OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 14 December 2006 [1]

I — Introduction

1. The Commission seeks a declaration from the Court of Justice pursuant to Article 226 EC that, by requiring undertakings established in another Member State posting workers to Germany to contribute to the national paid-leave fund unless they already contribute to a 'comparable body', and to translate certain documents, and by requiring foreign temporary employment agencies to give notification of each hiring-out of a worker and of the job assigned, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

2. However, before considering whether those requirements are contrary to Community law, it is necessary to establish the criterion for their assessment, bearing in mind 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 ('Directive 96/71' or 'the Directive'). [2]

3. In addition, the Federal Republic of Germany argues that the application is inadmissible on the grounds that it lacks clarity and is inconsistent with the reasoned opinion, and that the administrative procedure was excessively long.

II — Legal framework

A — *Community legislation*

1. The EC Treaty

4. In accordance with the first paragraph of Article 49 EC, 'restrictions on freedom to

1 — Original language: Spanish.

2 — OJ 1997 L 18, p. 1.

provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

2. Directive 96/71

5. When workers are temporarily transferred to the territory of another Member State in the exercise of that fundamental freedom, [3] the convergence of different legal systems gives rise to a number of specific problems. [4] That is the context in which Directive 96/71, which is aimed at combining 'a climate of fair competition and measures guaranteeing respect for the rights of workers' (recital 5 in the preamble), is placed. [5]

6. Article 1(1) of the Directive limits its scope to undertakings established in a Member State which, for the purposes of the transnational provision of services, post workers to another Member State in one of the ways provided for in paragraph 3, that is to say: (a) under a contract concluded between the undertaking making the posting and the party for whom the services are intended; (b) by posting workers to an establishment or to an undertaking owned by the group; or (c) where a temporary employment undertaking hires out a worker to a user undertaking operating in a Member State other than that of the employment undertaking.

7. Following the definition of the term 'posted worker' (Article 2) and a list of minimum rules governing terms and conditions of employment (Article 3), Article 4

3 — According to Palao Moreno, G., 'La Ley 45/1999, de 29 de noviembre, sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional. Un nuevo paso hacia la consolidación de un mercado de trabajo integrado en Europa', *Gaceta Jurídica de la Unión Europea y de la Competencia*, No 208, July-August 2000, p. 46, the movement of workers is not only another consequence of European integration but also an inherent requirement of the system.

4 — García Ninet, J.I. and Vicente Palacio, A., 'La Ley 45/1999, de 29 de noviembre, relativa al desplazamiento (temporal y no permanente) de trabajadores en el marco de una prestación de servicios transnacional', *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 27, 2000, p. 14.

5 — Academic writers argue that the fundamental aim is to preclude States which have made less progress in the recognition of employment rights, and which have lower costs, from gaining an advantage in other States where employment costs are higher owing to the increased protection provided (De Vicente Pachés, F., 'Desplazamiento temporal de trabajadores para la ejecución de un contrato en otro Estado miembro. Comentario a la Sentencia del Tribunal de Justicia de las Comunidades Europeas (Pleno), de 23 de noviembre de 1999', *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 27, 2000, p. 240). In that connection, Landa Zapirain, J.P. and Fotinopulou Basurko, O., 'Breve comentario de la Ley 45/1999 sobre desplazamiento de trabajadores en el marco de una prestación de servicios transnacional, que incorpora al ordenamiento jurídico español la Directiva 96/71/CE', *Relaciones Laborales*, No 9, 2000, p. 10, maintain that the Directive is more 'economic than social' in scope.

provides for '[c]ooperation on information' in the following terms:

'1. For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.'

8. Next, the Directive provides that Member States must take appropriate measures in the event of failure to comply with its provisions (Article 5), delimits jurisdiction (Article 6) and, in Article 7, fixes the time-limit for implementation, stating that:

'Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 16 December 1999 at the latest. They shall forthwith inform the Commission thereof.

...'

9. Article 8 governs review of the Directive by the Commission, [6] while Article 9 provides that the Directive is addressed to the Member States.

B — *German legislation*

10. In Germany, the movement of workers is governed by the Arbeitnehmer-Entsendegesetz (Law on the posting of workers; 'the AEntG') of 26 February 1996, [7] which entered into force on 1 March 1996.

11. Paragraph 1(1) of the AEntG extends, in certain circumstances, the effects of the provisions of collective agreements with universal, compulsory application to the construction industry, determining minimum rates of pay, the duration of time off, and paid leave, to the legal relationship linking an employer established in another State and his employees. In accordance with Paragraph 1(3), collective agreements governing the payment of contributions towards the grant of paid leave must also be complied with, unless those contributions are paid to a 'comparable body' in the State where the undertaking is established.

12. Paragraph 2 sets out 'monitoring' mechanisms, such as the requirement, laid down in subparagraph 3, that non-German employers must keep German-language versions of the documents which substantiate compliance with the obligations referred to in Paragraph 1, namely, the contract, payslips, and proof of hours worked and of payment of wages.

13. Paragraph 3(2) requires foreign temporary employment agencies to submit, before each job commences, a declaration in German which includes the name, surname and date of birth of the workers hired out; the start and end dates of the placement; the place of work; a location in Germany where the documents referred to in Paragraph 2(3) are to be kept; an agent in Germany; and the name and address of the undertaking using the workers' services. The contract between the temporary employment agency and the undertaking to which the workers are posted may stipulate that changes of workplace must be notified.

III — The pre-litigation procedure

14. Having received a number of complaints regarding the AEntG, the Commission sent Germany a letter of formal notice on 12 November 1998, which was supplemented

6 — The communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States of 25 July 2003 (COM(2003) 458 final) states that it does not appear necessary to amend the Directive at present because the difficulties encountered are more practical than legal in nature (p. 19).

7 — BGBl. 1996 I, p. 227.

by a further letter on 17 August 1999. Germany replied to those letters on 8 March, 4 May and 25 October 1999.

15. The Commission was not persuaded by the explanations given in those letters and, on 25 July 2001, it sent a reasoned opinion calling upon Germany to enact specific measures in order to comply with the Commission's requirements within two months of the date on which the reasoned opinion was sent.

16. The German Government submitted observations on 1 October 2001, 10 December 2001, 3 February 2003 and 4 December 2003. On 23 January 2004, the German Government reported that the AEntG had been amended by the Drittes Gesetz für moderne Dienstleistungen am Arbeitsmarkt (Third Law on the modern provision of services on the labour market) of 23 December 2003. [8]

17. Taking the view that that amendment had eliminated only some of the instances of the AEntG's incompatibility with Community law, the Commission brought an action before the Court under Article 226 EC, seeking a declaration that Germany had failed to fulfil its obligations.

8 — BGBl. I, p. 2848.

IV — The procedure before the Court

18. The application, which was received at the Court Registry on 29 November 2004, requests a declaration that, by providing that: (a) foreign undertakings must contribute to the Germany paid-leave fund, even when the workers are entitled to similar protection under the law of the State where their employer is established (Paragraph 1(3) of the AEntG); (b) foreign undertakings must have translated into German the employment contract, payslips, documents constituting proof of hours worked and proof of payment of wages, and any others requested by the German authorities (Paragraph 2 of the AEntG); and (c) that foreign temporary employment agencies must give notification every time a worker is posted to an undertaking using his services in Germany and of every job to which the worker is assigned (Paragraph 3(2) of the AEntG), [9] Germany has failed to fulfil its obligations under Article 49 EC. The application also claims that the defendant Member State must be ordered to pay the costs.

19. The defence, lodged on 4 February 2005, contends that the action is inadmissible and unfounded.

9 — The Commission has withdrawn two of the pleas in law put forward in the preliminary stage, relating to the conditions for classification as a construction undertaking (paragraphs 24 to 26 of the application) and to fines (paragraph 64), because discrimination on grounds of nationality in that regard was eliminated by the legislative amendment of 2003.

20. The reply was lodged on 29 March 2005 and the rejoinder on 17 May 2005.

21. By order of 7 June 2005, the President of the Court of Justice gave leave to France to intervene in the proceedings. That Member State lodged a statement in intervention on 22 September 2005 in support of the arguments put forward by the Federal Republic of Germany contesting the second ground of failure to fulfil obligations. Observations on that intervention were lodged by Germany on 27 October 2005 and by the Commission on 28 November 2005.

22. Representatives of the Federal Republic of Germany and of the Commission were present at the hearing held on 8 November 2006.

V — The admissibility of the action for failure to fulfil obligations

23. The defendant government contends that the national provisions should be examined in the light of Directive 96/71 rather than of Article 49 EC, challenging thereby the relevance of the claims put forward by the applicant (A). In addition, the defendant has invoked three procedural objections which, it claims, render the action inadmissible in whole or in part: these relate to the duration of the pre-litigation procedure (B), a lack of precision in the application (C), and the amendment of the third plea in law (D).

A — *The criterion for assessment*

24. Directive 96/71 had not been adopted when the administrative procedure began but when the reasoned opinion was sent the period fixed for transposition of the Directive into national law had expired. The German Government emphasises that chronological sequence in support of its contention that the AEntG must be examined in the light of Directive 96/71 rather than Article 49 EC, asserting that the latter is applicable only when, in transposing a directive into domestic law, Member States exceed the discretion they enjoy.

25. The Commission has not responded clearly to that plea and, in fact, contradicts itself, by, for example, arguing in paragraph 1 of the application that the determination of whether the national rules are compatible with Community law must be based on Article 49 EC, only to cite that provision and Directive 96/71 four lines below. Nor, at the hearing, despite being asked a question on that point, did the Commission's Agent offer any clarification concerning that objection.

26. This argument prompts reflections on the provision of Community law in question and on the effects of it being incorrectly chosen. In support of this, if a conflict should be plainly evident, the fundamental legal basis would be lacking and the action unfounded; the same situation would obtain if it were to be claimed that a provision of

secondary law not enacted when the facts occurred had been infringed; in any other circumstances, it is correct to consider the substance of the case without examining the plea of inadmissibility.

27. In the circumstances of the case, there is no reason to dismiss the action *in limine litis* because, in order to identify the breach, it is appropriate to refer to the Treaty and to leave aside Directive 96/71, which does not implement in full the content of Article 49 EC, for the following reasons: first, recital 13 in the preamble to the Directive states that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers, [10] and, second, Article 5 grants the national authorities considerable latitude, provided always that they respect fundamental freedoms. [11]

28. So, the national rules governing the transnational provision of services may be contrary to both primary and secondary law. If they infringe the Directive, application of the Treaty is excluded, although, the Treaty being its source of inspiration, any infringement of the Directive must entail infringement of the Treaty. However, if the national rules contravene the Treaty directly and are not caught by the provisions of the Directive which gives it effect, the sole point of reference is the Treaty itself.

29. The provision referred to in the application is, therefore, a valid basis, since the complaints put forward go beyond the scope of Directive 96/71, wherefore it is immaterial whether the reasoned opinion was sent after the expiry of the time-limit for transposition, without prejudice however to the possibility that the Directive might become relevant in interrelated fields or as a guideline for interpretation.

B — *The duration of the pre-litigation procedure*

30. Germany contends that the time-limit for bringing an action before the Court has expired because although proceedings were initiated in 1998 the application was not lodged until 23 November 2004, with the result that the principles of the protection of legitimate expectations and legal certainty were breached. Moreover, in 2001 the Court assessed the compatibility of the AEntG with Community law.

10 — I endorse the words of Advocate General Léger in footnote 15 to the Opinion in Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, in which he observes that 'Directive 96/71 does not provide for any specific procedures concerning the posting of workers in the context of a transnational provision of services ...; in essence, the Directive merely guarantees that workers who are posted in that context are entitled to benefit from certain rules in force in the Member State in which they provide their services, relating to particular conditions of work and employment. In all other respects, the Directive charges the Member States with the task of ensuring that those rules are respected ... without prejudice to the right to take the appropriate measures ... which must not infringe the provisions of the Treaty in connection with freedom to provide services'.

11 — Case C-71/02 *Karner* [2004] ECR I-3025, paragraphs 33 and 34.

31. The Commission counters that the defendant led it to believe that the planned statutory amendments would eliminate the infringements.

32. Even though the administrative stage of the proceedings under Article 226 EC lasted more than six years, there are a number of reasons why the objection raised must be dismissed.

33. First, according to case-law, the excessive duration of the administrative stage gives rise to inadmissibility only where the conduct of the Commission makes it difficult to refute its arguments, thus infringing the rights of the defence, and it is for the Member State concerned 'to provide evidence of such a difficulty'. [12] In this instance, the German Government has failed to demonstrate that there has been any reduction in its rights of defence.

34. Second, infringement proceedings are based on the objective finding of an infringement of the Treaty or of secondary law; [13] to admit reliance on the principle of the protection of legitimate expectations would amount to justification of the infringement in a manner which runs counter to the aim pursued by Article 226 EC. [14] The same assertion applies to the principle of legal certainty. [15] In the absence of a decision suspending the application of the rules at issue, individuals must observe them, including while proceedings are in progress.

35. Third, although *Finalarte and Others*, [16] *Portugaia Construções*, [17] *Wolff & Müller*, [18] and *Commission* v *Germany* [19] dealt with the compatibility of the AEntG with Community law, those cases concerned aspects different from those at issue in the present action, despite certain points in common:

— *Finalarte and Others* provides an important link with one of the present

12 — Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16; Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraphs 24 and 25; Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 14; and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 76.

13 — Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14; Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 23; and Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 67.

14 — Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraph 38.

15 — In Case C-508/03 *Commission* v *United Kingdom*, the Court relied on a number of cases in support of its assertion that, 'while the principles of legal certainty and of the protection of legitimate expectations require the withdrawal of an unlawful measure to occur within a reasonable time and regard must be had to how far the person concerned might have been led to rely on the lawfulness of the measure, the fact remains that such withdrawal is, in principle, permitted' (paragraph 68).

16 — Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 [2001] ECR I-7831.

17 — Case C-164/99 [2002] ECR I-787.

18 — Case C-60/03 [2004] ECR I-9553.

19 — Case C-341/02 [2005] ECR I-2733.

grounds of failure to fulfil obligations because, in that case, the Court also ruled on the German system of funds for paid leave and held that the extension of the legislation to the transnational provision of services was compatible with the Treaty, provided that two conditions were satisfied. [20] However, the Commission argues that those conditions have not been fulfilled in the circumstances of this case;

— *Portugaia Construções* dealt with the payment of the minimum wage to posted workers;

— *Wolff & Müller* also concerned the issue of pay and, in particular, the obligation to pay wages pursuant to Article 5 of Directive 96/71 interpreted in the light of Article 49 EC;

— finally, in the judgment in Case C-341/02 *Commission* v *Germany*, which was delivered after the application in the present proceedings was lodged, the Court found that there had been an infringement of Article 3 of Directive 96/71 with regard to the constituent elements of a worker's wages.

36. Fourth, after the reasoned opinion was sent in 2001, the German legislation was amended at the end of 2003, from which it follows that it is not appropriate to level any criticism at the Commission for having analysed those amendments before filing the application in November 2004.

37. As the Commission points out, the foregoing considerations invalidate the criteria relied on by Germany for appraising the reasonableness of a period applicable to competition proceedings [21] and to proceedings brought before the Court of First Instance. [22]

C — The precision of the application

38. The German Government also claims that the action is inadmissible by reason of its want of precision, in that it sets out in the abstract the legal circumstances but mentions no specific instance of the posting of a worker that might show that the AEntG is incompatible with Article 49 EC.

20 — In that case, the Court also dealt with two other issues relating to paid leave and with the question whether the period of leave provided for in the legislation of a Member State may be extended to posted workers.

21 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 187, cited in footnote 7 to the defence.

22 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 29, also cited in footnote 7 to the defence.

39. The Commission emphasises the plainness of the application and argues that the proceedings have been brought not as a result of a claim by a worker or an undertaking, or of judicial or administrative practices, but rather because the national legal order is incompatible with the Community order.

40. In accordance with Article 38(1)(c) of the Rules of Procedure of the Court of Justice, [23] an application must state 'the subject-matter of the proceedings and a summary of the pleas in law on which the application is based'. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, from which it follows that the legal and factual particulars on which a case is based must 'be indicated coherently and intelligibly in the application'. [24]

41. Those requirements have been satisfied in the present case. The Commission has arranged the application in four main sections: the first, dedicated to the facts and the pre-litigation procedure, describes the procedural steps taken and identifies the five instances of incompatibility set out in the reasoned opinion; the second sets out the relevant provisions of Community and national law; the third, which contains the legal assessment, begins with a preliminary point about the amendment of the national law before referring to each ground of failure to fulfil obligations, rebutting the observations put forward in the administrative procedure; and the fourth section contains the form of order sought, which is consistent with the rest of the application and focusing specifically on Paragraph 1(3), Paragraph 2, and Paragraph 3(2) of the AEntG, claiming that those provisions are contrary to Article 49 EC.

42. The Court is perfectly aware of the allegations and their grounds, as is the defendant Member State which has denied them, but it is important not to confuse a description of the factual and legal arguments with their truth and accuracy.

43. Specific evidence must be adduced when the failure to fulfil obligations arises out of the implementation of a national provision but not when it arises out of the terms of the provision itself, so that only in the first case is there a need for documented and detailed proof of the practice in question. [25]

44. Consequently, the plea of inadmissibility put forward in the present proceedings must be dismissed.

23 — OJ 1991 L 176, p. 7, and OJ 1992 L 383, p. 117 (corrigenda), as subsequently amended.

24 — Case C-178/00 *Italy* v *Commission* [2003] ECR I-303, paragraph 6, and Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 50.

25 — Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 28, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 49.

D — *The amendment of the first plea in law*

45. Germany has submitted a further objection to the first ground of action contained in the application to the effect that, in its opinion, the complaint set out in the reasoned opinion is not consistent with the complaint as formulated in the application. The Commission denies any amendment, arguing that the differences consist of the giving of further details concerning what was argued in the administrative phase of the proceedings.

46. The Court has frequently held that the preliminary administrative phase provided for by Article 226 EC delimits the subject-matter of an action brought under that provision, from which it follows that the application must be based on the same grounds and pleas as the reasoned opinion, [26] even when the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application are not exactly the same, provided that the subject-matter of the proceedings has not been extended or altered. [27]

47. To determine whether there is any discrepancy and, if so, its extent entails a comparison of the administrative and judicial documents:

— the reasoned opinion analyses 'the obligation to pay contributions to the German paid-leave fund' and concludes that it infringes Article 49 EC by requiring foreign undertakings to contribute to that fund when they are still obliged to pay holiday pay directly to their employees in the State of establishment;

— the application frames that complaint in the same way but adds that the infringement stems from the obligation of foreign undertakings to pay contributions to the German body even when workers enjoy equivalent protection under the law of the State where their employer is established.

48. Comparison of the two documents reveals a number of discrepancies but it does not demonstrate that different pleas have been put forward because it is clear from the wording of the complaint in issue, which is the same in the two documents, that the Commission claims that Paragraph 1(3) of the AEntG requires undertakings which do not make payments to an institution similar to the German fund to make more than one payment, in cash or in kind.

26 — Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273, paragraph 16; Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 28; Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 11; and Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 18.

27 — Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 24 and 25; Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56; Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 25; Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 44; Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraphs 18 and 19; Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 37; and Case C-441/02 *Commission* v *Germany*, paragraph 61.

49. The issue is whether the national rules give rise to a double financial burden for those who post workers in the framework of the transnational provision of services, and that is how it is understood by the defendant. The arguments advanced in connection with the plea in law supplement it but do not alter it or restrict the rights of the defence.

50. Furthermore, I have identified an additional reason for the additional details which is that the judgment in *Finalarte and Others*, referred to in the application, was delivered after the reasoned opinion was sent.

51. Accordingly, the discrepancy identified between the form of the reasoned opinion and that of the application is not sufficient to give rise to inadmissibility.

VI — Analysis of the action for failure to fulfil obligations

52. If, as I have proposed, the Court dismisses the pleas of inadmissibility submitted by the German Government, it must examine the alleged infringements.

A — *Preliminary observations*

53. The obligations laid down in the AEntG entail additional burdens for undertakings established in another Member State, which in turn makes it difficult for such undertakings to carry on their activities in Germany and reduces their interest in doing so, thereby constituting a restriction on the freedom to provide services.

54. In the Opinion in *Arblade and Others*, [28] I outlined the case-law on restrictions of that freedom (points 53 to 60). That case-law remains settled, although some explanation of the reasoning is called for.

55. I also emphasised that the freedom to provide services is intended to facilitate the exercise of all kinds of professional activity within the territory of the Community, and requires the elimination of all discrimination on grounds of nationality and of all restrictions, even if applicable without distinction to national providers of services and to those of other Member States, when they are liable

28 — Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453. The question before the Court was 'whether Community law precludes a Member State from requiring an undertaking established in another Member State which posts workers to the territory of the first State in order to provide services there to comply with provisions of national law relating to the keeping and storage of documents concerning workers and the observance of minimum wage requirements, which provisions are intended to protect workers and to combat labour fraud, where that undertaking is already subject, in respect of the same workers and for the same period of employment, to requirements which are identical or similar to obligations in the Member State where it is established' (point 1 of the Opinion).

to prohibit, impede or render less attractive the activities of the latter. [29]

56. I also set out the conditions for valid restriction of that fundamental principle: (a) there must be an overriding reason relating to the public interest; (b) it must be necessary to ensure that the objective pursued is attained; and (c) the measure enacted must be proportionate. [30]

57. With regard to the first condition, 'the social protection of workers' has been cited as an overriding reason relating to the public interest, [31] in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established. [32]

58. Those propositions form a framework for the consideration of the three pleas in law alleging failure to fulfil obligations.

B — *The first plea in law: relating to the obligation to contribute to the German paid-leave fund*

1. Introduction

59. In order to understand the dispute between the Commission and Germany on this point, it is advisable to dwell a while on how the German paid-leave fund operates.

29 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25; Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 18; *Arblade and Others*, paragraph 33; *Finalarte and Others*, paragraph 28; and *Portugaia Construções*, paragraph 16.

30 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 25; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 26; *Säger*, paragraph 15; *Guiot*, paragraphs 11 and 13; *Arblade and Others*, paragraph 35; *Portugaia Construções*, paragraph 19; and *Wolff & Müller*, paragraph 34. Davis, P., 'Posted Workers Directive and EC Treaty', *Industrial Law Journal*, 2002, p. 299, argues that if those jurisprudential criteria were applied to Directive 96/71, many of its provisions would have to be ruled contrary to Article 49 EC because they would be unlikely to satisfy the requirements of justification and proportionality which are essential in order to restrict the application of that article.

31 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18; *Guiot*, paragraph 16; *Arblade and Others*, paragraph 36; *Finalarte and Others*, paragraph 33; *Portugaia Construções*, paragraph 20; and *Wolff & Müller*, paragraph 35.

32 — Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 17; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 18; *Webb*, paragraph 17; *Säger*, paragraph 15; *Vander Elst*, paragraph 16; *Guiot*, paragraph 11; *Arblade and Others*, paragraph 34; and *Finalarte and Others*, paragraph 31. That is how the principle of equivalence, which circumvents the law of the place of destination, is declared, according to Molina Navarrete, C. and Esteban de la Rosa, G., 'Mercados nacionales de trabajo, libertad comunitaria de prestación de servicios y defensa de la competencia. Comentario de la Ley 45/1999, sobre desplazamiento de trabajadores en el marco de una prestación transnacional de servicios', *Revista de Trabajo y Seguridad Social (Centro de Estudios Financieros)*, No 205, April 2000, pp. 21 and 32.

60. As Advocate General Mischo explained in his Opinion in *Finalarte and Others*, the system supposes that a worker will during the reference year accumulate holiday entitlement acquired while working for different employers and will claim the whole of that entitlement from his current employer, who must pay workers an allowance for days accrued during other periods of employment. The fund was created with a view to an equal distribution of the financial burden, German employers paying into it a percentage of their total gross wages; in return for which, they are entitled to obtain reimbursement in whole or in part of the benefits paid to workers.

61. Paragraph 1(3) of the AEntG extends the obligation to contribute to the fund to employers in other Member States who temporarily post workers to Germany, unless those employers pay contributions to a comparable body in the Member State of establishment.

62. The Court held in *Finalarte and Others* that that rule gives rise to a 'restriction of the freedom to provide services' (paragraph 37), which is justifiable only if it is necessary in order to attain an objective in the public interest, such as the protection of workers (paragraph 33), provided that appropriate means are used. Consideration of those two conditions prompted the Court to declare compatible with the Treaty legislation such as the German law 'on the twofold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued' (paragraph 53 and operative part).

63. Therefore, *Finalarte and Others* made the validity in the light of Community law of that measure subject to two conditions (no other similar protection and proportionality), the assessment of which falls to the national court. In the present proceedings, the Commission considers that those conditions have not been satisfied, criticising German restrictions on the right to claim exemption from the obligation to pay contributions.

2. Examination of the plea

64. The paid-leave fund addresses a difficulty inherent in the field of employment. According to information obtained from the German Government and set out in the reasoned opinion, there are comparable institutions in France (Caisse nationale de surcompensation du bâtiment et des travaux publics de France), Austria (Bauarbeiter-Urlaubs- und Abfertigungskasse), Belgium (Office national de sécurité sociale), Italy (Commissione Nazionale Paritetica per le

Casse Edili), and, to a certain extent, the Netherlands (Stichting Vakantiefonds voor de Bouwnijverheid and Stichting Vakantiefonds voor de Landbouw). [33]

65. The exception laid down in Paragraph 1(3) of the AEntG takes full effect with regard to those bodies in that it prevents employers from having to contribute twice and it is balanced. At least in theory, for, in practice, it must be determined whether the bodies which collect the contributions are 'comparable' to the German body, a task which is assisted by the bilateral agreements referred to, in particular, in the defence.

66. However, paid-leave funds are not the only solution to the problem referred to. In fact, those bodies are unknown in a number of the Member States such as the United Kingdom, Sweden, Ireland, Portugal and, to some extent, the Netherlands. The Commission submits that there are situations in which the protection of workers is not based on contributions to a fund but rather on the direct assumption by employers of responsibility for obligations relating to holidays.

67. It does not fall within the scope of the present proceedings to analyse the possible remedies and determine which is the most advantageous, which depends on the situation prevailing in each Member State and on a variety of other factors, not all of them legal in nature (the application does not discuss the German system). It is appropriate to note that there are a number of options. [34]

68. The German scheme envisages one of those options only and does not contemplate any of the others. It is silent on the protection afforded to workers where an employer takes responsibility, in his place of establishment, for the obligations arising from paid leave, regardless of where those obligations have accrued, and the argument put forward by the representative of the German Government at the hearing, to the effect that undertakings in States which do not have paid-leave funds are exempt from paying the contributions, cannot be accepted because the wording of the national provision has the opposite meaning. The rule is therefore insufficient and the manner in which it is applied is immaterial; it is based solely on contribution to a fund which is similar to the national fund, leading to the

33 — Denmark (Arbejdsmerkedets Feriefond) is also referred to but the Commission and Germany both cite that Member State as a case which supports their conflicting arguments.

34 — In the Opinion in *Finalarte and Others*, Advocate General Mischo also referred to a number of alternatives, including that of an employer who is subject to the German holiday fund scheme and is not entitled, under the law of his State of establishment, to claim exemption from paying holiday pay to his posted workers. In such cases, contributions to the fund would be added to the latter obligation, thereby creating 'a serious, perhaps insurmountable, restriction of the freedom to provide services' (point 70).

imposition of an unjustified additional burden if there is no comparable fund in the State where the undertaking providing the services is established, without strengthening the rights of posted workers who are already protected in their State of origin. [35]

69. The German Government argues that the provision is justified on the ground that the application of Paragraph 1(3) of the AEntG is conditional on a prior assessment of the protection enjoyed by workers, with the result that the provision takes effect only if that protection is found to be inadequate, as is clear from the bilateral agreements concluded and from the judgment of 20 July 2004 of the Bundesarbeitsgericht (Federal Labour Court).

70. I do not agree with that reasoning. The Court's declaration that the protection of workers implies an initial assessment intended to identify the most advantageous rules does not prevent those rules from being harmonised later. Comparison of the provisions governing maximum working time and rest periods, minimum periods of paid leave, the minimum wage and health and safety measures will tip the balance. [36]

71. Germany's argument supposes that, if its legislation affords posted Community workers better rights with regard to paid leave — not just in respect of its duration — the German leave scheme applies in full, with the result that an employer must pay the contributions unless he has made payments to a comparable body, thereby excluding all other types of consideration and leading to the risk of double payment.

72. However, on the one hand, the provision for mutual recognition in the bilateral agreements makes compatibility with Community law dependent on the existence and the content of those agreements, in spite of the fact that in comparing 'bodies' other options are ignored, such as the fact that certain States may not have comparable bodies.

73. On the other hand, the Bundesarbeitsgericht has applied in this sphere the principle of 'the most favourable provision' in order to avoid an incompatibility which in fact it assumes, since the provision in question might not always call for judicial interpretation. This is the opposite view to that taken in *Commission* v *Italy*, [37] in which the Court found that the national provision itself was neutral but held that the manner in which it was construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione (Supreme Court of

35 — As Advocate General Mischo observed in the Opinion in *Finalarte and Others*, '[i]t might be ... that the worker receives essentially the same benefits under the law of his country of origin without there being a holiday fund' (point 112).

36 — Although it does not always have to be the State where the service is provided. Recital 17 in the preamble to Directive 96/71 states that the minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers.

37 — Case C-129/00 [2003] ECR I-14637.

Cassation), amounted to an infringement of Community law. In the present case, the Commission alleges that Germany has not ensured that the national provision, viewed objectively, complies with Community law, irrespective of the way in which the provision is applied in practice. Comparison of the wording of the provisions referred to is sufficient to demonstrate the alleged infringement.

74. I therefore consider that Paragraph 1(3) of the AEntG is contrary to Article 49 EC.

C — *The second plea in law: relating to the obligation to have documents translated*

1. Introduction

75. It is clear from Paragraph 2(3) of the AEntG that, when workers are posted to Germany, certain documents, such as the employment contract, payslips, time sheets and proof of payment of wages, must be translated into German.

76. The Commission contends that such a requirement constitutes an unjustified restriction of the freedom to provide services because if, in accordance with the judgment in *Arblade and Others*, the obligation to retain documents in the host Member State is not justified by the supervisory task with which the authorities are charged, nor is the obligation to translate those documents. Furthermore, the Commission describes the national provision as excessive and disproportionate on the ground that the cooperation provided for in Article 4 of Directive 96/71 renders translation unnecessary.

77. Germany and France contend that the restriction is lawful because it enables monitoring of compliance with employment legislation ensuring the protection of workers. The judgment relied on by the Commission must be interpreted out of its context, given the limited scope of the measure in issue in these proceedings, since, considering the small number of documents involved, their brevity and repetitious nature, the measure is proportionate in that it does not give rise to heavy administrative or financial burdens. Moreover, the system of cooperation provided for in Directive 96/71 must coexist with national rules, because the authorities of the Member States concerned do not have the documents in their possession and are unable to send them to the German authorities.

2. Examination of the plea

78. It is clear from the foregoing considerations that the parties agree that the requirement to translate documents amounts to a restriction of the freedom to provide services but disagree about whether that requirement is compatible with Community law. That dispute calls for an analysis of the judgment in *Arblade and Others* (a), and of the methods of mutual assistance provided for in Directive 96/71 (b), with a view to proposing a solution aimed at securing the protection of workers (c).

(a) The judgment in *Arblade and Others*

79. In that judgment, the Court replied to a number of questions which had been referred for a preliminary ruling by the Tribunal correctionnel (Criminal Court), Huy, Belgium, concerning '[t]he detailed rules regarding the keeping and retention of social documents' (paragraphs 71 to 79). The matters considered in that case included, inter alia, the obligation imposed on an employer established in another Member State to keep certain documents available for inspection by the national authorities on site or in an accessible and clearly identified place in the territory of the host Member State. The Court held that that burden was justified (paragraph 74) and that, with regard to the principle of proportionality, it is for the national court to indicate which documents are covered by such an obligation (paragraph 75).

80. The judgment also addressed the requirement to keep documents available and to retain them for five years at the address of a natural person in the host Member State. In line with the proposal I made in point 8[8] of my Opinion in the case, the Court held that those obligations 'cannot be justified' (paragraphs 77 and 78), adding that 'the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there' (paragraph 79).

(b) Cooperation under Directive 96/71

81. First of all, I must point out that Directive 96/71 does not delimit the framework in which this action for infringement of Article 49 EC must be determined, and instead merely concerns the appraisal of whether the conditions have been met which justify a restriction of the freedom to provide services in the form of the obligation to translate into German certain documents relating to the employment relationship.

82. Article 4 provides for two channels of cooperation with regard to information, which are foreshadowed in recitals 23

(between the Member States) and 24 (between the Member States and the Commission) in the preamble to the Directive. It is clear from the wording of the article that the cooperation provided for:

— has as its purpose the implementation of the Directive;

— takes place between the public authorities which are responsible for monitoring the terms and conditions of employment;

— consists specifically of the supply of information concerning the transnational hiring-out of workers and the terms and conditions of employment laid down in Article 3;

— is carried out by means of liaison offices or competent national bodies which the Member States have notified to each other.

(c) The solution proposed

83. *Arblade and Others* examined the obligation to retain documents, whereas in the present case the issue is the language in which those documents are drafted. That nuance makes it impossible to extrapolate the legal theory in that judgment, which did not include any examination of the issue of language, to this case.

84. On that premiss, it is clear that, if a document does not exist in German, the monitoring authorities will find it more difficult to carry out their task because, as the defendant government's representative pointed out at the hearing, they do not have direct access to the information. A rendering in the language of the State where the service is provided makes it easier to check the documents and contributes to the protection of workers. [38] The translation rule is therefore justified.

85. Furthermore, the rule is proportionate and appropriate because the difficulties generated by requiring the Member State to carry out the translation are greater than those generated by requiring the employer to do it. In the first situation, the national authorities would need to have the means to tackle translations from all the other Member States, leading to delays which might be detrimental to the rights of workers [39] and to the monitoring tasks, the success of which

38 — In the communication on the implementation of Directive 96/71, the Commission states that '[l]anguage barriers are the first problem' encountered in the monitoring of transnational postings (p. 15).

39 — It is important to recall the temporary nature of the posting. It is possible that, by the time an infringement comes to light and an attempt is made to redress it, the worker concerned will have returned to his State of origin.

would be dependent on the linguistic skills of the civil servants. In the second situation, the action required would not constitute a disproportionate burden, in the sense that it applies to three very repetitive documents which generally present an equivalent level of difficulty in all the languages, use standard wording, and are not excessively long. [40] As Germany's representative pointed out at the hearing, an unofficial translation is sufficient.

86. Clearly, there are other options, such as the drafting of multilingual documents. [41] However, to date, no legislative instruments in that field have been enacted. [42] In the light of the matters set out in the preceding point, that absence cannot be compensated for by the assignment of the task of translation to the State to which workers are posted.

87. Moreover, the cooperation mechanisms provided for in Directive 96/71 are not sufficient to replace, with the same guarantee of effectiveness, the obligation to have documents translated. [43] The aim of those mechanisms and the individuals responsible for their implementation are different, compatible, but not mutually exclusive. I support the view put forward by Germany and France that the employment authorities in the Member States are unable to transmit the documents, together with translations, because those documents are not in their possession. [44]

88. I also disagree with the complaint put forward by the Commission concerning the general nature of the obligation to translate documents, which the Commission contends is useful only in certain situations, since: (a) the failure to provide the documents in the language of the host State precludes, in practice, preventive monitoring and on-the-spot inspections; (b) creates greater legal uncertainty for employers; and (c) leads to delays in protecting workers' rights.

89. In short, Paragraph 2(3) of the AEntG is compatible with Article 49 EC.

40 — Article 2 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32) lays down the minimum information required.

41 — Support for a proposal of that kind may be found in paragraph 24 of the defence and paragraph 25 of the observations of the French Government. It is possible that employers' associations may opt for uniform European models.

42 — The Commission's Agent, in reply to a question I asked at the hearing, stated that he was unaware of any initiative in that regard, but the Agent of the German Government confirmed that there is a joint Commission-Member States study group which has yet to reach an agreement.

43 — The communication from the Commission — Guidance on the posting of workers in the framework of the provision of services — of 4 April 2006 (COM(2006) 159 final) implicitly acknowledges the urgent need to improve that cooperation since it discusses '[c]ooperation on information' in paragraph 3.

44 — That occurs in Germany, as the representative of that State acknowledged at the hearing. In such situations, the authorities must request the documents from the undertaking.

D — *The third plea in law: relating to the obligation to notify each posting*

1. Introduction

90. Paragraph 3(2) of the AEntG provides that foreign temporary employment agencies must give notification of the workers posted prior to the commencement of a job, in addition to notification of all changes of site, although that obligation may be transferred, by means of an agreement, to the undertaking using the worker's services.

91. The Commission argues that German temporary employment agencies are exempt from giving such notification, so that the transnational provision of services is made more difficult. There are, in its view, no grounds justifying the unequal treatment, nor is the inequality eliminated by the option to transfer the obligation.

92. The German Government asserts that the rule is compatible with Directive 96/71, which authorises the adoption of special provisions for temporary employment agencies, and with Article 49 EC, on the grounds that the rule ensures effective monitoring and improves the protection of workers without giving rise to excessive costs. The German Government also draws attention to the legislative reform under way which will ensure that the burden always falls on the user of a worker's services.

2. Examination of the plea

93. Notwithstanding what was asserted by Germany's Agent at the hearing, the obligation to notify each posting is not in issue but rather the identity of the person responsible for that task; Paragraph 3(2) of the AEntG applies only to Community suppliers of services not established in Germany, from which it follows that there is discrimination against such persons vis-à-vis persons established in that Member State.

94. The Court has held that a measure which provides that suppliers of services established in another Member State are afforded less favourable treatment than suppliers of services located on national territory, thereby giving rise to discrimination based on the place of establishment of the supplier or on the place of origin of the activity, is compatible with the Treaty only if it comes under one of the derogations explicitly laid down therein, such as the

derogations provided for in Article 46(1) EC. [45]

95. Accordingly, a restriction may be justified only on grounds of public policy, public health or public security, but not on general-interest grounds derived from case-law, such as the protection of workers, intended to justify measures applying without distinction. [46]

96. The circumstances put forward by the German Government to justify the unequal treatment do not come within public policy, public health or public security. That finding is not weakened by the fact that, as I stated in my Opinion in *Arblade and Others*, 'a substantial part of the legislation comprising social law relates to matters of public policy', in that it applies 'to all persons within the territory of the State in question' (point 85), since the contested provision does not fall into that category. The concept of 'public policy' in the Community context, especially when it is used as a justification for derogating from the principle of freedom to provide services, must be interpreted strictly; [47] it may be invoked in cases where there is a genuine and serious threat affecting one of the fundamental interests of society, [48] but that has not been proved in the present case.

97. Finally, the right to transfer that obligation to undertakings using the services of posted workers in Germany does not justify the discrimination either, because it is no more than a possibility. Imposing the obligation to give notification on such undertakings would remove the restriction, which does not appear to be particularly appropriate in any case since, as the German Government acknowledges, the user of a worker's services has access to more recent and more accurate information regarding the posting. [49] Meanwhile, the Court must find that there has been an infringement of Article 49 EC, because the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. [50]

45 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 24; Case C-288/89 *Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, paragraph 11; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 15; Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraphs 10 and 11; Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 16; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 15; and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 31.

46 — Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 29; *Kraus*, paragraph 32; *Gebhard*, paragraph 37; and *Cura Anlagen*, paragraph 32.

47 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33; Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 23; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 64 and 65; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 30.

48 — Case 36/75 *Rutili* [1975] ECR 1219, paragraph 28; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 8; Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17; *Bouchereau*, paragraph 35; and *Omega*, paragraph 30.

49 — Paragraph 38 of the reply.

50 — Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13; Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 17; Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23; Case C-63/02 *Commission* v *United Kingdom* [2003] ECR I-821, paragraph 11; and Case C-333/01 *Commission* v *Spain* [2003] ECR I-2623, paragraph 8.

VII — Corollary

98. On those grounds, I conclude that the pleas of inadmissibility submitted by the German Government must be dismissed. As concerns the pleas in law alleging that Germany has failed to fulfil its obligations, Paragraph 1(3) and Paragraph 3(2) of the AEntG infringe Article 49 EC, but Paragraph 2(3) of the AEntG is compatible with that provision of Community law.

VIII — Costs

99. Article 69(2) of the Rules of Procedure of the Court of Justice provides that the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. In accordance with Article 69(3) of the Rules of Procedure, where the claims are upheld in part, the Court may order that the costs be shared or that each party bear its own costs.

100. In view of the fact that both the Commission and the Federal Republic of Germany have applied for costs, and that I propose that two of the three pleas in law should be upheld, that State must bear two thirds of the costs of the Commission which must pay one third of the other party's costs.

101. Pursuant to the first paragraph of Article 69(4) of the Rules of Procedure, the Member State which has intervened in these proceedings must bear its own costs.

IX — Conclusion

102. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) declare that, by providing that undertakings established in another Member State which post workers to Germany in the framework of the provision of

services must pay contributions to the German paid-leave fund, even when the workers enjoy a similar level of protection under the law of the State of establishment, and by imposing on temporary employment agencies established in another Member State the obligation to give notification of each hiring-out of a worker to an undertaking using that worker's services in Germany, and of each job to which the worker is assigned, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC;

(2) dismiss the remainder of the action;

(3) order the Federal Republic of Germany to pay two thirds of the Commission's costs;

(4) order the Commission to pay one third of the costs of the Federal Republic of Germany;

(5) order the French Republic to pay its own costs.