, on a permanent or occasional basis, services of:

(a) guarding and protecting movable or immovable property;

(b) protecting persons;

(c) guarding and protecting the transport of property;

(d) operating alarm networks.

2. For the purposes of this Law, an internal security service shall be taken to mean any service organised by a natural or legal person, to meet the needs of such person, in places accessible to the public, in the form of the activities listed in paragraph 1(a), (b) or (c).

3. For the purposes of this Law, a security systems firm shall be taken to mean any natural or legal person carrying on an activity which consists in the supply to third parties, on a permanent or occasional basis, design, installation and maintenance services for alarm systems and networks.

...

3 Article 2 of the Law prohibits the operation of a security firm or the organisation of an internal security service without prior authorisation from the Minister for the Interior pursuant to an opinion from the Minister for Justice. Security firms may take the form of legal persons constituted under the legislation of a Member State of the European Union, but their place of business must be situated in Belgium. Article 4 of the Law prohibits the operation of a security systems firm without prior approval of the Minister for the Interior.

4 Under Article 5 of the Law, persons who have charge of the actual management of a security firm or internal security service must have their permanent residence or, failing that, their habitual residence in Belgium. Under Article 6 of the Law, that condition also applies to the staff of security firms and internal security services, save for administrative and logistical staff.

5 Article 8 of the Law requires persons working for or on behalf of a security firm or an internal security service to carry an identification card issued by the Minister for the Interior.

6 The Law was amended, as from 28 August 1997, by the Law of 18 July 1997 (Moniteur Belge, 28 August 1997, p. 21964). However, the amendments thereby introduced do not concern those aspects of the Law that form the subject-matter of this action for failure to fulfil obligations.

Pre-litigation procedure

7 By letter of 11 April 1996, the Commission formally requested the Belgian Government to submit its observations on the compatibility of the provisions of the Law with the freedom to provide services, freedom of establishment and the free movement of workers.

8 The Belgian Government replied on 14 June 1996 that the restrictions on those freedoms imposed by the Law were justified by the exceptions laid down in Article 48(3) of the Treaty and Article 56 of the EC Treaty (now, after amendment, Article 46 EC), combined, in appropriate cases, with Article 66 of the EC Treaty (now Article 55 EC).

9 By letter of 10 June 1997, the Commission sent the Belgian Government a reasoned opinion, calling on it to take the measures necessary to comply with that opinion within two months of its notification.

10 In its reply dated 6 May 1998, the Belgian Government cited the specific nature of the private security industry, referring in that respect to Article 55 of the EC Treaty (now Article 45 EC).

11 As regards, more particularly, the obligation for the undertaking to have its place of business in Belgium, the Belgian Government has argued that this was justified on grounds of public policy referred to in Article 56 of the Treaty. As far as the requirement of a prior authorisation or approval is concerned, the Government draws attention to the absence of cooperation between Member States in the matter and to the fact that it had not been demonstrated that services similar to those authorised in Belgium were provided in other Member States. Finally, as regards the condition of permanent or habitual residence, the Belgian Government refers to the need to screen persons wishing to work in the security industry.

12 Being dissatisfied with that reply, the Commission brought this action for failure to fulfil obligations.

Arguments of the parties

13 The Commission argues that the Law entails several restrictions on the freedom to provide services. Those restrictions flow from the obligation for security firms to have their place of business in Belgium, from the requirement of an authorisation to carry on business as a security firm and an approval to carry on business as a security systems firm, and, finally, from the obligation for the staff of undertakings and of internal security services to carry an identification card issued by the Belgian Minister for the Interior.

14 The Commission also maintains that the Law restricts freedom of establishment and the free movement of workers in so far as it imposes a residence condition on, first, persons having charge of the actual management of a security firm or internal security service, and, secondly, the staff of those undertakings and services, save in administration or logistics.

15 The Commission considers that Article 55 of the Treaty does not apply, since security firms, internal security services and security systems firms are not involved in the exercise of official authority.

16 Regarding the obligation that the place of business be in Belgium, the Commission considers that such a requirement may be justified on public policy grounds under Article 56 of the Treaty only if it is established that the individual conduct of the person or undertaking in question constitutes a present, genuine and sufficiently serious threat, affecting a fundamental interest of society. Proof of such a threat has not been supplied in this case. Furthermore, the Commission considers that the requirement in question is disproportionate in relation to the aim pursued.

17 The requirement for an authorisation or approval and for an identification card, issued by the Belgian Minister for the Interior, are, the Commission argues, also disproportionate in the case of an occasional supply of services. First, the Law does not allow account to be taken of guarantees already presented by the person supplying the services for the pursuit of his activity in the Member State of establishment. Moreover, under Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), any person entering Belgian territory on a temporary basis for the purpose of providing a service is already required to be in possession of a current identity card or passport.

18 As for the residence conditions imposed by the Law, the Commission considers that they cannot be justified by the need to carry out a screening of the persons concerned.

19 The Belgian Government argues that, by reason of its specific nature, the security business requires strict regulation, which is lacking at Community level and in most Member States. According to that government, every security firm is capable of constituting a genuine and sufficiently serious threat, affecting a fundamental interest of society, namely public policy and public security.

20 Concerning the residence conditions, the Belgian Government states that it has taken note of the judgment in Case C-114/97 Commission v Spain [1998] ECR I-6717 and that, in accordance with that judgment, the possibility of amending the disputed provisions of the Law is now being examined.

21 By letter of 23 August 1999, the Belgian Government sent to the Court of Justice the text of the Law of 9 June 1999 amending the Law of 10 April 1990 (Moniteur Belge, 29 July 1999, p. 28316) and a copy of a letter in which it asked the Commission to consider withdrawing these proceedings.

Findings of the Court

22 Concerning the Belgian Government's letter of 23 August 1999, it should be recalled that, under consistent case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-316/96 Commission v Italy [1997] ECR I-7231, paragraph 14).

23 As regards the provisions of the Law, in the version in force at the end of the period laid down in the reasoned opinion, which form the subject-matter of the present action, the Belgian Government does not deny that they constitute restrictions on the free movement of workers, freedom of establishment and the freedom to provide services. It maintains, however, that those measures are justified.

24 By way of preliminary observation, it should be noted that the exception laid down in the first paragraph of Article 55 of the Treaty, combined in appropriate cases with Article 66 of the Treaty, does not apply in this case.

25 According to established case-law, that derogation must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (Case 2/74 Reyners [1974] ECR 631, paragraph 45; Commission v Spain, cited above, paragraph 35).

26 The activities of security firms, security systems firms and internal security services are not normally directly and specifically connected with the exercise of official authority, and the Belgian Government has not adduced any evidence to permit the contrary to be established.

The obligation to have the place of business in Belgium

27 The condition that a security firm must have its place of business in Belgium directly negates the freedom to provide services in so far as it makes it impossible for undertakings established in other Member States to provide services in Belgium (see Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 52).

28 As regards the reasons of public policy and public security relied upon in order to justify that requirement, it should be noted, first, that the concept of public policy assumes a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Like all derogations from a fundamental principle of the Treaty, the public policy exception must be interpreted restrictively (see Case C-348/96 Calfa [1999] ECR I-11, paragraphs 21 and 23).

29 Moreover, the right of Member States to restrict the free movement of persons and services on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the private security sector from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health (see Commission v Spain, cited above, paragraph 42).

30 Since the Belgian Government's argument that any security firm is capable of constituting a genuine and sufficiently serious threat to public policy and public security is obviously unfounded and, in any event, unproven, it cannot justify the restriction on the freedom to provide services resulting from the obligation for companies running such a business to have their place of business in Belgium.

The residence obligation

31 The residence obligation imposed on both managers and staff of security firms and internal security services, save for administrative and logistical staff, constitutes a restriction on both the freedom of establishment (see Commission v Spain, cited above, paragraph 44) and the free movement of workers (see Case C-350/96 Clean Car Autoservice v Landeshauptmann von Wien [1998] ECR I-2521, paragraphs 27 to 30).

32 That condition cannot be justified by the need to check the background and conduct of the persons in question, as the Belgian Government maintained in its reply to the reasoned opinion.

33 The need to obtain information on the conduct of managers and staff may be satisfied by means less restrictive of freedom of movement, if necessary through cooperation between the authorities of Member States.

34 Moreover, checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its managers (Commission v Spain, paragraph 47).

The requirement of prior authorisation or approval

35 According to consistent 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 59 of the Treaty (see, inter alia, Case C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803, paragraph 15).

36 As regards the specific nature of the security and security systems businesses and the absence of legislation at Community level and in most Member States, which are matters relied upon by the Belgian Government in order to justify this requirement, it must be noted that, in any event, the Law goes beyond what is necessary to attain the objective sought, which is to ensure close supervision of those activities.

37 The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case 279/80 Webb [1981] ECR 3305, paragraph 17).

38 By requiring all undertakings to fulfil the same conditions for obtaining prior authorisation or approval, the Belgian legislation makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established.

The requirement of an identification card

39 The condition that every staff member of a security firm or internal security service must carry an identification card issued by the Belgian Minister for the Interior must also be regarded as a restriction on the freedom to provide services. The formalities involved in obtaining such an identification card are likely to make the provision of services across frontiers more difficult.

40 Moreover, as the Commission has rightly emphasised, the provider of a service who goes to another Member State must be in possession of an identity card or a passport. It follows that the requirement of an additional

identity document, issued by the Belgian Minister for the Interior, is disproportionate in relation to the need to ensure the identification of the persons in question.

41 It follows from the whole of the above considerations that, by adopting within the framework of the Law provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

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

Decision on costs

Costs

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

Operative part

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that by adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services, provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

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

2. Orders the Kingdom of Belgium to pay the costs.