JUDGMENT OF THE COURT (First Chamber)

19 January 2006 *

In Case C-244/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 June 2004,

Commission of the European Communities, represented by G. Braun and E. Traversa, acting as Agents,

applicant,

v

Federal Republic of Germany, represented by C.-D. Quassowski and A. Tiemann, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilešič and E. Levits (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration by the Court that, by restricting in a wholly disproportionate way, according to its practice based on a circular, the posting of workers who are nationals of non-member States in the framework of the provision of services, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

Legal context

2 Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1) provides:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

— by law, regulation or administrative provision,

and/or

— by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

...

(c) the minimum rates of pay, including overtime rates ...

...'

3 The posting of salaried workers who are nationals of a non-member State is governed in Germany by the Ausländergesetz (Law on Aliens) in the version of 9 January 2002 (BGBl. 2002 I, p. 361, hereinafter 'the AuslG'), a regulation implementing that law and a circular of 15 May 1999 addressed by the Ministry of Foreign Affaires to all German diplomatic and consular representations (hereinafter 'the circular').

4 Under Articles 1 to 3 of the AuslG, non-German nationals must present a residence permit in the form of a visa to enter and stay on German territory.

5 Article 10 of the AuslG provides that foreigners intending to reside for more than three months on German territory and to pursue there salaried employment must be in possession of a specific residence visa, complying with the regulation implementing the AuslG.

6 The detailed rules for the issue of that visa are governed by the circular under which the German diplomatic representation at which the worker who is a national of a non-member State seeks a visa with a view to his posting to Germany is to examine the application, in advance, to satisfy itself that the following criteria and information are met and provided:

— the dates of the beginning and end of the period of the worker's posting must be clearly determined;

— that worker must have been employed for at least a year by the undertaking posting the worker;

— the residence visa and, where applicable, the work visa in the Member State of establishment of the undertaking posting the worker must be presented to guarantee the continuation of the employment of that worker by that undertaking at the end of the period of activity in Germany;

— the national of a non-member State must belong to the national social security scheme in force in the Member State in which the posting undertaking is established or, if affiliation is voluntary, be sufficiently covered by a private insurance scheme against the risks of sickness and accident. The protection guaranteed by the insurance scheme must, in addition, cover the intended activities in Germany, and

— that national must be in possession of a passport valid for the period of intended residence.

Pre-litigation procedure

7 The Commission, in a letter of formal notice sent on 12 February 1997 to the German authorities, raised the question of the compatibility with Article 49 EC of the procedure applied by the Federal Republic of Germany to the posting on its territory, by service providers established in other Member States, of workers who are nationals of non-member States.

8 Since the Commission did not consider the authorities' reply to that formal notice satisfactory, on 7 August 1998 it sent the Federal Republic of Germany a reasoned opinion requesting it to comply with its obligations within a period of two months from the date of the notification of that opinion.

9 The German Government having replied on 5 November 1998 to that reasoned opinion maintaining, essentially, its previous position, the Commission sent requests for additional information to the Federal Republic of Germany on 24 May 2000 and 17 September 2001. After establishing that the legal situation had evolved significantly in certain respects, the Commission decided to concentrate its complaints on the conformity with Article 49 EC of the check carried out, in advance, by the German diplomatic authorities as well as the requirement of a year's prior employment within the undertaking intending to post workers.

10 Since it considered that the replies given by the German Government to those requests for additional information, particularly by a letter of 28 November 2001, were not satisfactory in the light of the complaints still in issue, the Commission decided to bring this action.

The action

Arguments of the parties

11 The Commission claims that, by making service providers established in a Member State other than the Federal Republic of Germany subject to specific requirements

relating to the posting of their staff from non-member States, the German authorities' practice discriminates to the detriment of those providers compared to their competitors established in Germany who may freely use their personnel to provide services in Germany.

12 Such restrictions, if discriminatory, are prohibited by Article 49 EC, unless they are justified by the combined provisions of Articles 46 EC and 55 EC, or, if they are not discriminatory, by other overriding reasons in the public interest developed in the Court's case-law.

13 In this case, the Commission submits that both the practice based on the checking of certain criteria, in advance of the posting, and its restriction to workers employed for at least a year by the provider, established in another Member State, amount to obstacles to the freedom to provide services which cannot be justified on the basis of the provisions cited in the preceding paragraph.

14 First, as regards the requirement relating to the check prior to the posting, while the Commission does not object to posted workers who are nationals of a non-member State being made subject to a check on the basis of the criteria formulated by the Court in Case C-43/93 *Vander Elst* [1994] ECR I-3803, it challenges the fact that such check is carried out in advance of the posting of the workers to Germany.

15 The Commission submits that a check after the posting would be just as effective in enabling the German authorities to satisfy themselves of the workers' return to the Member State of origin, yet such a check is less restrictive than the current measure of prior checks.

16 Secondly, the Commission claims that the fact that an undertaking can post only workers who are nationals of non-member States whom it has employed for at least a year amounts to an obstacle to the freedom to provide services.

17 The Commission argues, first, that that restriction of the right of posting in no wise reflects the criteria identified by the Court in *Vander Elst* and renders the right to benefit from freedom of movement illusory for newly-formed undertakings.

18 Concerning the justification for that second requirement, the Commission states, secondly, that the Court, in Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, expressly rejected the economic ground linked to the protection of the national employment market inasmuch as the posted worker does not aspire to enter the employment market of the Member State in which the service is to be provided.

19 The German Government doubts, first, the significance of the restriction caused by the current procedure by virtue of which, for the purposes of a posting in Germany, a worker who is a national of a non-member State must obtain a visa, known as a '*Vander Elst* visa', to be allowed to work in that Member State.

20 That procedure meets the requirements of Community law, such as result, in particular, from the case-law born of *Vander Elst*, and affects only a limited number of cases in fact: those relating to, first, posted workers who do not have a Schengen visa and, second, nationals of non-member States who have a residence visa issued by a Member State, but who are posted for a period of more than three months to Germany. Furthermore, the competent authority for the issue of a '*Vander Elst* visa' has no discretion, with the result that such issue is almost automatic and takes place within a very short time.

21 Secondly, even though the German Government accepts that it is a restriction on the freedom to provide services, it disputes the validity of the Commission's complaints.

22 As regards the requirement of a check prior to the posting, the German Government submits that such a procedure is intended only to verify that a provider is entitled to the privilege of the freedom to provide services in connection with the posting. That enables evasion of the Community and national requirements in the employment of nationals of non-member States to be prevented.

23 Thus, it is a necessary and appropriate measure given that the mere presentation of a passport or a simple visa to enter the host Member State would not enable nationals of non-member States to prove that they are lawfully employed in their employer's Member State of establishment.

24 The German Government contends, in addition, that a subsequent check, at the time of registration of residence, would not be as effective. First, that registration requirement relates to residence, a status to which posted workers do not aspire and, second, it is the responsibility of the Länder which have no powers in respect of foreigners' entry to and stay in Germany. Consequently, a subsequent check of the posting's legality, at the stage of registration of residence, would involve legal uncertainty for the undertaking established in another Member State and making the posting, since prior to the dispatch of its workers to Germany it would not know whether they could stay in the territory of that Member State until the end of the period of the provision of services for which they were posted.

25 The German Government submits that, contrary to the Commission's submission, *Commission* v *Luxembourg* is not a relevant authority as regards the German practice which is the subject of the action. In fact, it is not, in this case, a question of a work visa within the meaning of the Luxembourg legislation, but only of a visa involving the consideration of certain additional criteria. Likewise, in the case which gave rise to that judgment, the grant of the work visa was subject to the determination of the competent authority in relation, particularly, to considerations relating to the situation, evolution and organisation of the national employment market. That is not so in this case, since the German authorities' practice is based exclusively on requirements linked to the public interest.

26 As regards the requirement of an employment contract made at least a year before the posting, the German Government submits that it is a matter of implementing the criterion relating to the necessity to have lawful regular employment as enshrined by the Court in *Vander Elst.*

27 That requirement is an appropriate and effective means to attain various objectives in the public interest. First, it contributes to the protection of posted workers by preventing undertakings established in another Member State from employing staff for the exclusive purpose of the posting. Second, as regards the access of nationals of non-member States to the Member States' employment market, it enables the latter to safeguard their prerogatives in respect of the control of such access.

28 In that regard, the German Government maintains that the result upheld by the Court in *Commission* v *Luxembourg* is irrelevant in the present case. In the case which gave rise to that judgment, it was the cumulative effect of the various requirements under the Luxembourg legislation which rendered the overall procedure disproportionate to the aims pursued by that legislation.

29 In that respect, the German Government states that it is prepared to reduce the length of the period of employment prior to the posting to six months.

Findings of the Court

30 At the outset, it must be recalled that it is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national

providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services (see, in particular, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16).

31 However, where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35, and *Portugaia Construções*, paragraph 19).

32 Since the posting of workers who are nationals of non-member States for the purposes of providing cross-border services has not, hitherto, been harmonised at Community level, it is in the light of the principles recalled in the two preceding paragraphs that it is necessary to examine the compatibility with Article 49 EC of the requirements of the German authorities' practice.

As regards the check, in advance, of compliance with the requirements of the German authorities' practice

33 At the outset, it must be stated that the fact that the German authorities' practice in respect of the posting of workers from non-member States concerns only a limited circle of persons, that the procedure for the issue of a '*Vander Elst* visa' does not take longer than seven days and that the competent authority has no discretion in the issue of such visas is of no consequence as regards the restrictive nature of that practice in the light of the freedom to provide services.

34 It has already been held, with respect to the deployment of workers who are nationals of non-member States by a service-providing undertaking established in the Community, that national legislation which makes the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative visa constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC (see *Vander Elst*, paragraph 15, and *Commission* v *Luxembourg*, paragraph 24).

35 While it is true, as the German Government submits, that the administrative and financial charges involved in the prior check as practised by the German authorities are not of the order of those considered by the Court in *Commission* v *Luxembourg*, such a procedure may make it more difficult, or even impossible, to exercise the freedom to provide services through posted workers who are nationals of non-member States, in particular where the services to be provided necessitate a certain speed of action.

36 The Court has recognised that the Member States have the power to verify compliance with the national and Community provisions in respect of the provision of services. Likewise, it has accepted the justification for the control measures necessary to verify compliance with requirements which are themselves justified by grounds of public interest (*Arblade and Others*, paragraph 38). However, in paragraph 17 of the judgment in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, the Court also held that those controls must comply with the limits imposed by Community law and must not render the freedom to provide services illusory.

37 That being so, it is appropriate to consider whether the restrictions on the freedom to provide services arising from the German authorities' practice appear to be justified by a public interest objective and, if so, whether they are necessary in order to pursue, effectively and by appropriate means, such an objective (see Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 37, and *Commission* v *Luxembourg*, paragraph 26).

38 In this case, the German Government relies on grounds relating to the prevention of abuse of the freedom to provide services, the protection of workers and legal certainty.

39 In the first place, the German Government maintains that it is necessary to check whether a service provider established in a Member State other than the Federal Republic of Germany is availing itself of the freedom to provide services for a purpose other than that for which it was instituted, for instance, that of deploying its staff for the purpose of placing them on the national employment market. In that regard, it submits that the checks are justified in so far as they are intended to implement a requirement of Community law, that is, to verify whether the workers concerned were 'lawfully and habitually' employed in the provider's Member State of

establishment, within the meaning of the judgment in *Vander Elst*, before being posted in Germany.

40 It has already been held that a Member State may check that an undertaking established in another Member State, which deploys on the territory of the first-mentioned Member State workers who are nationals of a non-member State, is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service concerned (*Rush Portuguesa*, paragraph 17, and *Commission* v *Luxembourg*, paragraph 39).

41 However, as the Advocate General observed in point 27 of his Opinion, a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established (see, to that effect, *Commission* v *Luxembourg*, paragraph 46). Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular. Such a requirement could in addition take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out.

42 It follows that the control measure in advance of the posting resulting from the German authorities' practice exceeds what is necessary to prevent the abuse to which the implementation of the freedom to provide services may give rise.

43 Secondly, the German Government relies on grounds relating to the protection of workers to justify the practice of a check in advance of the posting.

44 In that regard, while the Court has already held that the overriding reasons relating to the public interest capable of justifying restrictions on the freedom to provide services include the protection of workers (*Arblade and Others*, paragraph 36), it must be observed that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means, when it is established that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established (*Commission* v *Luxembourg*, paragraph 29).

45 However, an obligation imposed on a service provider established in another Member State, at the same time as the requirement referred to in paragraph 41 above, to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the service or services justifying the deployment would be a more proportionate means than the check in advance of positing because it is less restrictive but just as effective. It would enable those authorities to monitor compliance with German social welfare legislation during the deployment while at the same time taking account of the obligations by which that undertaking is already bound under the social welfare legislation applicable in the Member State of origin (*Commission* v *Luxembourg*, paragraph 31).

46 It must therefore be held that the check in advance of the posting exceeds what is necessary to pursue the objective of protection of the workers.

47 Thirdly, the German Government submits that a check in advance of the posting enables service providers established in another Member State to have a guarantee that the posting has been effected lawfully and the certainty of being able to rely on the availability of their entire staff throughout the period of the service provision.

48 In that regard, it must be observed that, according to settled case-law, the Member States can justify control measures which interfere with the freedom to provide services by overriding requirements relating to the public interest, where that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which it is established (*Portugaia Construções*, paragraph 19).

49 It is certainly in the interest of both the host Member State and the service provider to have, prior to the posting, the assurance that workers who are nationals of a non-member State are posted lawfully.

50 However, as the Advocate General noted in point 28 of his Opinion, it is for undertakings which do not comply with that legislation to bear the responsibility for a posting effected unlawfully.

51 Accordingly, the check in advance practiced by the German authorities in respect of the posting of workers who are nationals of a non-Member State cannot be justified by the necessity of ensuring that the posting is effected lawfully and, therefore, it is a disproportionate means having regard to the objectives pursued by the Federal Republic of Germany.

As regards the requirement of at least a year's prior employment by the undertaking effecting the posting

52 The German Government maintains that the requirement of at least a year's prior employment by the undertaking effecting the posting implements the case-law arising from *Vander Elst*, in which the Court recognised that the Member States have the power to check whether posted workers who are nationals of a non-Member State have lawful and habitual employment in their employer's Member State of establishment.

53 It is not disputed that such a requirement is a restriction on the freedom to provide services. That requirement is particularly damaging to undertakings operating in sectors in which frequent use is made of short-term and service-specific contracts, or of newly-created undertakings (see *Commission* v *Luxembourg*, paragraph 44).

54 In this case, the German Government pleads that that requirement is an appropriate and effective means of monitoring the efficacity of the national and Community

legislation in respect of the protection of workers, of safeguarding the Member States' prerogatives in respect of control of the access to the national employment market and of preventing social dumping.

55 As a preliminary point, it must be stated that the Federal Republic of Germany cannot, in that regard, rely on the formula used by the Court in paragraph 26 of the judgment in *Vander Elst*, by arguing that such a requirement of prior employment enables it to verify that a posted worker who is a national of a non-member State has lawful and habitual employment in his employer's Member State of establishment. As the Advocate General noted in point 38 of his Opinion, it is important to put that formula in the context of the question referred by the national court in the case which gave rise to the judgment in *Vander Elst*. In that regard, it must be observed that the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider.

56 However, it must be ascertained whether the requirement of at least a year's prior employment by the posting undertaking is an appropriate measure to attain the objectives relied upon by the Federal Republic of Germany.

57 In this instance, grounds are invoked relating to the protection of workers, the safeguarding of the Member States' prerogatives in respect of access to their employment market and the prevention of social dumping.

58 In that regard, contrary to the German Government's submission, it has already been held that legislation imposing a requirement of a period of only six months' prior employment exceeds what can be required in the name of the objective of the social welfare protection of workers who are nationals of non-member countries (*Commission* v *Luxembourg*, paragraph 32).

59 Furthermore, as regards the safeguarding of the Member States' prerogatives in respect of access to their employment market, it must be noted that posted workers do not aspire to access to the employment market of the Member State where they are posted (see *Rush Portuguesa*, paragraph 15; *Vander Elst*, paragraph 21; *Finalarte and Others*, paragraph 22, and *Commission* v *Luxembourg*, paragraph 38).

60 In addition, it has already been held that such a requirement is disproportionate to the objective of seeking to ensure to that the workers return to the Member State of origin at the end of the posting (*Commission* v *Luxembourg*, paragraph 45).

61 Finally, as regards the defence based on the prevention of social dumping, the Court has held that the Member States may extend their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory (*Arblade and Others*, paragraph 41). That prerogative is also recognised by Article 3 of Directive 96/71.

62 In that regard, the prior declaration mentioned in paragraphs 41 and 45 above, supplemented by the relevant information in respect of wages and employment

conditions, would constitute a less restrictive measure so far as the freedom to provide services is concerned, whilst enabling the local authorities to ensure that posted workers are not made subject to a regime less favourable than that which applies in the Member State in which they are posted.

63 Accordingly, the requirement of at least a year's prior employment by the undertaking effecting the posting must be regarded as disproportionate to attain the objectives relied upon by the Federal Republic of Germany.

64 Consequently, it must be held that, by not confining itself to making the posting of workers who are nationals of non-member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking established in another Member State which intends to post such workers, and by requiring that they have been employed for at least a year by that undertaking, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

Costs

65 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 Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

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

1. **Declares that, by not confining itself to making the posting of workers who are nationals of non-member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking established in another Member State which intends to post such workers, and by requiring that they have been employed for at least a year by that undertaking, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC;**

2. **Orders the Federal Republic of Germany to pay the costs.**

[Signatures]