COUNCIL OF THE EUROPEAN UNION

Brussels, 18 March 2002 (27.03)
(OR. es)

7245/02

ENFOPOL 41

NOTE

from :	Spanish delegation
to :	Police Cooperation Working Party
No. prev. doc. :	6847/02 JUR 90 ENFOPOL 37
Subject :	Network of contact points of authorities with responsibility for private security

The Spanish Presidency of the Police Cooperation Working Party submitted a proposal on a network of contact points of national authorities with responsibility for private security (see 15206/01 ENFOPOL 156).

That initiative was given formal expression in Council document 5135/02 ENFOPOL 5 which, following the Police Cooperation Working Party's discussions on 5 and 6 February, resulted in Council document 6462/02 ENFOPOL 29.

During the Police Cooperation Working Party's discussions in February, serious doubts were raised as to whether the control of private security came under the Third Pillar or whether it fell within the sphere of Community competence and thus encroached upon areas relating to the internal market concerning the free movement of persons, the right of establishment and the freedom to provide services. During the proceedings, the Council Legal Service was asked for its opinion.

The Council Legal Service delivered its opinion (see 6847/02 JUR 90 ENFOPOL 37) at the Working Party's most recent meeting on 5 and 6 March 2002. Its view was that the initiative contained in ENFOPOL 5 encroached upon the sphere of Community competence and was not feasible under Article 47 of the Treaty on European Union (TEU).

However, the Spanish delegation firmly believes that not only does the adoption of a network of contact points of national authorities with responsibility for private security not encroach upon the sphere of Community competence but that it is also an essential requirement for achieving the TEU's objective of constructing an area of freedom, security and justice.

We shall attempt to establish that private security falls within the powers of the Third Pillar of the European Union and that the control of private security activities therefore does not encroach upon areas of Community competence. Our starting point is the concept of private security itself.

I. Nature of private security

Private security is a services sector activity with the single basic objective of protecting its customers from the risk of losing their property or of suffering damage as a result of attacks against their physical integrity, image, material and intellectual property, etc. As an essentially profit-making activity, private security is governed on the whole by the laws of supply and demand, with a private relationship – a purchase or services contract – linking customer and supplier.

The aim of private security is to protect against the potential risk posed by certain criminal activities through the provision under contract of persons, services and new technologies including CCTV, electronic video and audio recording techniques, x-rays, infrared spectroscopes, radar and/or magnetic receivers and detectors, radiofrequency transmitters, detection of location of mobile phones, access and perimeter monitoring equipment, alarm detection networks, smart cards and digital PIN systems, and biometric eye, voice and fingerprint readers.

II. The relationship between public security and private security

The question we should be asking ourselves is whether private security as an activity is autonomous and remains within the scope of the private sector or, alternatively, whether it affects the public sector, i.e. whether its fields of action have any influence on public order administration.

Here, three general observations suffice to show that private security is private as far as the right of establishment and the freedom to provide services are concerned, but, nevertheless, closely related to public security by the nature of its activities. The observations are the following:

1. It is a fact that private security undertakings and services are a means of preventing crime, that they contribute to the maintenance of public security and that consequently the activities they carry out:
   (a) are part of the essential nucleus of exclusive competence attributed to the State in security matters;
   (b) assist the public police forces in their task of protecting the free exercise of rights and freedoms and guaranteeing the security of citizens.

2. The public police forces' task of guaranteeing the security and protecting the rights of all people necessarily entails supervising the activities of private security companies for two reasons:
   (a) they need to be aware of facts and data coming to light in the field of private security which have a bearing on public security, acting whenever such facts constitute offences which may be prosecuted officially;
   (b) the activities of the private security sector cannot encroach on the legal and property rights of other people.

3. When private operators are ultimately required to deal with a problem, they call the police as the only authority legally entitled to employ force. Private security companies take the initiative of calling in the police for help, and the police respond accordingly.

III. Is private security an integral part of security as a whole?

This would seem to be the case, as demonstrated by the boom in the provision of security services by private undertakings, which has resulted in the private security sector's functional integration in the State's monopoly of security in countries like Spain, Belgium, France, the United Kingdom and Italy.

It must not be forgotten that security is one of the main pillars of co-existence and the reason why societies organise themselves politically. Guaranteeing security is therefore central to the very existence of the modern State and, as such, is an activity exercised by the public authorities as a monopoly.

If security in the abstract is the exclusive competence of the State and if security is understood to mean the result of the activities of public security services plus the result of private security activities, the logical conclusion is that private security activities are also the competence of the State, i.e. of the public security authorities.

IV. Why is there a need for private security?

There are two main reasons for the emergence and strength of the commercial private security sector.

1. The disequilibrium between the supply of security services by States governed by the rule of law, which are subject to budgetary constraints, and the demand for protection from businesses and individuals, forcing the latter to turn to the market to protect themselves against the increasing number of attacks on property and a growing sense of insecurity.

   What this explanation reveals is the lack of a genuine public debate on spaces which are "public" and spaces which are "private but open to the public". Parks, football stadiums, discotheques, department stores, car parks, airports, etc have elements of both types of space in that the public has access to them but they are governed by private rules and have developed their own supervision systems and means of control and security, such as people on the door checking identities, private guards recording arrivals and departures on video, etc.

2. Secondly, the predominant crime prevention philosophy places more stress on "defensible space" and thus on "situation prevention". These are concepts which, on the one hand, have enabled businesses, sellers and installers of protection services to present their private economic interests (doing business) as being in the general interest of society and, on the other hand, have enabled the public authorities to make a virtue of necessity, as shown by the fact that targets considered particularly vulnerable to crime (e.g. banks, jewellers', chemists', etc) are frequently required to protect themselves "privately".

   This second cause shows that there has been no public debate on the problematic link between the growth in crime and the growth in private security.

V. To what extent can certain private security-related activities come under the Third Pillar of the European Union?

This question can be answered by examining the provisions of Articles 30(1)(a) and 33 of the TEU. Here we find that police cooperation includes operational cooperation between the competent authorities of the Member States in relation to the prevention, detection and investigation of criminal offences, and that the maintenance of law and order and the safeguarding of internal security are responsibilities incumbent upon Member States, a point also referred to in Articles 39(3) and 64 of the Treaty Establishing the European Community (TEC).

As mentioned earlier, the private security sector operates in the field of prevention. It enables criminal offences to be detected and sometimes contributes to their investigation. In other words, although the activity is carried out by private agents, it is of relevance to the authorities responsible for public security in the Member States.

If the maintenance of law and order and the safeguarding of internal security are responsibilities incumbent upon the Member States and if, as has already been established, private security activities sector have a bearing on and form part of law and order and internal security (public security + private security), it follows that part of the activities of the private security sector are a responsibility incumbent upon the Member States.

VI. Does the control of private security activities by means of Third Pillar instruments encroach upon Community powers?

Article 3 of the TEC provides that to achieve the objectives set out in the TEC the Community shall adopt measures in the areas of customs duties, entry and movement of persons, commercial policy, the internal market, agriculture and fisheries, transport, approximation of laws for the functioning of the common market, employment policy, social policy, environmental policy, competitiveness of industry, research and technological development, trans-European networks, health protection, training of quality, development cooperation, consumer protection and civil protection and tourism.

There is clearly no mention whatsoever of security policy, public or private, and it could in principle therefore be said that security is not one of the areas of competence assigned to the Community.

On the other hand, the grounds for administrative intervention in the private security sector (mainly security and the prevention and investigation of crime) cannot be compared with the grounds for intervention in other sectors of the economy such as banking or private insurance (economic and social considerations).

VII. Why is it argued that the control of private security activities encroaches upon areas of Community competence?

In our definition, we said that private security was a services sector activity, with a private relationship (a purchase or services contract) linking supplier and customer.

In other words, private security is not regarded as part of a public service or as involving the exercise of any authority. It is argued that private staff only perform auxiliary functions which any individual could be called upon to carry out and that they have no more power to intervene than any other ordinary member of the public.

It is further asserted that as a service sector in the internal market, private security is subject to Community rules in all matters relating to the right of establishment, i.e. access to and pursuit of activities on a self-employed basis and the setting up and management of undertakings and companies, the opening of agencies, branches and subsidiaries and the freedom to provide services.

However, the wide range of situations covered by the private security sector and the organisation and planning involved in providing private security services, many of which require weapons, undermine the argument that private security is not part of public security and, in this respect, we refer back to our comments on the private nature of private security (point II) and on private spaces open to the public (point IV).

Furthermore, Community competence in the private security sector relates specifically to *access* to activities, *the setting up and management* of undertakings and *the opening* of agencies. Articles 43 to 55 of the TEC are silent on *the control* of activities in this sector.

VIII. Is a network of contact points of national authorities responsible for controlling private security feasible?

It should be possible to conclude from the foregoing whether the proposal to create a network of contact points of national authorities responsible for controlling private security is feasible without contravening the provisions of the Treaties.

What is involved is, a sense, a case of shared competence between the Community and the Member States. The Community is competent in relation to the right of establishment and freedom to provide services (access, setting up, management, opening, contracting of activities). The Member States are competent in relation to the exercising and control of security, including the control of private security activities.

However, the fact that competence is shared should not cloud the issue. In our view, there is nothing to prevent the Council from adopting an act under the TEU setting up a network of contact points of national authorities with responsibility for controlling private security, Community powers notwithstanding, particularly when the national control authorities concerned are already in place and functioning in the Member States. In fact, for some States such as Germany (see 5817/02 ENFOPOL 22) the difficulty in the proposal is that they have no central authority because the control function is carried out by numerous local authorities.

It must be borne in mind that it is by no means exceptional for some of the most serious crimes to have their origin in or be related to the (supposed) pursuit of economic activities. If the Council Legal Service were correct in its reasoning, it would follow that Article 30(1)(a) of the TEU *would not permit the creation of machinery for cooperation between the competent authorities of Member States to prevent and prosecute criminal activities through the control of certain economic activities* since any such cooperation would fall under Article 44(2)(b) of the TEC on the grounds that it related to an economic activity subject to harmonisation.

The opinion of the Spanish legal services is that such an interpretation is inconsistent not only with the aim of Article 30(1)(a) of the TEU but also with that of Article 44(2) of the TEC, which provides for cooperation for the sole purpose of harmonising access to economic activities
(See opinion annexed hereto).

To conclude, the opinion of the Council Legal Service notwithstanding, the establishment of a network of contact points would not encroach upon any sphere of Community competence and would not conflict with the powers of the Community, and, in the light of the relevant discussions within the Police Cooperation Working Party, there is no reason why it should infringe the TEC.

OPINION OF THE SPANISH STATE'S LEGAL ADVISORY SERVICE FOR MATTERS RELATING TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (STATE SECRETARIAT FOR EUROPEAN AFFAIRS)

Note on the Spanish Presidency's initiative concerning a network of contact points of national authorities with responsibility for private security.

I. Opinion of the Council Legal Service on the Spanish proposal

1. The Council Legal Service's opinion of 4 March 2002 concludes that the adoption by the Council of the Spanish proposal (see ENFOPOL 5 and 156) would contravene Article 47 of the Treaty on European Union (TEU), which provides that Community law prevails over the law of the Union. Its argument is essentially as follows:

   – The Court of Justice has described private security as an economic activity subject to the freedom of movement provisions of the Treaty. It has ruled that the derogations from the freedom of movement of persons under Article 39(4) of the TEC (employment in the public service) and from the freedom of establishment under Article 45 of the TEC (exercise of official authority) do not apply to the activity of private security undertakings and their employees, and that such activity does not in itself constitute a threat to public policy (Articles 39(3) and 46(1) of the TEC).

   – Article 44(1) of the TEC empowers the Community to harmonise establishment in a particular economic activity by means of directives. Under Article 44(2)(b) of the TEC, the Council and the Commission are expressly entrusted with ensuring "*close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Community of the various activities concerned*". Access to the private security business has not been harmonised so far but there is no reason to rule out the possibility that it may be harmonised in the future.

– While only indirectly envisaging such harmonisation, the draft Decision provides for cooperation, coordination and exchange of information in relation to activities of the private security sector involving a cross-border element. Since cooperation of this kind would contribute to achieving freedom of establishment and freedom to provide services in the sector, it could and should take place on the basis of Articles 44 or 52 of the TEC.

– Furthermore, the initiative would appear not to come under Title VI of the TEU: it is not certain that the cooperation envisaged is a form of police and judicial cooperation because even if the authorities exercising administrative powers over the sector were police authorities, they would not necessarily be acting in relation to the prevention, detection and investigation of criminal offences within the meaning of Article 30(1)(a) of the TEU.

II. On the objection that the proposal does not come under Title VI of the TEU

2. This objection would appear to be unfounded. Introductory paragraphs 1, 2 and 5 of ENFOPOL 156 establish the (obvious) link between private security activities and public security. Paragraph 5 in particular explains that private security activities need to be controlled by the competent authorities to ensure that individuals engaging in such activities do not commit criminal offences and that any information the sector generates on serious criminal acts is monitored. The main aim of the proposal is clearly cooperation with a view to preventing and prosecuting crime.

3. The grounds for administrative intervention in this field cannot be compared with the grounds for intervention in other sectors of the economy. In sectors such as banking or private insurance, intervention is justified above all by economic and social considerations, whereas the main purpose of intervention and monitoring in relation to private security companies is to enhance security and prevent and prosecute crime.

It is one thing for the Court to have rejected the argument adduced in support of derogation from Community rules on free movement that private security as an economic sector is comparable to public security and law and order (a view defended before the Court at the time by several States including Spain); to refuse to accept that the case for administrative intervention in this area is based more on grounds of security and public policy than on economic considerations would be a different matter altogether.

4. In our view it therefore follows that the proposal is covered by Title VI of the TEU. Introductory paragraphs such as those referred to could be included in the recitals of the act to be adopted in order to stress that the objective sought comes under the provisions of the Articles of the TEU given as the legal basis.

III. On the powers of the Community to harmonise the sector

5. The first and main objection of the Council Legal Service is based on the observation that since the Community has powers to harmonise the sector, it cannot be harmonised by the Council under the TEU. However, the Legal Service's report itself acknowledges that harmonisation is only indirectly envisaged by the draft decision.

6. The proposed act does not seek to harmonise this economic sector or establish the basis for its harmonisation. Only Article 3(d) could encourage such a view. Perhaps it should therefore be made clear that if the need were seen to initiate a Community harmonisation process in this economic sector, the Commission would be asked to submit the relevant proposals.

7. Recital 2 in ENFOPOL 156 may also be a source of difficulty in that it expressly refers to a need to establish common requirements regarding the authorisation and supervision of the supply of private security services. This links up directly with harmonising access to the activity. References of this kind should not appear in the recitals of or in the grounds for the proposal.

8. These two points having been made, the content of the proposal as such entails no harmonisation whatsoever but rather cooperation between competent authorities in the Member States to control an economic activity directly related to the prevention of criminal offences or to obtaining information enabling such offences to be prosecuted.

9. The Council Legal Service's objection to the content of the proposal (point 11 of its opinion) is based on Article 44(2)(b) of the TEC mentioned earlier. It argues that the TEC requires the Council and the Commission to ensure close cooperation between the competent authorities in the Member States in order to ascertain the particular situation of an economic activity with a view to attaining freedom of establishment through harmonisation. Consequently, such cooperation should not be effected under the TEU and through the proposed act.

This argument is open to two challenges:

10. *One*: the Council Legal Service's argument is based on the assumption that Article 44 of the TEC *assigns powers* to the Council and the Commission to ensure cooperation between Member States in relation to any economic activity subject to harmonisation.

However, it is clear from the wording of Article 44 of the TEC that rather than assigning powers to the Council and the Commission, it states how such powers are to be exercised by the institutions in question, i.e. "[the Council and the Commission] *shall carry out the duties devolving upon them under the preceding provisions ... by according ..., by ensuring ..., by abolishing ...*". When harmonising a given activity, the Community institutions are required to act as provided in Article 44 of the TEC. In no case does the Article in question confer upon the Community the exclusive power to ensure cooperation between Member States in certain areas where the aim of such cooperation is not to harmonise the conditions for access to an economic activity.

If ensuring cooperation between authorities under Article 44(2)(b) of the TEC were a power in itself, the question would arise of what the procedure would be for introducing the relevant rules and what legislative vehicle should be used.

11. *Two*. It is common these days for some of the most serious crimes to have their origin in or be related to the (supposed) pursuit of economic activities. If the Council Legal Service is correct in its reasoning, it would follow that Article 30(1)(a) of the TEU would not permit the creation of machinery for cooperation between the competent authorities of Member States to prevent and prosecute criminal activities through the control of certain economic activities since any such cooperation would fall under Article 44(2)(b) of the TEC on the grounds that it related to an economic activity subject to harmonisation.

    Such an interpretation is obviously inconsistent with the aim of Article 30(1)(a) of the TEU, and it is also inconsistent with the purpose of Article 44(2)(b) of the TEC, which provides for cooperation for the sole purpose of harmonising access to economic activities.

Conclusion

The Council Legal Service's opinion notwithstanding, we believe that the above arguments support the case for maintaining that the Spanish Presidency's initiative falls under the TEU and does not encroach upon the TEC.