No Need To Be Italian: ECJ Hands Down Third Case Related To Nationality Requirements For Private Security Guards

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[1] After the European Court of Justice handed down its "Spain" *(Commission v. Kingdom of Spain*, C-114/97, decided October 29, 1998) and "Belgium" (*Commission v. Kingdom of Belgium*, C-355/98, decided March 9, 2000) decisions, those familiar with European Law, and in particular, the European Law governing the Free Movement of Persons, could not have been surprised by its recent decision addressing the freedom of movement for workers. In *Commission v. Italian Republic*, C-283/99, decided on May 31, 2001, the European Court of Justice held that, by legally requiring private security guards in Italy to hold the Italian nationality, the Italian Republic failed to meet the requirements under Art. 48, 52 and 59 of the Treaty of the European Union (now Articles 39, 43 and 49 EC).

[2] Art. 39 (formerly Art. 48 EC-Treaty) addresses the free movement of workers within the European Community, especially prohibiting "any discrimination based on nationality" [...] "as regards employment, remuneration and other conditions of work and employment". The Court made it clear that the existing Italian regulations establishing a requirement of Italian citizenship with regard to employment in a private security company violated primary European law, including Art. 43 and 49 (formerly Articles 52 and 59 EC-Treaty). These provisions deal with the right of establishment and the right to provide services, both of which are also protected from discrimination with regard to nationality.

[3] The disputed Italian legislation dates from 1931 and its Articles 133, 134, 138, 139 and 250, as well as two succeeding Royal decrees of 1935 and 1936, provide the decisive legal framework for the employment of private security guards. In particular, the provision in Articles 133 and 134 of the Public Security Law requires pre-authorization from the Prefect for employment as a security guard and the Prefect may only issue such authorization to persons of Italian nationality. Article 134 of the Public Authority Law further provides that a license may not be granted to a non-Italian "for activities involving the exercise of public duties or any restriction of individual freedom."(1) In Article 138 the law requires that all private security guards hold Italian citizenship. Other provisions of the law require that a guard: (a) swear his or her loyalty to the Italian Republic and its Head of State, (b) obey the governing laws, and (c) wear a uniform and a badge upon approval by the Prefect. The Royal Decree-Law of 12 November 1936 regulates private security firms and places them under the supervision of the *questore* (provincial chief of police). The *questore* is given disciplinary powers, including suspension and the withdrawal of any arms in their possession.

[4] The Commission of the European Communities found the Italian provisions to be in conflict with governing European law related to the freedom of movement for workers, the freedom of establishment of nationals of a Member State as well the freedom to provide services within the Community (now Articles 39, 43, and 49 EC-Treaty). As a consequence, the Commission asked Italy in 1994 to provide detailed information on the rules in question and found the norms, presented by Italy in 1995, to be incompatible with European Community Law. After Italy failed to adapt the laws to bring them into compliance with standards under European Law, the Commission brought the present suit in 1999. The Italian government mainly countered that the activities of security guards concerned the exercise of public authority and that this in itself justified a limitation upon these EC freedoms.

[5] The Court, after reporting the parties' arguments, asserted that the provisions of Italian Law at issue were indeed capable of constituting restrictions on the free movement of workers, the freedom of establishment and the freedom to provide services. The Court then moved to focus on Article 45 (ex Article 55) and the question whether the disputed Italian regulations qualified for a derogation from the freedom of establishment and the freedom to provide services. Under Article 45 EC-Treaty derogation from the freedoms are permitted "so far as any given Member State is concerned, [with respect to] activities which in that State are connected, even occasionally, with the exercise of official authority." The Court, in flatly rejecting the Italian government's reasoning, held that there was no room for an application of this derogation as the activities carried out by private security guards were, in the Court's view, not connected with the exercise of public authority. The Court cited its "Spain" and "Belgium" judgements, in which it had already ruled that there was room for the derogation only with regard to "activities which in themselves are directly and specifically connected with the exercise of public authority" (paragraph 20 of the "Italy" decision). The Court found that the Italian government had failed to give proof that the activities at issue in the disputed legislation (the work of private security guards) were, in Italy, connected to the exercise of public authority. Furthermore, the Court quoted the Advocate General's opinion whereby the power to arrest persons in the commission of offences did not reach any further than that of "any other ordinary member of the public." (paragraph number 21).

[6] The Court found that, unlike the Treaty's provisions related to freedom of establishment and the freedom to provide services, Articles 39 et seq. (ex Articles 48 et seq.) concerned with freedom of movement for workers do not make room for any such derogation and that, as a consequence, there was no room under Article 39 EC-Treaty to ask whether the activities concerned the exercise of official authority. Rather, as follows from Article 39 para. 4 EC-Treaty, the provisions laid out in this Article "shall not apply to employment in the public service." Again quoting the opinion delivered by the Advocate General, the Court held that employment with a private security firm did not form part of the public service. From this the Court concluded that the provision laid down in Article 39 para. 4 EC-Treaty simply did not apply in the case of the disputed Italian legislation.

[7] The message of the European Court of Justice seems quite clear. It emphasized its already established practice of applying a considerably narrow and strict margin of interpretation as to restrictions of fundamental freedoms under European Law. In this respect, the "Italy" case serves as a continuation of and cap-stone to the Court's decisions in "Spain" and "Belgium". From that perspective, the Italian Republic had only the most meager chance to have its private security guard activities qualified as being part of an exercise of public authority. Furthermore, the Court left little room for the Italian argument which aimed at the establishment of a particularly "public" quality of a private security guard's action in the prevention of crime, and the apprehension of criminals or with respect to a duty to cooperate with the police. The Court stated that these activities, when undertaken by private security firms, fall under the authority of private law and that the identified duties did not reach further than those expected of any private security guard protecting private property or, with respect to a right of apprehension *in flagrante delicto* in cases of serious offences, the governing Italian Law conferred this on "any person", without imposing nationality requirements. The Court also followed the Advocate General's argument to reject the differentiation made by the Italian government with regard to a different level of apprehension powers as to "less serious offences". The Court plainly held that the private security guards' power to arrest did not exceed that "of any other ordinary member of the public."

[8] It is again, as in many other decisions by the European Court of Justice, the case that one must take a closer look at the Advocate General's opinion in order to fully appreciate the decision's dimensions. The entire holding breathes the air of the delicately woven line of argument presented by an Advocate General employing meticulous reasoning. It is here that we learn of the intricacies hidden both in the case's facts but, even more importantly, in the referrals to other cases handed down by the Court. The Advocate General's presentation of the parties' arguments also illuminates the stakes of the case by providing a more complete background as to the social reality of the provisions of the Italian law at issue, but also with regard to the fine differences in the Court's case law. These subtleties, fine distinctions and contexts will escape the public if it merely relies on the quotes and small reference in the final judgment of the Court.

[9] The Advocate General's argument gains its decisive thrust from the observation that merely the existence of a public regime that supervises the activities and procedures of privately run security guards does not, unto itself, establish those activities as "public" activities. In this regard the Advocate General's opinion in the "Italy" case relied upon the argumentative matrix to which state theorists and experts of the studies of government refer as the "Supervision State". This model of public governance has a recent vintage, following on succeeding models of a *social or welfare*, a *preventionist* or even *environmental* state. These descriptions of state or public governance aimed at defining those social contexts that seemed, still, to be obscure; to attempt to manipulate what was the undefined and the "other" in the classical model of the state that has held sway since the nineteenth century under the construction "the rule of law". The rule of law, classically understood as a merely formal amalgam of rules and procedures, served as the model by which the domestication and curtailment of public power was legitimized. The rule of law embodied various stages of proceduralization. Our by now habitual understanding of democratic self-rule is merely one that can be described as eventually having been "picked up" along our evolutionary ways in describing and assessing our polity (Habermas). This material basis of the rule of law has, however, not led to a completion of the model of the rule of law, to which we keep referring. Instead, the rule of law has regularly been regarded as being in need of complementarity, of Ergänzung (being supplemented). Thereby, the developments pursued under the political programs of "social rights", welfare programs and social entitlements, have been understood as being something different from the original rule of law. They have commonly been understood as being a material addendum to a pure and finely sketched formal corpus. These additional theories have been dogged by questions regarding their legitimacy, which, ultimately, they can only overcome by making reference to the *forgotten core* of the rule of law. We see, in fact, that theories of social rights, theories of institutional guarantees or theories of social citizenship can adequately be assessed only when we remember and are aware of this particular rule-of-law frame-of-mind (one of formality and incompleteness) with which we have been attempting to legitimize the different supplements to the traditional rule-of-law model. The various denominations with which the "state" is today equipped (interventionist/post-interventionist, social, environmental, cooperative), bespeak this ongoing attempt to reconcile the materializations, done in the name of a political desire, with the legitimization grounds that we associate with the rule of law.

[10] A recent, and possibly one of the very sensible, terms used to describe the nature of the state has been the

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"Supervision State".(2) The idea of supervision takes the 1970's and 1980's critique of the ineffective *interventionist* state, originally arising at the turn from the 19th to the 20th century, seriously, and asks for a more adequate description of public (private) governance. With growing legitimacy problems arising from a differentiated society, governance can no longer be based on a clear cut hierarchical understanding of public guidance and directive on one side and private market egoism on the other. Instead, cooperation and the exchange of information and expertise have become prime goals for public administrations. The idea of the supervising state then expresses this new, indeed *soft* role of the state in overseeing social activities. The supervising state does not present the entire spectrum of standards and possibilities but, instead, serves as a control agency or broker, not above but in a flexible but strong enough relationship with the self governing capacities in society; strong enough to intervene and yet distant enough to account for the contextual quality of standards and private initiatives.

[11] Behind the third and newest in the line of Luxembourg decisions, with regard to private security firms, we have nothing less than a firm step towards (even, perhaps, an endorsement of) the State as supervisory agency. This calls for a sensible assessment of competencies and, as shown in the Court's decision, of traditional associations.

For more information: Decision by the European Court of Justice "Commission v. Kingdom of Spain", C-114/97, decided October 29, 1998. (http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=114%2F97&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

Decision by the European Court of Justice, "Commission v. Kingdom of Belgium", C-355/98, decided March 9, 2000. (http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=355%2F98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

Decision by the European Court of Justice, "Commission v. Italian Republic", C-283/99, decided on May 31, 2001. (http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=C-283%2F99&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

Consolidated Version of the Treaty Establishing the European Community: http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf

The European Union online: http://europa.eu.int/eur-lex/en/

(1) Opinion of the Advocate General, Jacobs, delivered on February 15, 2001, Case C-283/99 Commission of the European Communities v. Italian Republic, # 3.

(2) See, e.g., HELMUT WILLKE, IRONIE DES STAATES 335, et. seq. (1992); ibid., SUPERVISION DES STAATES (1997).