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REPORT

on the initiative of the Kingdom of Spain with a view to the adoption of a Council decision on the setting-up of a network of contact points of national authorities responsible for private security
(5135/2002 – C5-0052/2002 – 2002/0802(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Carmen Cerdeira Morterero

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 1 February 2002 the Council consulted Parliament, pursuant to Article 39(1) of the Treaty on European Union, on the initiative of the Kingdom of Spain with a view to the adoption of a Council decision on the setting-up of a network of contact points of national authorities responsible for private security (5135/2002 – 2002/0802(CNS)).

At the sitting of 7 February 2002 the President of Parliament announced that he had referred the initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0052/2002).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Carmen Cerdeira Morterero rapporteur at its meeting of 20 February 2002.

At its meeting of 18 April 2002 the committee decided to request the opinion of the Committee on Legal Affairs and the Internal Market on the initiative's legal basis, pursuant to Rule 63(2).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs considered the initiative of the Kingdom of Spain and the draft report at its meetings of 18 April 2002 and 14 May 2002.

At the last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote: Ana Palacio Vallelersundi (chairman), Robert J.E. Evans (vice-chairman), Lousewies van der Laan (vice-chairman), Giacomo Santini (vice-chairman), Carmen Cerdeira Morterero (rapporteur), Hans Blokland (for Ole Krarup, pursuant to Rule 153(2)), Giuseppe Brienza, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Marco Cappato (for Mario Borghezio), Charlotte Cederschiöld, Ozan Ceyhun, Carlos Coelho, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Marie-Thérèse Hermange (for Thierry Cornillet), Jorge Salvador Hernández Mollar, Pierre Jonckheer, Anna Karamanou (for Michael Cashman), Timothy Kirkhope, Eva Klant, Lucio Manisco (for Fodé Sylla), Luís Marinho (for Sérgio Sousa Pinto), Manuel Medina Ortega (for Adeline Hazan), Claude Moraes (for Martin Schulz), Hartmut Nassauer, William Francis Newton Dunn, Arie M. Oostlander (for Bernd Posselt), Elena Ornella Paciotti, Paolo Pastorelli (for The Lord Bethell), Hubert Pirker, Martine Roure, Heide Rühle, Olle Schmidt (for Baroness Sarah Ludford), Ilka Schröder, Ole Sorensen (for Francesco Rutelli), Patsy Sörensen, The Earl of Stockton (for Mary Elizabeth Banotti), Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco, Gianni Vattimo (for Walter Veltroni), Christian Ulrik von Boetticher and Olga Zrihen Zaari (for Gerhard Schmid).

The opinion of the Committee on Legal Affairs and the Internal Market on the legal basis is attached.

The report was tabled on 15 May 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Initiative of the Kingdom of Spain with a view to the adoption of a Council decision on the setting-up of a network of contact points of national authorities responsible for private security (5135/2002 – C5-0052/2002 – 2002/0802(CNS))

The initiative is rejected.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative of the Kingdom of Spain with a view to the adoption of a Council decision on the setting-up of a network of contact points of national authorities responsible for private security (5135/2002 – C5-0052/2002 – 2002/0802(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Kingdom of Spain (5135/2002¹),
 - having regard to the Treaty on European Union, and in particular to Articles 29, 30(1)(a) and 34(2)(c) thereof,
 - having been consulted by the Council pursuant to Article 39(1) of the Treaty on European Union (C5-0052/2002),
 - having regard to Rules 106 and 67 of its Rules of Procedure,
 - having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the proposed legal basis,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0168/2002),
1. Rejects the initiative of the Kingdom of Spain;
 2. Calls on the Kingdom of Spain to withdraw its initiative;
 3. Instructs its President to forward its position to the Council, the Commission and the Government of the Kingdom of Spain.

¹ OJ C 42, 15.2.2002, P. 16.

EXPLANATORY STATEMENT

I. INTRODUCTION

The police provide one of the vital functions performed by the modern State. A vital aspect of police work lies in providing citizens with the guarantee of security as the basis for enabling them to live together in a free society.

The function of providing security has traditionally fallen exclusively within the competence of individual States, which have exercised a monopoly in that area. However, with the exponential growth in activities in modern societies new needs have emerged for natural or legal persons offering private surveillance and security services for people and property.

Security services of this kind provided by private agents have experienced a boom in recent years and have compelled governments to respond with steps to bring private security functions – seen as an additional activity subordinate to public security services –under the umbrella of the State's security monopoly.

This situation has arisen in all EU Member States, which have moved to adopt different legislative provisions aimed at placing administrative controls on the performance of private security activities and ensuring that security continues to be a fundamental right enjoyed by all citizens.

In addition, the creation of a functioning single market and area of freedom, security and justice within the EU has brought to the fore equally worrying problems relating to the private security sector for which solutions will have to be found without delay.

II. SPAIN'S INITIATIVE FOR A DECISION

1. Background

Both the Council and the Commission have been aware that, as if the huge domestic difficulties relating to the private security sector in the different Member States were not enough, the difficulties at EU level are even more complex.

For that reason two seminars on private security were held, one from 13 to 17 December 2000 in Madrid, the other on 6 and 7 September 2001 in Brussels, during the Belgian Presidency.

Both seminars highlighted the following facts in the conclusions they reached:

- a) the laws regulating this area differed widely from one Member State to another;
- b) formidable legal hurdles between EU Member States were restricting or hampering the freedom to provide services in the private security sector; and
- c) the crucial aspects of the various national rules and regulations governing the sector

needed to be harmonised.

The initiative of the Kingdom of Spain on the setting-up of a network of contact points of national authorities responsible for private security should be viewed as an initial step towards meeting this need to harmonise national laws governing the provision of services by natural or legal persons engaged in private security activities in a border-free internal market.

2. The substance of the initiative

Spain's initiative for a decision is made up of seven articles covering the following matters:

- a) Under Articles 1 and 2, a 'network' of contact points of national authorities responsible for private security will be set up.
- b) Article 3 lays down the objectives, namely cooperation, collaboration, coordination and exchanges of information between the national authorities responsible for private security.
- c) Article 4 stipulates that, in order to achieve the proposed objectives, an Internet site will be set up and kept constantly up to date. In respect of private security the site will permit:
 - access to the legislation of the Member States;
 - permanent contact between the national authorities concerned;
 - exchanges of experience; and
 - knowledge of the companies operating in the sector.
- d) Articles 5, 6 and 7 cover meetings, financing, evaluation and entry into force.

III. ASSESSMENT

In principle your rapporteur takes a highly favourable view of the interest that both the previous Belgian Presidency and the current Spanish Presidency have shown in taking the first steps towards resolving a serious headache for the European Union, that is the pressing need to harmonise EU Member States' legislation on the private security sector in order to guarantee the freedom to provide services in a European area of freedom, security and justice.

However, your rapporteur openly disagrees both with the choice of legal method – i.e. a decision –and with the legal bases chosen by the current Council Presidency to regulate the subject of its Initiative, namely Articles 29 and 30(1)(a) of the Treaty on European Union.

Decisions are indeed a legislative method used under the third pillar of the European Union and as such are regulated by Article 34(2)(c) of the Treaty on European Union.

Nonetheless power is distributed between the European Community, for action taken pursuant to the EC Treaty, and the Union, for action taken pursuant to the Treaty on European Union.

In accordance with Article 47 of the Treaty on European Union, European Community law

takes precedence in the event of a dispute between it and European Union law. It follows from this that, where the Community enjoys the legal capacity to act, the Union must abide by that and refrain from any other action.

Hence the vital need to determine whether the area that is to be subject to regulation under the draft initiative submitted by the Kingdom of Spain falls within the sphere of competence of the Community or within that of the Union.

In this respect it is worth remembering that in three separate judgments the Court of Justice has ruled against the Kingdom of Spain (Case C-114/97), the Kingdom of Belgium (Case C-355/98) and the Italian Republic (Case C-283/99) for having retained in their legislation certain conditions governing the performance of private security services that were in breach of the principle of non-discrimination contained in the Treaty on European Union.

The Court rejects in particular the claim that the provision of private security services forms part of a 'public service', and thus the exception granted to employment in the public service under Article 39(4) of the EC Treaty in respect of the freedom of movement of workers does not apply.

Furthermore, the Court does not accept that private security activities constitute the 'exercise of official authority' or that private security bodies are acting in an auxiliary capacity when assisting the public security forces.

The Court refers to the private security sector as an 'economic sector' and as such the legal provisions regulating its activity in the Member States are subject to the regulatory measures established by the Community with a view to setting up a single market without internal borders inside the EU.

In addition, the private security sector is subject to the provisions of Articles 43 to 48 of the EC Treaty on the right of establishment and the provisions of Articles 49 to 55 of the EC Treaty on the freedom to provide services; discrimination or restrictions between Member States are prohibited.

In order to achieve its objectives the Community is entitled to adopt directives allowing for harmonisation of the rules by which Member States regulate a given profession or economic activity. In this connection Article 44(2)(b) of the EC Treaty stipulates that the Council and Commission shall ensure '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'.

Hitherto the Community has not adopted any directive aimed at regulating the private security sector. That does not, however, rule out legal moves to harmonise the sector, since the Court of Justice has deemed its activities to be economic in nature.

Your rapporteur thus takes the view that this initiative for a decision, were it adopted, would be in breach of Article 47 of the Treaty on European Union, under which the Union is obliged to respect the Community's scope to take action in areas falling within Community competence as established by the EC Treaty and is thus prevented from legislating in such areas.

For the reasons set out above, your rapporteur believes that the substance of this timely and very useful initiative should nonetheless be reconsidered and that, in accordance with Article 208 of the EC Treaty, the Council should ask the Commission to conduct a study into the needs for joint action in the area of private security services provided by natural or legal persons and, if need to be, to propose the adoption of the requisite provisions.

Lastly, your rapporteur suggests that the Committee reject the initiative of the Kingdom of Spain for a decision, given that it is not legally feasible to use the scope of the third pillar as regulated by the Treaty on European Union in order to regulate matters that come under the first pillar of the EC Treaty. To do so would result in a breach, *inter alia*, of Article 47 of the Treaty on European Union.

It is worth pointing out here that, pursuant to Article 46, subparagraph (e) of the Treaty on European Union, alleged violations of Article 47 of the said Treaty are referred to the Court of Justice for judicial review.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET ON THE LEGAL BASIS

Mrs Ana Palacio Vallelersundi
Chairman
Committee on Citizens' Freedoms and Rights, Justice and Home Affairs
BRUSSELS

Subject: Legal basis of the initiative of the Kingdom of Spain on the setting-up of a network of contact points of national authorities responsible for private security - 5135/02.

Dear Madam President,

By letter of 18 April 2002 you requested the Committee on Legal Affairs and the Internal Market, under Rule 63(2), to consider the issue of the appropriate legal basis for the above proposal. The Council had based its proposal on Articles 29, 30 (1)(a) and 34 (2)(c) of the Treaty of the European Union.

The Committee on Legal Affairs and the Internal Market considered the above question at its extraordinary meeting of 13 May in Strasbourg.

The Spanish initiative

The initiative seeks create a framework of cooperation and coordination between national bodies responsible for supervising and controlling private security.

It is based on Articles 29, 30(1)(a) and 34(2)(c) of the Treaty on European Union. Those provisions are inserted in Title VI of the EU Treaty, which provides the framework for police and judicial cooperation in criminal matters between Member States.

Pursuant to Title VI of the EU Treaty, the Union may act in various ways in order to prevent and combat crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud¹.

Common action in the field of police cooperation includes operational cooperation between national law enforcement services in relation to the prevention, detection and investigation of criminal offences [Article 30(1)(a) EU Treaty].

The Council, acting unanimously on the initiative of any Member State or of the Commission, is to adopt common positions defining the Union's approach to particular matters, adopt framework decisions - binding as to the result to be achieved, but leaving the choice of form and methods to the Member States and lacking direct effect - and adopt decisions for any other purpose than the approximation of legislation [Article 34(2)(a), (b) and (c) EU Treaty].

¹ See Article 29, second paragraph EU Treaty.

The initiative aims at facilitating coordination and cooperation between authorities responsible for private security.

As regards the scope of the initiative, it envisages creation of a network of contact points of national authorities responsible for private security. The network is constituted by the designation of national contact points and the setting up of an internet site.

For that purpose, the initiative provides the exchange of information pertaining to the national models for regulating private security and to the companies operating in the sector [Article 3(b) and 4 (a) and (d) of the draft decision].

The draft decision also allows for the exchange of experience on the efficiency of elements such as security systems, alarm centres, transport and deposit of funds, works of art [Article 4(c) of the draft decision].

A further objective of the initiative is to establish best practices and, in the long term, to examine the possibility of approximation of such models and best practices [Article 3(c) of the draft decision].

The fourth recital of the draft decision mentions that "[t]here is a need to unify those aspects which, without affecting the peculiarities of each Member State, would allow the parties involved in that sector of activity to extend their business interests to any Member State". Its second recital indicates the need to establish common requirements in Member States regarding the authorisation and supervision of the supply of private security persons by natural and legal persons acting in the territory of the Union.

The measures envisaged by the draft decision under its second and fourth recitals should be taken by the Community acting on the basis of the powers conferred to it by the EC Treaty and not by the EU Treaty.

The ECJ has ruled on three occasions that private security is an economic sector¹. Economic activities are subject to the EC Treaty provisions pertaining to the internal market and, in particular, to the free movement of persons, which preclude Member States from discriminating against or imposing restrictions on both workers (Article 39 EC) and self-employed persons (Article 43 EC) who are nationals of another Member State. The right to free movement includes the right to provide services within the Community (Article 49 EC).

The Council is to act by means of directives in order to attain freedom of establishment as regards access to a particular profession or economic activity [Article 44(1) and 52(1) EC].

A person may rely on the Treaty provisions on free movement of services or the right of establishment only where his or her situation exhibits a genuine cross-border factor. In contrast, the Treaty provisions cannot be applied to situations wholly internal to a Member State².

¹ Case C-114/97 *Commission v Spain* [1998] ECR I-6717, para. 42; Case C-355/98, *Commission v Belgium*, [2000] ECR I-1221, para. 29; Case C-283/99, *Commission v Italy*, [2001] ECR I-4363, para. 22 (implicitly).

² Case 175/78 *Regina v Saunders* [1979] E.C.R. 1129, para. 11.

Assessment

The coordination and cooperation measures envisaged by the draft decision should be taken by the Community acting on the basis of the powers conferred to it by the EC Treaty and not by the EU Treaty.

Where activities carried out by the private security sector entail a cross-border element and where the measures envisaged contribute to the attainment of freedom of establishment or freedom to provide services in the Community, the adequate legal basis is Article 44 EC and Article 52 EC, combined with Article 55 EC.

Where the measures envisaged lack such cross-border element, thus concerning situations wholly internal to a Member State, it would be necessary to pass the subsidiarity and proportionality test provided for in Article 5 EC¹.

In conclusion:

- Adoption of this legislative act under third pillar legal basis contravenes Article 47 EU Treaty.
- The measures envisaged fall under the substantive scope of the EC Treaty provisions on free movement of persons, in particular freedom of establishment and free movement of services as concerns the private security sector.
- Where activities carried out by the private security sector entail a cross-border element and where the measures envisaged contribute to the attainment of freedom of establishment or freedom to provide services in the Community, the adequate legal basis is Article 44 EC and Article 52 EC, combined with Article 55 EC.
- Where the measures envisaged concern situations wholly internal to a Member State, it would be necessary to pass the subsidiarity and proportionality test provided for in Article 5 EC.

The Committee on Legal Affairs and the Internal Market thus decided by 15 for and 1 abstention² that the adequate legal basis is Article 44 EC and Article 52 EC, combined with Article 55 EC.

Yours sincerely,

(s) Giuseppe Gargani

¹ See also the Protocol on the application of the principles of subsidiarity and proportionality.

² At its meeting of 13 May 2002, the following were present for the vote: Giuseppe Gargani (chairman), Willi Rothley (vice-chairman), Paolo Bartolozzi, Bert Doorn, Raina A. Mercedes Echerer, Janelly Fourtou, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Klaus-Heiner Lehne, Manuel Medina Ortega, Francesco Enrico Speroni, Marianne L.P. Thyssen, Rijk van Dam, Diana Wallis and Joachim Wuermeling.