OPINION OF ADVOCATE GENERAL LÉGER

delivered on 23 February 2006 [1]

1. By this action, the Commission of the European Communities seeks a declaration from the Court that, by making the posting of workers who are nationals of a non-member State by an undertaking established in another Member State subject to the acquisition by that undertaking of a document known as an 'EU-Entsendebestätigung' (EU Posting Confirmation), the issue of which by the competent Austrian authorities requires the fulfilment of two cumulative conditions relating, on the one hand, to the duration or stability of the employment relationship between that undertaking and the workers concerned and, on the other hand, to those workers being systematically subject to the employment legislation in force in Austrian territory during the period of the prospective posting, the Republic of Austria has failed to fulfil its obligations under Article 49 EC. The Commission also seeks a declaration from the Court that the Republic of Austria has failed to fulfil its obligations by prohibiting the grant of an entry or residence permit to a national of a non-member State who is posted by an undertaking established in another Member State, where that national has entered the national territory without a visa.

2. While the first complaint raised in this action bears some comparison with that examined by the Court in the judgment in *Commission* v *Luxembourg*, [2] and the judgment in *Commission* v *Germany*, [3] the second complaint, on the other hand, appears to be new, even though it exhibits certain links with that raised in that latter case. By that second complaint, the Commission asks the Court to assess whether national legislation seeking to enforce requirements relating to checks on the entry and residence of nationals of non-member States in the territory of a Member State is compatible with the rules of the EC Treaty on the freedom to provide services.

I — The relevant national legislation

3. In Austria, the posting in national territory of workers who are nationals of non-

1 — Original language: French.

2 — C-445/03 [2004] ECR I-10191.

3 — C-244/04 [2006] ECR I-885.

member States by an undertaking established in another State is governed by the Ausländerbeschäftigungsgesetz (Law on the employment of foreign nationals) ('AuslBG'),[4] and by the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contracts) ('AVRAG').[5]

4. Paragraph 18(1) of the AuslBG lays down the principle that the posting of foreign nationals in the national territory by an undertaking which does not have its registered office in Austria is subject to prior authorisation. A number of exceptions to that principle are provided for certain undertakings or activities.

5. Those various exceptions include that provided for in Paragraph 18(12) of the AuslBG (as modified by an amendment in force since 1 January 1998) as being applicable to the posting of nationals of non-member States by a foreign undertaking which has its registered office in another Member State of the European Community for the purpose of providing services in Austrian territory. Such an operation is subject to a special procedure known as an 'EU Posting Confirmation' and not to that applicable under general law to the posting of foreign nationals, which, as I have just pointed out, is an authorisation procedure.

4 — BGBl. 1975, p. 218.

5 — BGBl. 1993, p. 459.

6. The EU Posting Confirmation procedure, which is at issue in these proceedings, operates as follows.

7. Firstly, an undertaking established in a Member State other than Austria which wishes to make a posting must make a prior declaration to that effect to the competent national authorities, that is to say, the regional office of the national employment service.

8. That office must then issue to the undertaking in question a document known as an 'EU Posting Confirmation', which is described as constituting acknowledgement of the notice. The issue of that document, within a period of six weeks from receipt of the aforementioned notice, is subject to the fulfilment of two cumulative conditions. Those conditions, set out in Paragraph 18(13) of the AuslBG, are as follows.

9. Firstly, it is necessary that 'the foreign national has been employed lawfully and habitually for at least one year by the undertaking making the posting in the country in which the undertaking has its registered office, or [has] concluded with that undertaking an employment contract of indefinite duration, and has the relevant work permits which are required by the posting State for the employment of nationals of non-member countries'.

10. Secondly, the workers in question must be subject, for the duration of their prospective posting, to the pay and working conditions and social security provisions applicable under Austrian law.

11. In addition to those requirements concerning the EU Posting Confirmation procedure, Paragraph 7(b)(3) and (9) of the AVRAG imposes on an undertaking established in another Member State of the European Economic Area which wishes to post its workers to Austria the obligation, on pain of a fine, to make a declaration to that effect to the central coordinating office for the control of illegal employment, which forms part of the Federal Ministry of Finance. That declaration, which is additional to that made to another department as part of the EU Posting Confirmation procedure, must, in principle, be given at least a week before commencement of the work to be carried out on posting. The declaration must include a number of items of information concerning the persons involved in the posting operation and the arrangements governing it. [6] The department to which the declaration has been sent then forwards it to various social security bodies and to the Labour Inspectorate.

12. Moreover, the Fremdengesetz (Law on foreign nationals) ('FrG') [7] requires nationals of non-member States, in particular those who carry on a professional activity in Austria without being resident there, to hold an entry and residence permit, unless an international agreement provides otherwise. [8]

13. Paragraph 10(1)(3) of the FrG provides that 'an entry or residence permit must be refused where ... the residence permit ... [except for certain categories of persons] is to be granted following entry without a visa'. That article thus precludes the issue of an entry or residence permit to a national of a non-member State who is posted by an undertaking established in another Member State, where that national has entered Austrian territory without having previously obtained the necessary visa. In other words, where that national has entered the national territory unlawfully, without having previously been authorised to enter and, subsequently, reside there, his situation cannot be regularised *in situ* by the issue of an entry or residence permit.

II — The pre-litigation procedure

14. Following an exchange of correspondence between the Republic of Austria and

6 — Those items of information, listed in Paragraph 7(b)(4) of the AVRAG, are as follows: (1) the name and the address of the employer; (2) the name of the person acting on behalf of the employer; (3) the name and address of the national undertaking requesting the posting; (4) the names, dates of birth and social security numbers of the workers posted to Austria; (5) the commencement and probable duration of the employment within Austria; (6) the amount of remuneration payable to the worker; (7) the place of employment in Austria; (8) in the case of construction work, the type of activity in question and the task to which the worker is assigned.

7 — BGBl. I 1997, p. 75.

8 — See the combined provisions of Paragraphs 2(1), 5(1) and (2), and 7(4)(4) of the FrG.

the Commission and the receipt by the latter of a complaint, the Commission, taking the view that that Member State had failed to fulfil its obligations under Article 49 EC, gave formal notice to the Austrian Government by letters of 14 July 1997 and 2 July 1998 [9] to submit its observations.

15. Unconvinced by the observations submitted by the Republic of Austria, the Commission, by letter of 5 April 2002, sent it a reasoned opinion calling on it to take the measures necessary to comply with its obligations under that article within two months of notification of the reasoned opinion.

16. Since the Austrian authorities stated that they did not intend to amend the national legislation in question, the Commission decided to bring the present action by application lodged at the Court Registry on 5 April 2004.

17. Having been granted leave to intervene in the proceedings in support of the Republic of Austria, by order of the President of the Court of 26 October 2004, the Kingdom of the Netherlands withdrew its intervention by letter of 16 December 2004, with the result that, by a further order of the President of the Court of 4 February 2005, that Member State was removed as an intervener in the proceedings.

III — The action

18. It should be recalled that, in support of its action, the Commission raises two complaints relating, on the one hand, to the EU Posting Confirmation procedure and, on the other hand, to the impossibility for a posted worker who is a national of a non-member State to regularise *in situ* his situation with regard to his entry and residence within national territory. I shall consider each of those two complaints in turn.

A — *The first complaint relating to the EU Posting Confirmation procedure*

1. Arguments of the parties

19. By its first complaint, the Commission claims that the Republic of Austria has infringed Article 49 EC by making the posting of workers who are nationals of

9 — The second letter, of 2 July 1998, takes account of the amendments to the AuslBG which came into force on 1 January 1998, by which (as I have already pointed out in point 5 of this Opinion) the 'authorisation' procedure was replaced by the 'EU Posting Confirmation' procedure for nationals of non-member countries posted by an undertaking established in a Member State other than Austria.

non-member States by an undertaking established in another Member State subject to the acquisition by that undertaking of an EU Posting Confirmation, the issue of which requires, on the one hand, that an employment relationship has been in existence for at least one year between the workers in question and that undertaking or that an employment contract of indefinite duration has been concluded between them, and, on the other hand, that those workers are subject to the pay and working conditions existing in the national territory for the duration of the prospective posting.

20. In support of that complaint, the Commission submits that, contrary to what the Austrian Government claims, the EU Posting Confirmation procedure is not purely declaratory, but gives rise to a genuine authorisation the issue of which is made subject to the fulfilment of certain conditions. In the Commission's view, that authorisation requirement places a restriction on the freedom to provide services in so far as, in view of the administrative and financial burdens and time involved, it discourages undertakings established in another Member State from posting their workers to Austria for the purpose of providing services there.

21. The Commission further argues that, whether or not it is discriminatory, [10] that restriction is, in any event, disproportionate to the objectives of protecting workers and combating abusive practices pursued by the imposition of the EU Posting Confirmation and by the conditions or requirements relating to it.

22. More particularly, the Commission claims that the requirement relating to compliance with the pay and working conditions applicable in Austria is redundant since it is already taken into account during the checks to that end introduced by the AVRAG to transpose 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. [11]

23. It also contends that the further requirement concerning the stability of the employment relationship between the undertaking concerned and the workers affected by the planned posting has the effect not only of rendering the possibility of posting workers who are nationals of non-member countries illusory in some sectors but also of disadvantaging those workers rather than protecting them.

24. Although the Republic of Austria recognises that the EU Posting Confirmation

10 — As the Commission pointed out in paragraph 35 of its application, its approach is unaffected by the question whether the national legislation at issue is discriminatory.

11 — OJ 1997 L 18, p. 1.

procedure is capable of restricting the freedom to provide services, it none the less disputes the assertion that that measure is disproportionate to the objective of protecting workers which it seeks to pursue. It submits that the contested procedure, which it describes as declaratory, is not only not the same as that applicable under the AVRAG, which, it contends, does not involve any checks on compliance with pay and working conditions, but is also fully consistent with the judgment of the Court in *Vander Elst*, [12] according to which workers who are nationals of non-member States and who are not subject to an authorisation requirement must, for the purposes of posting, satisfy the condition of being lawfully and habitually employed by the service-providing undertaking.

2. Assessment

25. I take the view that the first complaint is well founded.

26. Before examining whether, as I consider, the Treaty rules on the freedom to provide services preclude the national legislation at issue concerning the posting of workers, I shall at the outset determine whether such rules are actually intended to apply in that field.

(a) Applicability of the Treaty rules on the freedom to provide services to the posting of workers

27. In paragraph 25 of the judgment in *Commission* v *Luxembourg*, the Court pointed out that the posting of workers who are nationals of non-member States in the framework of the provision of cross-border services was not harmonised at Community level since the relevant Proposal for a Directive of the European Parliament and of the Council tabled by the Commission on 12 February 1999 had not been adopted. [13] As the Court has recently held that observation remains valid. [14] That proposal was ultimately abandoned by the Commission in August 2004, that is, some months after the present action for failure to fulfil obligations was brought.

28. With regard to Directive 96/71, while it is applicable irrespective of the nationality of the workers in question and thus, in particular, to those who are nationals of

12 — Case C-43/93 [1994] ECR I-3803.

13 — OJ 1999 C 67, p. 12.

14 — Judgment in *Commission* v *Germany*, paragraph 32.

non-member States, the harmonisation which it introduces remains partial rather than complete. [15]

29. It follows that the Treaty rules on the freedom to provide services are indeed intended to govern the posting of workers who are nationals of non-member States in the context of the provision of cross-border services.

30. I take the view that those Treaty rules, as the Commission maintains in its first complaint, preclude a Member State from making the posting of workers who are nationals of a non-member State by an undertaking established in another Member State subject to the acquisition by that undertaking of an EU Posting Confirmation, the issue of which requires, on the one hand, that an employment relationship has been in existence for at least one year between the workers in question and that undertaking or that an indefinite employment contract has been concluded between them and, on the other hand, that those workers are subject to the pay and working conditions existing in the national territory of the first Member State for the duration of the prospective posting.

31. I shall now explain this by examining, firstly, the restrictive effect of the contested EU Posting Confirmation procedure and, secondly, whether it is justified and, if so, whether it is proportionate in relation to certain objectives in the general interest.

(b) The restrictive effect of the contested EU Posting Confirmation procedure on the freedom to provide services

32. It is settled case-law that legislation of a Member States which makes the provision of certain services in the national territory by an undertaking established in another Member State subject to the issue of an administrative licence constitutes a restriction on the freedom to provide services. [16]

33. Contrary to what the Austrian Government claims, the requirement in Paragraph 18(12) of the AuslBG to obtain an EU Posting Confirmation before the posting is

15 — Unlike the 1999 proposal for a directive, which, as has been seen, was recently abandoned, Directive 96/71 does not lay down any specific procedure as being applicable to the posting of workers in the framework of the provision of cross-border services. That directive is essentially limited to guaranteeing, in principle, that workers who are posted to provide such a service will benefit from the application of certain rules, in force in the Member State within the territory of which that service is provided, concerning certain working and employment conditions. Moreover, although that directive leaves it to the Member States to enforce those rules, they may do so, as recital (12) in its preamble points out, only by the appropriate means for that purpose, that is to say, means which do not infringe the Treaty provisions on the freedom to provide services.

16 — See, in particular, the judgments in Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 14; Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 35; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 22; Case C-263/99 *Commission* v *Italy* [2001] ECR I-4195, paragraph 21; and, with regard to the posting of workers, the aforementioned judgments in *Vander Elst*, paragraph 15, *Commission* v *Luxembourg*, paragraph 24, and *Commission* v *Germany*, paragraph 34.

effected is not a mere declaration to the competent administrative authorities.

34. While it is true, as I have pointed out, [17] that the issue of an EU Posting Confirmation presupposes that the employer wishing to make such a posting has already notified the competent administrative authorities to that effect, it is still necessary for the latter to agree to issue that confirmation. Since the grant of the confirmation is subject to the fulfilment of several conditions and it is for the aforementioned authorities to ascertain whether those conditions have been met, there is no doubt that such confirmation must be regarded as an administrative authorisation, and not as a mere acknowledgement, issued automatically or systematically, that the prior notice required has been given. [18]

35. It follows that Paragraph 18(12) of the AuslBG represents an obstacle to the posting of workers who are nationals of non-member States by an undertaking established in another Member State and, in consequence, to the pursuit by that undertaking of activities involving the provision of services.

36. This is particularly true given that, as that paragraph provides, the issue of an EU Posting Confirmation may take up to six weeks from receipt of the required prior notice. As the Commission has pointed out, this is a particularly long time, especially in the context of the provision of maintenance services, which are usually requested urgently.

37. It must therefore be concluded that, simply by making the posting of workers who are nationals of non-member States subject to the acquisition of prior administrative authorisation, the national legislation at issue imposes a restriction on the freedom to provide services.

38. In addition to the restriction arising from the requirement of such authorisation, are those resulting from the specific conditions which must be fulfilled before it can be issued, which, I would reiterate, relate, under Paragraph 18(13) of the AuslBG, on the one hand, to the duration or continuity of the employment relationship between the undertaking concerned and the workers affected by the planned posting and, on the other

17 — See point 7 of this Opinion.

18 — Accordingly, the national legislation at issue (which, as I said in points 4 and 5 of this Opinion, has since 1 January 1998 been applicable only to the posting of foreign nationals, such as nationals of non-member States, by an undertaking established in a Member State other than Austria) is not, in the final analysis, fundamentally different from that which existed previously (which was applicable to all postings of foreign nationals by foreign undertakings, whether those undertakings were established in a non-member country or in another Member State).

hand, to those workers being systematically subject to the pay and employment legislation existing in Austria during the period of that posting. [19]

39. After all, the imposition of such conditions places on the undertaking concerned specific administrative and financial burdens associated, in particular, with the need to prove that those conditions have been met and the correlative requirement to have acted accordingly, either by establishing with the workers in question an employment relationship which has been in place for at least one year, or by concluding employment contracts of indefinite duration with them, and by systematically subjecting those workers to the pay and working conditions in force in Austria for the duration of the planned posting, which may have necessitated a corresponding change to their existing employment contracts. Such burdens can only discourage undertakings established in another Member State from posting workers who are nationals of non-member States to Austria for the purpose of providing services there. [20]

19 — The Court adopted a comparable line of reasoning, by drawing a distinction between a restriction on the freedom to provide services arising from the requirement of prior administrative authorisation *per se* and the additional restriction resulting from the specific conditions to be met for obtaining such authorisation, in the judgments cited above in *Commission* v *Italy*, paragraph 21, and *Commission* v *Luxembourg*, paragraphs 23 and 24. See also, to that effect, the judgment in *Commission* v *Germany*.

20 — See to this effect, inter alia, the judgments in Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 24; 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 30; Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 18, and *Commission* v *Luxembourg*, paragraphs 23, 24 and 30.

40. It follows from all the foregoing considerations that the contested EU Posting Confirmation procedure, provided for in Paragraph 18(12) and (13) of the AuslBG, constitutes, on a number of grounds, a restriction on the freedom to provide services.

41. It is now necessary to examine whether such a restriction is none the less capable of being justified and, if so, whether it is proportionate. Before considering whether that is the case, it is important to determine which categories of justification can be relied on in support of the restriction at issue.

(c) The categories of justification capable of being relied on in support of the restriction at issue

42. Echoing the arguments put forward by the Austrian Government in the pre-litigation procedure, the Commission considered whether the requirements relating to the protection of workers and the prevention of abusive practices are capable of justifying the national legislation at issue, irrespective of whether or not that legislation is discriminatory.

43. I am not convinced that this is an appropriate approach to follow.

44. After all, according to traditional case-law, to which the Court continues to refer, [21] national legislation which reserves for service-providing companies established in another Member State treatment different from that stipulated for those established in the national territory and which thus discriminates on the basis of the establishment of the service provider or the origin of the service is compatible with the Treaty rules on the freedom to provide services only if it is capable of falling within a derogation expressly provided for by the Treaty, such as that contained in Article 46(1) EC, to which Article 55 EC refers.

45. It follows that, in principle, such national legislation is capable of being justified only on grounds of public policy, public security or public health, in accordance with the combined provisions of those articles of the Treaty, and not by overriding reasons in the public interest, a head of justification developed by the Court, such as those relating to the protection of workers or the safeguarding of stability in the labour market (to which the prevention of abusive practices contributes), since the latter category of justification is in theory applicable only to non-discriminatory measures, that is to say those applicable without distinction (which apply to all those who intend to provide their services within the territory of the Member State which has adopted such a measure, in other words both to service providers established in that Member State and to those established in other Member States). [22]

46. While it is true that several developments in the case-law on the freedom to provide services are not entirely unambiguous with regard to the types of justification

21 — See, in particular, the judgments in Case C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 and 33; 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 5, 6, 10 and 11; Case C-17/92 *Fedicine* [1993] ECR I-2239, paragraphs 14 to 16; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraphs 12 and 15; and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraphs 30 and 31. To the same effect, see, in particular, the judgments in Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 16, concerning national legislation discriminating on the basis of the residence of a natural person in receipt of a service; and, as regards the freedom of establishment, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 32. See also to this effect, in the context of the freedom to provide services, the judgment in Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraphs 19 and 20, concerning national legislation discriminating on the basis, *inter alia*, of the nationality of natural persons in receipt of services. For a converse line of reasoning to the same effect, see the judgment in Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 29.

22 — In the judgment in *Säger*, cited above, the Court went beyond the traditional 'national treatment' rule by holding that 'Article 59 of the Treaty [now Article 49 EC] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality 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, when it is liable to prohibit or otherwise [to] impede the activities of a provider of services established in another Member State where he lawfully provides similar services' (paragraph 12). That broad understanding of the requirements arising from the freedom to provide services, which has also been adopted in respect of other fundamental freedoms guaranteed by the Treaty, has been combined with a relaxation of the rules relating to permissible heads of justification, in the form of the recognition — in respect of measures applicable without distinction — of a number of overriding reasons in the general interest covering an appreciably broader range of heads of justification than Article 46(1) EC, to which Article 55 EC refers.

which are permissible,[23] that ambiguity is essentially a reflection, it would seem, of the difficulties the Court has experienced in classifying certain national rules as discriminatory, and of the Court's concern to respect the powers of the Member States in the field of direct taxation.[24]

47. However, such considerations have no bearing on the national legislation at issue here since, on the one hand, the posting of workers does not fall within a field of competence reserved for the Member States (such as direct taxation) and, on the other hand, that legislation seems to be clearly discriminatory.

48. For, only companies established in a Member State other than the Republic of Austria are subject, it seems, to the contested EU Posting Confirmation procedure. The documents currently before the Court do not show that companies established in Austria which post workers who are nationals of non-member States within the national territory are also subject to the same or a comparable procedure.

49. It thus seems that, unlike that referred to in the judgment in *Commission* v *Luxembourg*, cited above,[25] the national legislation at issue in these infringement proceedings must be regarded as providing for different treatment based on the establishment of the company providing services which intends to post workers. Such a difference in treatment is overtly discriminatory.

23 — That ambiguity takes different forms. In most cases, the Court (without ruling on the question of discrimination) has confined itself to stating whether the national legislation at issue constitutes a mere obstacle to the freedom to provide services or a 'difference in treatment' putting operators which wish to exercise their rights under that freedom at a specific disadvantage, has then examined whether that legislation falls within the scope of a head of justification not expressly provided for by the Treaty, and has finally concluded that it does not or has provided evidence to that effect for the benefit of the national court. That was the approach followed in the judgments in Case C-118/96 *Safir* [1998] ECR I-1897, paragraphs 24 to 30 and 34; Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 36 et seq.; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 33 to 39; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 30 et seq.; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 57 et seq. More rarely, in order to respond to the arguments relied on by the parties, the Court has examined the contested national legislation with reference not only to justifications expressly provided for by the Treaty but also to other kinds of justification, although the Court has been at pains to classify that legislation as discriminatory, and has finally concluded that it was not justified. See, to that effect, the judgment in *Svensson and Gustavsson*, cited above, paragraph 15 et seq., and the judgment in Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 21 et seq.

24 — In this regard, see the Opinion of Advocate General Tesauro in *Safir*, (points 30 to 34, which highlight the difficulties involved in classifying certain national rules in terms of discrimination), and the Opinion of Advocate General Poiares Maduro in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, points 25 to 32, which point, on the one hand, to the Court's reluctance to go beyond the national treatment rule in the field of direct taxation, given the concern to preserve the integrity of national tax systems and, on the other hand, to the difficulties in establishing discrimination in this field by reference to the criteria laid down in the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225, according to which regard must be had to the objective differences between the situations in question.

25 — In paragraph 25, the Court was at pains to point out that the national legislation at issue applies without distinction to undertakings established outside or inside the territory of the Grand Duchy.

50. I infer from this that the considerations which seem to have given rise to a degree of imprecision in the case-law on the type of justifications which are permissible in the context of restrictions on the freedom to provide services have no place in this case.

51. On the basis of the predominant trend of the Court's case-law, which, it will be recalled, states that, in the field of the freedom to provide services, discriminatory national legislation is justifiable only on grounds of public policy, public security or public health, it is therefore necessary to examine whether that is the case with the restriction at issue, although there has been no discussion on this matter between the parties to these infringement proceedings.

(d) Possible justification for the restriction at issue on grounds of public policy, public security or public health

52. It must be stated that the contested legislation is largely unconnected with such considerations.

53. The Court has repeatedly held that such justifications, in as much as they derogate from a fundamental freedom guaranteed by the Treaty, must be interpreted strictly, so that, in particular, that relating to public policy can be relied on only in the case of a 'genuine and sufficiently serious threat ... affecting one of the fundamental interests of society'. [26] I find it hard to imagine that the requirement of an EU Posting Confirmation would constitute such a specific situation or, in any event, that it is proportionate to the objective of protecting public policy, which, moreover, cannot encompass considerations relating to the protection of workers or the safeguarding of stability in the labour market. In my view, preservation of public policy would fall more within the scope of legislation having the specific purpose of controlling the entry and residence of nationals of non-member States in the national territory, such as that referred to in the second complaint raised in these infringement proceedings.

54. However, it is precisely because of that strict interpretation of the derogations provided for in Article 46 EC, such as that relating to public policy, that some argue that other heads of justification should be permitted which are just as legitimate or overriding as those expressly provided for by the Treaty in order to unify the system of justifications applicable to restrictions on the freedom to provide services, irrespective of

26 — See, in particular, the judgments in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 and 35; Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 46; Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 21 and 23; Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17; and the judgment in *Omega*, paragraph 30.

whether or not those restrictions are discriminatory. [27]

55. To date, the Court has not formally gone down that road, although, as I have just pointed out in relation to *Danner*, it was vigorously invited to do so.

56. For my part, I have some reservations about such an invitation. After all, if the Court were to act on it, it would be going beyond the wording of Article 46 EC (to which Article 55 EC refers), not to say infringing it, since it would be accepting that reasons other than those expressly, or even exhaustively, referred to in Article 46 EC are capable of justifying national legislation laying down special rules for foreign nationals, such as that at issue, which reserves specific rules for undertakings providing services established in a Member State other than Austria which intend to post workers who are nationals of non-member States within the national territory.

27 — See, in particular, the Opinion of Advocate General Jacobs in *Danner*. He proposed that the discriminatory nature of national legislation be taken into account not at the stage of examining the justifications relied on, but at the subsequent stage of examining the proportionality of the restriction at issue in the light of the relevant head of justification, although 'the more discriminatory the measure, the more unlikely it is that the measure complies with the principle [of proportionality]' (point 40).

57. In any event, even if the Court were to decide otherwise in this case, in my view, the same conclusion would have to be drawn, that is to say that the Republic of Austria has failed to fulfil its obligations under Article 49 EC. This will become apparent from an examination of the restriction at issue in the light of the objectives that the Republic of Austria claims to be pursuing, that is to say, on the one hand, the protection of workers and, on the other hand, the safeguarding of stability in the labour market.

(e) Possible justification for the restriction at issue on grounds of protecting workers and safeguarding stability in the labour market

58. In this regard, I shall refer at length to the analysis set out in the judgment in *Commission* v *Luxembourg*, which was delivered some months after these proceedings were initiated.

59. It is therefore important to recall the content of that judgment (which was reproduced in full in the recent judgment in *Commission* v *Germany*) before considering the precise consequences to be drawn from it for the purposes of this case.

(i) The judgment in *Commission* v *Luxembourg*

60. In the judgment in *Commission* v *Luxembourg*, the Court examined whether national legislation broadly comparable with that at issue in this case was compatible with the Treaty rules on the freedom to provide services. More specifically, that legislation made the posting of nationals of non-member States by an undertaking established in national territory or in another Member State subject to the acquisition by that undertaking of individual work permits or a collective work permit, the issue of which by the Luxembourg authorities depended, in particular, on considerations relating to the employment market and the existence for at least six months prior to the deployment of an employment relationship between the workers in question and the undertaking of origin through a contract of employment of indefinite duration.

61. The Court held that that national legislation constituted a restriction on the freedom to provide services which was not proportionate to the objectives purportedly pursued by it, neither that relating to the protection of workers, nor that in respect of stability in the labour market.

62. In connection with the overriding reason in the public interest based on the protection of workers, the Court pointed out that, according to its case-law, 'Community law does not preclude Member States from applying their legislation ... 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 emerges 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'. [28]

63. However, according to the Court, the requirement of a work permit does not constitute an appropriate means of guaranteeing the protection of workers. The proof of this, it states, is that, '[a] measure which would be just as effective whilst being less restrictive than the measure at issue here would be an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment'. [29] Such a report 'would enable those authorities to monitor compliance with [national] social welfare legislation during the deployment while at the same

28 — Paragraph 29 of the judgment in *Commission* v *Luxembourg*, reproduced in paragraph 44 of the judgment in *Commission* v *Germany*. Directive 96/71 forms an extension of most of the case-law cited in the aforementioned paragraph 29. See, to that effect, Article 3(1) and (7) of that directive, which, it should be recalled, requires the Member States to ensure that, whatever the law applicable to the employment relationship, undertakings providing services guarantee that workers posted within their territory benefit from the working and employment conditions applicable there, without prejudice to the application of conditions which are more favourable to workers.

29 — Paragraph 31 of the judgment in *Commission* v *Luxembourg*, reproduced in paragraph 45 of the judgment in *Commission* v *Germany*.

time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin'. [30]

64. The Court further held that making the granting of that permit subject to the requirement that an employment contract of indefinite duration must have been in existence between the workers and their undertaking of origin for at least six months before the commencement of their posting to Luxembourg goes beyond what is required for the protection of workers. The Court relied on the following three grounds.

65. Firstly, 'that requirement is liable to make considerably more complicated the deployment in Luxembourg of workers who are nationals of non-member countries for the purposes of providing services in sectors where, due to the particular features of the activity in question, frequent use is made of short-term and service-specific contracts'. [31]

66. Secondly, that same requirement 'affects the situation of newly-created undertakings which wish to provide services in Luxembourg using workers who are nationals of non-member countries'. [32]

67. Thirdly, it 'does not take account of the social measures by which the undertaking intending to deploy is bound in the Member State of origin, particularly as regards working conditions and remuneration, under the law of the Member State in question or a possible agreement in place between the European Community and the non-member country concerned, the application of which is likely to eliminate any significant risk of workers being exploited or of competition between undertakings being distorted'. [33]

68. The Court concluded that neither the requirement of a work permit nor the correlative requirement concerning the duration and stability of the employment relationship between the workers affected by the posting and their employer of origin is proportionate to the objective of protecting workers.

69. According to the Court, the same conclusion must be drawn in the light of the objective of ensuring that the local labour market is not destabilised by a flood of workers who are nationals of non-member States.

70. For, it held, 'although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason of general interest ..., workers employed by an undertaking established in a Member State and

30 — Ibid.

31 — Paragraph 33.

32 — Paragraph 34.

33 — Paragraph 35.

who are deployed to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work'. [34]

71. The Court pointed out that it had, however, already accepted 'that a Member State must be able to check whether an undertaking established in another Member State and which deploys in its territory workers who are nationals of a non-member country is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service in question, for instance, that of bringing his workers for the purpose of placing workers or making them available ... [provided that it] observe[s] the limits imposed by Community law and in particular those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities'. [35]

72. However, according to the Court, the Luxembourg legislation at issue goes beyond the limits laid down by Community law in two respects. On the one hand, 'the need to obtain a work permit is, because of the formalities and procedural delays inherent in the process, likely to make it less attractive to engage in the freedom to provide services in Luxembourg using workers who are nationals of a non-member country', with the result that that fundamental freedom is rendered illusory. [36] On the other hand, the exercise of that freedom is subject to the discretion of the local authorities since it depends on the issue by them of a work permit which is exceptional and is dictated by the labour market situation as assessed by those authorities.

73. As regards the requirement relating to the duration and continuity of the employment relationship between the workers in question and their employer of origin (to which the issue of a work permit is made subject), the Court held that it was disproportionate to the objective of ensuring that the workers would return to their Member State of origin at the end of their deployment.

74. It held that '[a]n obligation imposed on a service-providing undertaking to provide the local authorities with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which that undertaking employs them would give those authorities, in a less restrictive but just as effective a manner as the requirements at issue here, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which

34 — Paragraph 38, which refers to the judgment in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraphs 13 and 15, and to the judgments in *Vander Elst*, paragraph 21, and *Finalarte and Others*, paragraph 22.

35 — Paragraphs 39 and 40, which refers to the judgment in *Rush Portuguesa*, paragraph 17.

36 — Paragraph 41.

the service-providing undertaking is established'.[37] The Court added that, '[c]ombined with the information provided by that undertaking concerning the anticipated period of deployment ..., that information would enable the Luxembourg authorities to take, as appropriate, the measures necessary at the end of that period'.[38]

75. The Court inferred from this that neither the requirement of a work permit nor the correlative requirement concerning the duration and continuity of the employment relationship between the posted workers and their employer of origin is proportionate to the objective of ensuring that the labour market is not destabilised.

76. It thus reached the same finding as that arrived at in respect of the objective of protecting workers. The Court concluded from this that the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 49 EC.

(ii) The consequences to be drawn from the judgment in *Commission* v *Luxembourg*

77. If the Court were, in the present case, to examine the national legislation at issue in the light of overriding reasons in the general interest, such as those relating to the protection of workers or the safeguarding of stability in the labour market, that case-law would be broadly transposable. The consequences which would have to be drawn from it would be as follows: neither the requirement of an EU Posting Confirmation nor the conditions attaching to it are proportionate either to the objective of protecting workers or to that of preventing the destabilisation of the labour market, with the result that the Republic of Austria has indeed failed to fulfil its obligations under Article 49 EC.

78. It may even be considered that what is true of the Luxembourg legislation above is particularly true of the Austrian legislation at issue here.

79. After all, the conditions which the Austrian legislation attaches to the issue of the prior authorisation at issue are, in a number of respects, even more restrictive than those laid down by the Luxembourg legislation.

80. Firstly, the requirement of an employment contract of indefinite duration and that concerning the duration of the employment relationship between the workers concerned and the employer of origin prior to the posting are imposed systematically under Austrian law, whereas, under Luxembourg law, they are applicable only in the context of

37 — Paragraph 46, expanded upon in paragraph 41 of the judgment in *Commission* v *Germany*.

38 — Ibid.

an application for a collective work permit and not in the context of an application for an individual work permit.

81. Moreover, the length of service requirement laid down by the Austrian legislation, even though it does not apply cumulatively with that concerning an employment contract of indefinite duration, is stricter than the condition laid down by the Luxembourg legislation, since the length of service required is one year and not merely six months. [39]

82. Finally, unlike in *Commission* v *Luxembourg*, the national legislation at issue here lays down an additional requirement in that it systematically makes the workers concerned subject to the Austrian pay and employment legislation for the duration of their posting. That additional requirement restricts yet further the posting of workers by an undertaking established in another Member State and, as a consequence, the provision of services by that undertaking. That requirement is, moreover, disproportionate to the objective of protecting workers, since, on the one hand, it is linked to a prior administrative authorisation scheme and, on the other hand, it is systematic, with the result that no account is taken of the level of protection from which the workers concerned benefit in the Member State in which the service-providing undertaking which employs them is established. [40]

83. Moreover, as the Commission has pointed out, the service-providing undertaking is already required to provide the national authorities, by prior notice, with certain items of information such as the amount of remuneration payable to the worker for the duration of the prospective posting. [41] That formality, which was introduced when the aforementioned directive was transposed and which is not challenged by the Commission, plays a significant part in helping to enforce, if necessary, the working and employment conditions in force in the national territory, in particular by facilitating any checks carried out *in situ* by the competent authorities during the period of posting referred to in the aforementioned notice. To require, in addition, that the service-providing undertaking should systematically provide proof of compliance with those conditions during the prospective posting, as part of a prior administrative authorisation procedure, goes beyond what is necessary to ensure the protection of workers.

39 — This was pointed out by Advocate General Geelhoed in point 34 of his Opinion in *Commission* v *Germany*, in connection with a similar condition requiring the workers concerned to have a length of service of one year with the undertaking of origin, although no condition — whether cumulative or alternative — concerning the conclusion of an employment contract of indefinite duration was applicable in that case.

40 — See, to this effect, paragraph 29 of the judgment in *Commission* v *Luxembourg*, reproduced in point 62 of this Opinion. The requirement at issue also goes beyond the provisions laid down by Directive 96/71 to protect workers, since not only is that requirement systematic, therefore excluding the application of any conditions more favourable to workers which are in force in the Member State of origin, contrary to Article 3(7) of that directive, but it also forms part of a prior administrative authorisation procedure, which does not constitute an appropriate means, within the meaning of that directive, of enforcing the pay and working conditions concerned.

41 — See point 11 and footnote 6 of this Opinion.

84. I infer from this that, if the Court were to examine the national legislation at issue in the light of the objectives of protecting workers or safeguarding stability in the labour market, it could only conclude that the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

85. Contrary to what the Austrian Government claims, in my view, it matters little that, unlike the national legislation at issue in the judgment in *Commission* v *Luxembourg*, the issue of the contested work permit is subject not to the discretion of the local authorities, [42] that is to say to considerations such as the situation in the labour market, but only to objective verification that the conditions relating, on the one hand, to the duration or continuity of the employment relationship and, on the other hand, to the workers concerned being subject for the duration of their posting to the pay, employment and social security rules in force within the national territory, have been fulfilled.

86. For, even if, as the Austrian Government maintains, the introduction of the EU Posting Confirmation procedure serves to verify that an undertaking established in another Member State which posts in Austrian territory 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 in question, such as that of bringing its workers for the purpose of placing them or making them available, the fact remains that, as the Court pointed out in paragraph 40 of the judgment in *Commission* v *Luxembourg*, such checks are permissible, in the light of the objective of preventing destabilisation in the local labour market, only if they observe the limits imposed by Community law and in particular those stemming from the freedom to provide services.

87. The Court has imposed two limits on checks of this kind. One prevents the exercise of the freedom to provide services from being subject to the discretion of the administration. The other prevents that fundamental freedom guaranteed by the Treaty from being rendered illusory. In order for the checks at issue to be permissible, it is therefore not sufficient that they are in no way discretionary. It is also necessary that they should not render the freedom to provide services illusory. However, in my view, that is precisely the situation in the case of the checks carried out under the EU Posting Confirmation procedure.

88. After all, it should be recalled that, as the Court held in paragraph 41 of the judgment in *Commission* v *Luxembourg*, 'the need to obtain a work permit is, because of the formalities and procedural delays inherent in the process, likely to make it less attractive to

42 — See, to that effect, the judgment in *Commission* v *Germany*, paragraph 33.

engage in the freedom to provide services in [national] territory using workers who are nationals of a non-member country'.

89. That finding concerning the Luxembourg legislation at issue also applies to the contested Austrian legislation, taking into account the formalities and time involved in the EU Posting Confirmation procedure, which, as has been shown, constitutes a work permit procedure. [43] As the Commission has pointed out, such restrictions render illusory the use of postings and, as a consequence, the freedom to provide services, in particular in sectors of activity often characterised by the provision of *ad hoc*, rapid-delivery or even urgent services.

90. This is particularly so given that, as will be recalled, the issue of such a work permit is subject, in particular, to the requirement that an employment contract of indefinite duration has been concluded or that an employment relationship has been in existence for at least one year between the workers affected by the planned posting and the undertaking contemplating it. Such conditions, even if they are simply alternative rather than cumulative (like those under the legislation at issue in the judgment in *Commission* v *Luxembourg*), are also liable to render the freedom to provide services illusory in some sectors, such as construction or information technology, which, as the Commission has pointed out, make frequent use of short-term or service-specific contracts, with the result that it is very unlikely that either of those conditions will be satisfied, especially if the undertakings wishing to make a posting are newly created and therefore have no option but to conclude employment contracts of indefinite duration in order to do so (since they are, by definition, unable to rely on an employment relationship of more than one year with the workers concerned).

91. Moreover, it must be recognised that that requirement concerning the duration or continuity of the employment relationship between the workers concerned and the service-providing undertaking is disproportionate to the objective of ensuring that those workers return to the Member State of origin once their work has been completed in order to safeguard stability in the labour market. [44]

92. I take the view that the judgment in *Vander Elst*, on which the Austrian Government relies, does not preclude such a finding. It is true that, in that judgment, the Court, as requested by the national court, relied on the fact that the Moroccan workers concerned were lawfully and habitually employed by the Belgian service-providing undertaking in order to dismiss the heads of justification

43 — See points 7 and 8, as well as points 34 to 36 of this Opinion.

44 — I refer to paragraphs 45 and 46 of the judgment in *Commission* v *Luxembourg*, which refers to measures which are less restrictive than but as effective as the requirements at issue. Moreover, I note that comparable measures are provided for by the AVRAG (see points 11 and 83 of this Opinion).

raised by the French Government, based on the prevention of destabilisation in the labour market and the protection of workers, to defend the fact that their posting was subject to the acquisition of a work permit from the French authorities. However, it is unreasonable to infer from this, in keeping with the converse interpretation put forward by the Austrian Government, that, in circumstances other than those expressly referred to by the judgment in *Vander Elst*, the requirement of a work permit the issue of which is subject to a condition concerning the existence of a lawful and habitual employment relationship, such as that laid down by the contested Austrian legislation, is admissible. In any event, the judgments in *Commission* v *Luxembourg* and *Commission* v *Germany* provide a formal rebuttal of that argument.[45]

93. It follows from all those considerations that, in the light of the judgment in *Commission* v *Luxembourg* (confirmed by the judgment in *Commission* v *Germany*), it is clear that the contested national legislation constitutes a restriction on the freedom to provide services which is disproportionate both to the objective of protecting workers and to that of safeguarding stability in the labour market.

45 — In paragraph 55 of the judgment in *Commission* v *Germany*, the Court was at pains to point out that it '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'.

94. Accordingly, I take the view that whether the Court examines that legislation in the light of those objectives or in the light only of the objectives of protecting public policy, public security or public health, the same conclusion must be drawn: the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

95. As a consequence, I consider that, in any event, the first complaint in this action is well founded.

B — *The second complaint concerning the impossibility for a posted worker who is a national of a non-member State to regularise his situation as regards his entry and residence in the national territory*

1. Arguments of the parties

96. By its second complaint, the Commission alleges that the Republic of Austria has also infringed Article 49 EC by systematically prohibiting the issue of an entry or residence permit to a national of a non-member State who is posted by an undertaking established in another Member State where that national has entered the national territory without a visa, with the result that the situation of that individual cannot under any circumstances be regularised *in situ*.

97. In support of that complaint, the Commission claims that a systematic prohibition of that kind, which would entail automatic expulsion from the national territory, constitutes a restriction on the posting of workers who are nationals of non-member States and, as a consequence, represents an obstacle to the provision of services by the undertaking which intends to post those nationals. The Commission argues that, even if that restriction on the freedom to provide services served to fulfil an objective in the general interest, which it doubts, it would be disproportionate inasmuch as it concerns workers who are nationals of non-member States and who are lawfully present in the territory of the Member State in which the service-providing undertaking is established, to which they intend to return at the end of their posting. In this regard, the Commission relies on the judgment in *MRAX*,[46] concerning nationals of non-member countries who are married to nationals of Member States, to support its view that the issue of a residence permit to a posted worker who is a national of a non-member State is a purely declaratory act and does not give rise to rights, so that decisions to refuse a residence permit and, *a fortiori*, expulsion measures which are adopted exclusively on grounds relating to the failure to comply with the statutory formalities concerning checks on foreign nationals are disproportionate.

98. The Austrian Government recognises that the prohibition on the issue of a residence permit, laid down in Paragraph 10(1)(3) of the FrG, is liable to restrict the posting of workers who are nationals of non-member States by a service-providing undertaking established in another Member State, except where that latter State is a party to the Schengen Agreements, since, in that case, the prohibition at issue would not apply. However, the Austrian Government denies that the prohibition in question is disproportionate. It argues that, in order to preserve public policy and public security, a visa application must be made prior to entry into the territory. Making it possible for a person's situation to be regularised *in situ* would have the effect of depriving the national authorities of their right to refuse a residence permit to a person presenting a risk to public policy or public security.

2. Assessment

99. As a preliminary point, it is important to state that, to date, the conditions governing the entry and residence of nationals of non-member States in the territory of a Member State for the purposes of a posting by a service-providing undertaking established in another Member State are not harmonised at the Community level.

100. For Directive 96/71 contains no provision to that effect. Moreover, the 20th recital in its preamble states that 'this Directive is ... without prejudice to national laws relating to

46 — C-459/99 [2002] ECR I-6591, paragraph 74.

the entry, residence and access to employment of third-country workers'.

101. As regards the 1999 proposal for a directive on the posting of workers who are nationals of non-member countries for the purpose of providing cross-border services, although it laid down rules relating to the conditions governing the entry and residence of those workers, as I have already pointed out, it was ultimately abandoned. [47]

102. It follows that the Treaty rules on the freedom to provide services are indeed applicable to the conditions governing the entry and residence in the territory of the Member State to which the posting is made of workers who are nationals of a non-member State and who are posted by a service-providing undertaking established in another Member State.

103. It must inevitably be concluded that, by systematically prohibiting the issue of an entry or residence permit to a worker who is a national of a non-member State, and who is posted by an undertaking established in another Member State, where that national has entered the national territory without a visa, the Austrian legislation at issue imposes a restriction on the posting of such workers and, consequently, on the exercise by that undertaking of activities involving the provision of services.

104. For, by thus making it entirely impossible for the situation of the worker concerned to be regularised *in situ*, that legislation exposes the worker to the risk of being expelled from national territory, and may even lead to his automatic expulsion and, in some cases, a prohibition on his returning to or residing within that territory. Such a prospect is liable seriously to jeopardise the carrying out of the planned posting.

105. In order to avoid such difficulties, the service-providing undertaking has no option but to ensure, before proceeding with the posting, that a visa has been requested and

47 — See point 27 of this Opinion. Under that proposal for a directive, the plan was to introduce a document known as an 'EC service provision card', valid for a specific period and renewable, in order to facilitate such postings. The idea was that the authorities of the Member State of establishment of the service provider would be required to issue such a document to the latter, at its request, where it intended to make such a posting, provided that the worker which it planned to post was lawfully present in the territory of that State. In return, Article 3(1) of that proposal provided that '[a]ny Member State in which services are provided shall permit the entry and residence of a worker who is a third-country national to its territory for the purpose of one or more provisions of services, if such person is in possession of the EC service provision card, and of an identity card or passport valid for the period during which the services are to be provided.' In accordance with that logic, Article 3(2)(a) and (b) of that same proposal stated that, in principal, '[n]o Member State in which a service is provided may require from the posted worker or the service provider in his capacity as employer an entry or exit visa [or] a residence permit ...'. However, Article 4(2) of that proposal permitted the Member States to derogate from the directive in question on grounds of public policy, public security or public health, in accordance with rules comparable with those laid down by Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117) (which applies to nationals of Member States).

obtained for each worker concerned. However, as the Commission maintains, without a convincing argument in rebuttal from the Austrian Government, the grant of a visa is, in principle, subject, in particular, to the acquisition of an EU Posting Confirmation, [48] which, as we have seen, may take up to six months from receipt of the required prior notice. [49] Making the issue of a visa subject to the acquisition of that confirmation thus tends to reinforce the restrictive effect of the prohibition on all *in situ* regularisation.

106. Indeed, it was precisely in order to prevent such obstacles that, as I have already said, the 1999 proposal for a directive contemplated prohibiting any Member State in which the service at issue is provided from requiring a posted worker or a service provider in his capacity as an employer to have any kind of entry visa or residence card or permit (unless the total time required for provision of the planned service or services exceeded six months out of a period of twelve months). [50]

107. While such a restriction on the freedom to provide services may be justified on grounds of public policy or public security, in my view, it none the less exceeds what can be required in the name of such objectives.

108. After all, it should be recalled that, according to settled case-law, [51] those justifications can be relied on only in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

109. The prohibition on awarding an entry or residence permit, laid down by the legislation at issue, is intended to apply automatically where a posted worker who is a national of a non-member State has entered the national territory without holding the necessary visa. In my view, committing such a breach of the visa requirement,

48 — A relatively comparable system exists under the national legislation at issue in *Commission* v *Germany*. According to that legislation, the posting in Germany of workers who are nationals of non-member States, by a service-providing undertaking established in another Member State, is subject to the issue of a residence permit in the form of a visa, which is itself subject to the fulfilment of several conditions, such as that requiring that the worker concerned has been employed for at least a year by the undertaking which carries out the posting (which, as we have seen, is similar to one of the conditions to which the issue of a posting confirmation is subject in Austria).

49 — See point 36 of this Opinion.

50 — That proposal for a directive is based on the finding that, as the fourth recital in its preamble points out, 'service providers who need to post a worker who is a third-country national encounter such difficulties that they are often obliged to withdraw from providing the service or put up with damaging delays ...'.

51 — See point 53 of this Opinion.

however reprehensible it may be,[52] is not sufficient to amount to a genuine and sufficiently serious threat affecting one of the fundamental interests of society,[53] or, therefore, to justify the contested prohibition and the measures which may accompany it (expulsion and prohibition on entering and residing in the territory). It follows that the prohibition at issue, because it is automatic, seems disproportionate to the objective of safeguarding public policy or public security.

110. This is particularly so given that that prohibition is intended to apply even where the worker concerned is lawfully present in the territory of the Member State from which he is posted or where he has an EU Posting Confirmation (which, as we have seen, presupposes that the service-providing undertaking has already complied with particularly stringent requirements), whereas, in fact, in such circumstances, far from constituting a threat to public policy or to public security within the meaning of the Court's case-law, that worker provides, on the contrary, effective guarantees as to his residence in the national territory and his return to the Member State of origin after the completion of his work.

111. Moreover, to my knowledge, most Member States which make the posting by an undertaking established in another Member State of workers who are nationals of non-member States subject to the acquisition of an entry visa or a residence permit do not penalise the unlawful entry of those workers into their territory by an automatic refusal to regularise the situation of the persons concerned *in situ*.[54] This comparative legal analysis supports my view that the prohibition at issue goes beyond what is necessary to ensure the safeguarding of public policy and public security.

112. That analysis cannot be called into question by the fact that, as the Austrian Government claims, the contested prohibition is not intended to apply, in principle, to workers who are nationals of non-member States who are posted for a given period by an undertaking established in a Member State other than Austria and hold a permit entitling them to reside in the territory of the Member State from which they have come, provided that that latter State is party to the Schengen Agreements and, in particular, to

52 — It is settled case-law that 'Community law does not prevent the Member States from prescribing, for breaches of national legislations concerning the control of aliens, any appropriate sanctions necessary in order to ensure the efficacity of those provisions ..., provided that those sanctions are proportionate'. See the judgment in *MRAX*, paragraph 77 and the case-law cited.

53 — See, to that effect, the judgment in Case 48/75 *Royer* [1976] ECR 497, paragraph 47, and the judgment in *MRAX*, paragraph 79.

54 — It seems that the only Member States which impose such a penalty are the Italian Republic, the Republic of Hungary, the Republic of Poland, and the Republic of Slovenia. Although the issue of a visa must in principle be requested before entry in the territory concerned, generally from the consular authorities of the country in which the foreign national is domiciled, that penalty is not, apparently, provided for in the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Grand Duchy of Luxembourg, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland. Moreover, the Belgian, Danish, and French authorities seem to allow the possibility of regularisation *in situ*.

the Convention implementing the Schengen Agreement. [55]

113. It is true that Article 21(1) of the CISA provides that '[a]liens who hold valid residence permits issued by one of the Contracting Parties may, on the basis of that permit and a valid travel document, move freely for up to three months within the territories of the other Contracting Parties, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e), [56] and are not on the national list of alerts of the Contracting Party concerned'.

114. It follows from those provisions that workers who are nationals of non-member States of the European Union and who are posted to Austria for a maximum period of three months by a service-providing undertaking established in another Member State which is a contracting party of the CISA are not required to obtain from the Austrian authorities any visa or residence permit whatsoever in order to complete their work in the context of that posting. For, provided that they satisfy the conditions laid down in Article 21(1) of the CISA, it is sufficient that the workers concerned hold residence permits issued by the authorities of the contracting Member State from which they have come. By definition, those workers therefore fall outside the prohibition, imposed by the Austrian authorities, on the issue of an entry or residence permit in the event of entry into the national territory without a visa.

115. That said whatever the effect of that limitation on the prohibition at issue (which is, moreover, appreciably reduced) the foregoing consideration has little bearing on the assessment of whether the restriction in question is disproportionate and, therefore, whether the second complaint is well founded. After all, it is apparent from settled case-law that a failure to fulfil obligations exists regardless of the significance or the gravity of the breach established. [57]

116. I therefore conclude that the second complaint in the present action is well founded.

55 — Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19) ('CISA'). All the other Member States of the European Union have acceded to that Convention, with the exception of Ireland, the United Kingdom of Great Britain and Northern Ireland and some new Member States (which acceded to the European Union in May 2004).

56 — Those conditions are as follows: (a) that the aliens possess a valid document or documents authorising them to cross the external border of the Schengen Area; (c) that the aliens produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they have sufficient means of subsistence, both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted, or are in a position to acquire such means lawfully; (e) that the aliens shall not be considered to be a threat to public policy, national security or the international relations of any of the contracting parties.

57 — See, in particular, for a recent illustration, the judgment in Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 32.

IV — Conclusion

117. In conclusion, I propose that the Court should:

(1) declare that the Republic of Austria has failed to fulfil its obligations under Article 49 EC:

— by adopting and by maintaining in force legislation which makes the posting of workers who are nationals of non-member States by an undertaking established in another Member State subject to the acquisition by that undertaking of prior administrative authorisation known as an 'EU Posting Confirmation', the issue of which requires, on the one hand, that an employment relationship has been in existence between the workers in question and that undertaking for at least one year or that an employment contract of indefinite duration has been concluded between them and, on the other hand, that those workers are subject to the pay and working conditions existing in the national territory for the duration of the prospective posting;

— by adopting and by maintaining in force legislation which systematically prohibits the issue of an entry or residence permit to a worker who is a national of a non-member State and who is posted by an undertaking established in another Member State, where that worker has entered the national territory without a visa, so that his situation cannot under any circumstances be regularised *in situ*;

(2) order the Republic of Austria to bear its own costs and those incurred by the Commission of the European Communities.