OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 15 September 2005 [1]

I — Introduction

1. In this case the Commission seeks a declaration by the Court that by subjecting the posting of workers from countries which are not members of the European Union by service providers established in other Member States of the European Union, to certain specific requirements, the Federal Republic of Germany has infringed Article 49 EC.

II — The German rules on the posting of third country nationals

2. The posting of third country nationals in Germany is governed by the Ausländergesetz (German law on aliens; hereinafter: AuslG) in its version of 9 January 2002, an implementing regulation and a circular of 15 May 1999 addressed to the German diplomatic and consular representations in other countries (hereinafter: the circular).

3. According to Articles 1 to 3 of the AuslG, non-German nationals require a visa in order to enter and stay on German territory. Foreigners wishing to stay in Germany in order to perform paid activities must obtain a specific authorisation to stay in accordance with a special implementing regulation. Current practice in respect of issuing of these special visas is based on the circular. Undertakings intending to provide services in Germany must ensure that their workers from third countries obtain a visa at the German diplomatic representation in the Member State where the undertaking is established. In processing such requests, the competent authority examines whether the following criteria, which are intended to give effect to the Court's *Vander Elst* [2] case-law, are fulfilled:

(a) The beginning and the end of the period of the posting of the worker concerned must be clearly determined.

1 — Original language: English.

2 — Case C-43/93 *Vander Elst* [1994] ECR I-3803. See point 11 below.

(b) The worker concerned must belong to the permanent work force of the undertaking posting the worker, which is deemed to be the case if the worker has been employed by that undertaking for at least one year.

(c) The residence permit and, where applicable, the work permit issued in the Member State of establishment must guarantee that the workers concerned will be reemployed by the seconding undertaking in that Member State upon completion of the activities in Germany.

(d) The worker from a third country must be affiliated to the social security system in the Member State of establishment of his employer, or be sufficiently covered by a private health and accident insurance. The protection under either system must extend to the activities to be carried out in Germany.

(e) The worker from a third country must be in a possession of a passport, which must be valid for at least the duration of the stay in Germany.

III — Procedure

4. The Commission first raised the issue of the compatibility with Article 49 EC of the special procedure applied by the Federal Republic of Germany for posting workers from third countries on its territory by service providers established in Member States of the European Union by formal notice of 12 February 1997. This was followed by a reasoned opinion of 7 August 1998 and further requests for information in 2000 and 2001.

5. Considering that the information provided by the German Government in response to these requests, ultimately on 28 November 2001, did not permit it to properly assess the legality of the rules applied to the posting of third country nationals in Germany, the Commission some two and a half years later, on 4 June 2004, decided to bring the present proceedings before the Court. It requests the Court to:

1. declare the Federal Republic of Germany in breach of its obligations under Article 49 EC in that by its practice based on administrative circulars, it has

consistently and disproportionately restricted the posting of non-member-country workers to Germany for the provision of services;

2. order the Federal Republic of Germany to pay the costs.

IV — Analysis

A — *Framework for assessment*

6. As a preliminary point, it is useful to establish that the special procedure applied in Germany in respect of the posting of third country nationals must indeed be assessed in the light of Article 49 EC. Although Community legislation does exist in this field, namely Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [3] this directive only applies to the terms and conditions of the employment relationship and not to the aspect of entering and staying in the territory of the host Member State. A Commission proposal aimed at regulating this latter aspect by means of the introduction of an 'EC service provision card' [4] was withdrawn in October 2004. [5] Consequently, the problem raised by the present case is not governed by secondary Community legislation, but, as indicated, by the provisions in the EC Treaty on the provision of services.

7. The basic principles in respect of the application of the Treaty provisions on the freedom to provide services in the Community have long been established in the Court's case-law. According to this case-law, 'Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State, where he lawfully provides similar services'. [6]

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

4 — Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services, OJ 1999 C 67, p. 12 as amended by COM(2000) 271 final of 8 May 2000.

5 — COM(2004) 542 final/2, point 8.

6 — See, inter alia, Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, at paragraph 20, Joined Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453, at paragraph 33, and *Vander Elst*, cited in footnote 2, at paragraph 14 of the judgment.

8. This basic rule is, however, not absolute: 'where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements relating to the public interest 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 in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.' [7]

9. In cases concerning the posting of workers by service providers, in particular, the Court has established various more specific principles which are pertinent to assessing the requirements which are at issue in the present case.

10. In *Rush Portuguesa* it recognised that the host Member State must be able to ascertain whether a service provider established in another Member State is not availing himself of the freedom to provide services for another purpose. Such checks must, however, observe 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. [8]

11. The Court's judgment in *Vander Elst* [9] is particularly relevant to the present case, as the specific requirements imposed by the Federal Republic of Germany in respect of the posting of workers from third countries are designed to give effect to it. In this case, which concerned the posting of Moroccan workers by a Belgian company for the provision of services in France, the Court stressed the fact that the workers concerned were lawfully resident in Belgium and had been issued with work permits [10] and that they possessed valid employment contracts. [11] In that situation the application of the Belgian system excluded any substantial risk of the workers being exploited or of competition between undertakings being distorted. [12] The Court concluded that '[Articles 49 and 50 EC] must be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which *lawfully and habitually* employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an

7 — See, inter alia, *Commission* v *Luxembourg*, cited in the previous footnote, at paragraph 21 of the judgment, and *Arblade and Leloup* cited in the previous footnote, at paragraphs 34 and 35 of the judgment.

8 — Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, at paragraph 17.

9 — Cited in footnote 2.

10 — At paragraph 18 of the judgment.

11 — At paragraph 24 of the judgment.

12 — At paragraph 25 of the judgment.

administrative fine as the penalty for infringement'.[13] The terms 'habitually and lawfully' employed have since been referred to as the *Vander Elst* criteria.

12. As regards the overriding reasons relating to the public interest which may justify restrictions to the posting of workers in the context of the provision of services, the Court has recognised, inter alia in *Arblade and Leloup*, that these include the protection of workers, but not considerations of a purely administrative nature. 'However, overriding reasons relating to the public interest which justify the substantive provisions of a set of rules may also justify the control measures needed to ensure compliance with them.'[14]

13. Finally, in this context, reference should be made to *Commission* v *Luxembourg*,[15] relating to national requirements which, though not identical to those at issue in the present proceedings, were similar to them, and therefore constitutes a useful precedent in assessing the Commission's application. More particularly, Luxembourg required a service provider established in another Member State to obtain an individual or collective work permit for deploying its workers who were nationals of non-member countries and who lawfully reside and work in that other Member State. The issuance of these permits was subject to considerations relating to the employment market and to the existence of a contract of indefinite duration and previous employment with the same service provider for a period of at least six months. The Court found these requirements to be inappropriate for pursuing the objective of worker protection.[16]

B — *Scope of the application*

14. The scope of the Commission's application is restricted in that it does not challenge all the criteria, listed in point 3 above, which are applied by the Federal Republic of Germany in granting the special authorisation for the deployment of third country nationals on German territory by a service provider established in another Member State. Rather it focuses on two particular aspects of the special procedure which it considers to be incompatible with Article 49 EC. The first of these concerns the fact that the verification of the criteria must take place prior to services being provided, so that the procedure essentially is preventive in character. The second relates to the requirement that the third country nationals must have been employed by the service provider for at least one year.

13 — Operative part of the judgment. Emphasis added.

14 — *Arblade and Leloup*, cited in footnote 6, at paragraphs 36 to 38 of the judgment.

15 — Cited in footnote 6.

16 — See paragraphs 30 to 36 of the judgment.

C — *The preventive character of the authorisation procedure*

15. The Commission makes clear at the outset that it does not object to visa requirements and prior controls to the extent that these are justified on grounds of public policy, public security or public health. Neither does it object to controls aimed at verifying whether the so-called *Vander Elst* criteria have been fulfilled. The only point of contention is that according to German practice this verification must take place prior to the deployment of the workers concerned on German territory. Where an authorisation is granted in the form of an 'Arbeitsvisum' (work visa), it is clear that without this document a worker will not be able to be deployed on German territory in order to perform the services to be provided by his employer. It, therefore, constitutes a restriction of the freedom to provide services. The Commission observes that the procedure goes beyond checking what is necessary for reasons of public security. Moreover, as it does not apply to all those providing services in Germany, it does not fulfil the conditions for being justified on imperative requirements relating to the public interest. In addition, the Commission considers that less restrictive measures, such as ex post checks, are envisagable in order to attain the objective of ensuring that the workers return to the Member State of origin. Such a check could be performed at the moment a person complies with the obligation to register in taking up residence in Germany.

16. The German Government points out that the current practice of granting visas does not leave any discretion to the diplomatic representations and that authorisations to stay are granted automatically within a period of seven days. It therefore doubts whether this practice amounts to a significant restriction of the freedom to provide services. The so-called *Vander Elst* visas are only required in a limited number of cases, in particular where third country nationals are not eligible to travel freely under the conditions of the Convention implementing the Schengen Agreement and where visas are required under Regulation No 539/2001. [17]

17. The German Government maintains that the Member States have a legitimate interest in carrying out prior controls in order to trace abuse of the freedom to provide services and to prevent the circumvention of national and Community requirements in relation to the employment of third country nationals. Carrying out prior checks, in its view, is justified for reasons of legal certainty and of worker protection. The procedure it applies must be regarded as an appropriate measure as the presentation of a passport alone does not constitute proof of the holder's regular employment in the Member State of origin. Ex post checks, as suggested by the Commission, are not adequate. This applies in particular to the possibility of conducting checks at the moment of compulsory registration on taking up residence. Besides the fact that posted

17 — Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81, p. 1.

workers usually have no intention of taking up residence in Germany, the registration of residents comes within the competence of the Bundesländer, whereas it is the federal authorities who are competent in respect of the conditions relating to entry into and stay within Germany. Conducting the verification of the compliance with the *Vander Elst* criteria in one single administrative procedure on granting a visa is less burdensome for the worker concerned, his employer and the administration.

18. First of all, it must be established that the need for a service provider, before providing services in Germany with third country nationals employed by him, to obtain the verification by the German diplomatic representation in the Member State of his establishment, that these employees fulfil certain criteria, failing which he will not be able to deploy these employees in Germany, clearly amounts to a restriction of his freedom to provide services within the meaning of Article 49 EC. Whether or not compliance with this procedure amounts to obtaining a formal work permit for the employees concerned of the types which were at issue in *Vander Elst* [18] and *Commission* v *Luxembourg*, [19] it is clear that it does have the same effect on the service provider to exercise his rights under that Treaty provision. The Court's finding in these cases that the work permits concerned were restrictions on the freedom to provide services [20] must apply here too.

19. The German Government, too, appears to recognise the restrictive character of the procedure it applies where it indicates that it does not amount to a 'significant restriction' (nennenswerten Beeinträchtigung) of the freedom to provide services. It is at any rate clear that, to date the Court has not recognised any *de minimis* rule in this field.

20. The question then arises as to the possibility of justifying the special procedure on the public interest grounds invoked by the German Government. In particular, it relies on the Court's consideration in *Rush Portuguesa* that the Member States must be able to ascertain whether a service provider established in another Member State is not availing himself of the freedom to provide services for another purpose, for example that of bringing his workers for the purposes of placing them. [21] As the checks are aimed at verifying whether the employees concerned are 'lawfully and habitually' employed in the Member State of establishment as indicated in *Vander Elst* and, therefore, are

18 — Cited in footnote 2.

19 — Cited in footnote 6.

20 — *Vander Elst*, at paragraph 15 of the judgment, and *Commission* v *Luxembourg*, at paragraph 24 of the judgment.

21 — Cited in footnote 8, at paragraph 17 of the judgment.

intended to give effect to a requirement of Community law, it considers them to be justified. Other grounds for justification which the German Government invokes in this context are legal certainty and worker protection.

21. It must be recalled that, according to the Court's settled case-law reiterated in paragraph 8 above, in order to be able to invoke imperative requirements related to the public interest in respect of a measure which restricts the freedom to provide services, such a measure must apply without distinction to all persons and undertakings operating in the territory of the Member State in which the service is to be provided. [22] If the measure restricting the provision of services does not comply with this condition, it may only be justified by the grounds recognised in Article 55 EC in conjunction with Articles 45 and 46 EC.

22. As such, it may be questioned whether the special procedure employed by the German authorities applies without distinction to service providers established inside and outside Germany. By its very nature, it is aimed at service providers established in other Member States. However, in this regard a distinction should be made between, on the one hand, substantive measures governing the provision of services and, on the other hand measures aimed at verifying compliance with these measures. Whereas it is clear that substantive measures must apply equally to all undertakings providing services in the territory of a Member State, it must, in my view, be recognised that verification of compliance may require a different approach in situations of cross-border provision of services as the service providers only come temporarily within the jurisdiction of the host Member State.

23. The Court, too, in various judgments relating to similar requirements to be fulfilled prior to posting workers by a service provider established in another Member State, has recognised the need for Member States to supervise compliance with national and Community rules on the provision of services. In *Rush Portuguesa*, it acknowledged that the Member States have the right to ascertain whether the freedom to provide services is not being abused e.g. by placing workers from third countries on the employment market of the host Member State. [23] In *Arblade and Leloup*, it accepted that control measures aimed at verifying compliance with requirements which themselves are justified in the public interest may also be justified. [24] Though accepting the principle of checks being carried out, the Court also emphasised that these checks must observe the limits imposed by Community law and must not make the free provision of services illusory. [25]

22 — See point 8 above and the case law referred to there.

23 — Cited in footnote 8, at paragraph 17 of the judgment.

24 — Cited in footnote 6, at paragraph 38 of the judgment.

25 — *Rush Portuguesa*, cited in footnote 8, at paragraph 17 of the judgment.

24. The primary aim of the special procedure applied by the Federal Republic of Germany is to verify compliance with requirements which stem from Community law, more particularly from Article 49 EC as interpreted by the Court in *Vander Elst*. These requirements are intended to ensure that third country nationals are lawfully resident and lawfully employed in the Member State of the establishment of the service provider. This implies, inter alia, that their employment relationship is governed by the social legislation of the Member State of establishment so that the risk of abuse of the freedom to provide services to circumvent social legislation in the host Member State and the risk of social dumping are minimised. In the light of the Court's judgments just cited, controls aimed at verifying whether these requirements, which themselves are justified in the public interest, are complied with, must also, in principle, be deemed to be justified.

25. However, as indicated, the Court has also made clear that such controls must observe the limits imposed by Community law. More particularly, they are required to be both appropriate in order to attain their objectives and not to restrict that freedom more than is necessary. In this regard, the Commission submits that ex post checks would enable the German authorities to verify the various data they deem necessary in order to ensure that third country nationals deployed in their territory by a service provider established in another Member State will return to that State and otherwise not claim entitlement to benefits in Germany.

26. It is indeed clear that checks to be carried out after the commencement of the provision of services would constitute a less restrictive measure than the preventive checks currently applied by the Federal Republic of Germany. In order for such checks to be effective, however, the authorities of the host Member State must be provided with the relevant information at such a moment that, if necessary, they are in a position to take measures to safeguard public interests. In this respect, I agree with the German Government that postponing checks till the moment at which the person concerned seeks registration in Germany, as was suggested by the Commission, would not be effective in meeting the German Government's concerns.

27. On the other hand, requiring a simple declaration by the service provider of his intended activities in Germany and of the necessary particulars of the third country nationals he wishes to deploy for that purpose at the moment of commencing these activities would enable the German authorities to check and verify these data, without the provision of services being unduly restricted. The Court in *Commission* v *Luxembourg* expressly referred to this less restrictive measure as an equally effective alternative to the work permits required by the Luxembourg authorities. [26]

28. I would add that, in general, undertakings intending to operate temporarily on

26 — Cited in footnote 6, at paragraph 31 of the judgment.

the territory of another Member State with workers from third countries must bear responsibility for ensuring that these employees are legally resident in the Member State of establishment and that their employment conditions are in line with the relevant social legislation. To the extent that legal certainty may be invoked as a separate ground of general interest, which I doubt, it cannot be used to justify the fact that these prior controls provide service providers from other Member States with clarity beforehand. It must be presumed that bona fide undertakings operate in compliance with the applicable immigration and social legislation of the Member State of establishment. The host Member State may apply its social legislation to service providers from other Member States to the extent that it provides further protection than that of the Member State of establishment of the service provider. [27] In these circumstances, it is more appropriate that the host Member State restrict its intervention to verifying the requisite information provided by the service provider on commencing activities in the host Member State and to take repressive action where this proves necessary.

29. I therefore conclude that by subjecting the deployment of third country nationals employed by a service provider established in another Member State for the provision of services on German territory to a prior authorisation procedure, the Federal Republic of Germany has infringed its obligations under Article 49 EC.

D — *The requirement of being employed for one year with the same employer*

30. The Commission considers the fact that a service provider may only deploy third country nationals who have been in its employment for at least one year prior to the provision of services in Germany to be a clear restriction of the freedom to provide services. This requirement does not correspond to the criteria indicated in *Vander Elst* that the nationals of non-Member States must be 'lawfully and habitually' employed by the service provider. Indeed, the Commission observes that rather than being a separate condition imposed by the Court, the requirement of lawful and habitual employment merely echoes the wording of the preliminary question submitted by the national court in that case. It also refers to the fact that the Court in *Commission* v *Luxembourg* expressly rejected the possibility of justifying a similar requirement on grounds of social welfare protection. [28]

27 — See, inter alia, *Rush Portuguesa*, cited in footnote 8 at paragraph 18 of the judgment, and *Commission* v *Luxembourg*, cited in footnote 6 at paragraph 29 of the judgment.

28 — Cited in footnote 6, at paragraph 32 of the judgment.

31. The German Government observes that the requirement of being employed for one year by the same service provider must be regarded as the implementation of the criterion of being 'lawfully and habitually' employed as expressed in the Court's *Vander Elst* judgment. This requirement is an appropriate and effective means of ensuring the efficacy of national and Community legislation on the protection of workers and in preventing social or salary dumping. These objectives are in line with Directive 96/71. Furthermore, it is also necessary for guaranteeing the prerogatives of the Member States in respect of controlling the admission of third country nationals to their employment markets.

32. The German Government states that the Commission is wrong in drawing a parallel between the Court's judgment in *Commission* v *Luxembourg* and the present case, as it was the cumulative effect of the requirements of a work permit, a period of prior employment and a bank guarantee which led the Court to find that the Luxembourg measures were disproportionate and therefore contrary to Article 49 EC. It also points out that in examining how to give effect to the Court's judgment in *Vander Elst*, Committee K.4 agreed that a period of prior employment of at least one year should be accepted as indicative of a worker being lawfully and habitually employed in the Member State of origin. It observes furthermore, that the Commission itself, in its proposal for a directive on the posting of workers who are third country nationals for the provision of cross-border services, [29] considered that the period of prior employment should not be less than six months. The German Government finally declares its willingness to replace the requirement of at least one year of prior employment by a more flexible criterion, e.g. by relating the period of employment to the duration of the provision of services on its territory.

33. The question as to the compatibility with Article 49 EC of the requirement of a period of prior employment of a certain duration with the same employer has already been dealt with by the Court in *Commission* v *Luxembourg*. [30] In this case the Court held that '... making the granting of a collective work 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 their deployment to Luxembourg goes beyond what is required for the objective of social welfare protection as a necessary condition for providing services through the deployment of workers who are nationals of non-member countries'. [31]

34. Although the special authorisation for the posting of third country nationals for the

29 — Referred to in footnote 4.

30 — Cited in footnote 6.

31 — At paragraph 32 of the judgment.

provision of services in Germany does not require the existence of an employment contract of indefinite duration, the requirement of belonging to the permanent workforce of the service provider which is only deemed to be the case after one year's prior employment with the same employer, is a standard which is even stricter than that imposed by Luxembourg. In the light of the Court's finding in *Commission* v *Luxembourg*, this requirement, which is applied in the context of the special authorisation procedure as a condition for granting the special authorisation to post third country nationals in Germany for the provision of services, cannot be accepted as being an appropriate means for attaining the objectives referred to by the German Government.

35. Indeed, where the German Government indicates that this requirement is imposed in order to ensure that the workers concerned are able to familiarise themselves with applicable rules of labour law and to safeguard its prerogatives on controlling admission to the national employment market, it is not clear how a fixed period of prior employment can contribute to these objectives being attained or whether it is necessary for these purposes. At any rate, it is in the nature of posting workers, as the Court has frequently observed, that the workers concerned return to the country of establishment of the service provider after completion of their work and that they do not seek admission to the employment market of the Member State where the service is provided. [32]

36. The problem of social dumping, also referred to by the German Government, can be combatted by other means, given the fact that the Court has acknowledged that the Member States may extend their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established. [33] Directive 96/71, moreover, also contains guarantees in this regard.

37. The German Government's attempt to distinguish the procedure it applies from the requirements which were at issue in *Commission* v *Luxembourg* on the grounds that the Court allegedly only declared these requirements incompatible with Article 49 EC because of their cumulative effect, must also be rejected. Not only did each of the requirements applied by Luxembourg constitute as many restrictions to the freedom to provide services, the conditions imposed in the context of the special procedure also apply cumulatively.

32 — Cf, inter alia, *Rush Portuguesa*, cited in footnote 8, at paragraph 15 of the judgment, and *Commission* v *Luxembourg*, cited in footnote 6, at paragraph 38 of the judgment.

33 — Cf, inter alia, *Arblade and Leloup*, cited in footnote 6, at paragraph 41 of the judgment.

38. More generally, on reading *Vander Elst* more closely the question is whether it can be said that the Court did indeed lay down a specific criterion in this judgment and, if it did, what this criterion must be deemed to be. As was pointed out by the Commission, by determining in the operative part of its judgment that the nationals of non-member countries are 'lawfully and habitually' employed by the service provider, the Court merely repeated the wording of the preliminary question put to it by the referring national court. This could be regarded as an indication that the Court did not intend to set a distinct standard in this regard.

39. On the other hand, in its reasoning the Court attached particular importance to the fact that the workers concerned in *Vander Elst* were lawfully resident in the Member State of origin (Belgium), that they had been issued with work permits in that country and that they possessed valid employment contracts. As their situation was, therefore, fully governed by Belgian law, there was no substantial risk of them being exploited or of competition between undertakings being distorted.

40. It would thus appear to me that the Court was emphasising the need to ensure that only workers from third countries who are legally resident in the Member State of establishment of the service provider and are legally employed by that service provider in that Member State should be able to be posted for the provision of services in other Member States without further restrictions being imposed by the host Member State in respect of these two subjects. The Court, significantly, did not make the fulfilment of either criterion subject to a given duration of residence or employment. This means that it did not accord the aspect of being 'habitually' employed in the Member State of origin the significance which has been attached to it by Luxembourg, the Federal Republic of Germany and even Committee K.4.

41. This aspect of being 'habitually employed' does not, in my view, therefore have autonomous meaning. The question as to the legality of the employment relationship must be answered by reference to the law of the Member State which governs the contract of employment. Accordingly, the Member State in which the service is to be provided is not entitled to apply its own criteria in order to establish the legality of the employment status of the workers posted by a service provider established in another Member State. The host Member State may only verify that third country nationals, seconded in its territory to provide services on behalf of an undertaking established in another Member State, are indeed lawfully resident and employed in that Member State according to the laws applied in that Member State. [34]

34 — On this point, cf. Advocate General Tesauro's Opinion in *Vander Elst*, cited in footnote 6, at point 27 of the Opinion, where he adopts a similar position.

42. Consequently, I conclude that the requirement that a worker, who is a third country national and who is to be posted in Germany for the provision of services, must belong to the permanent work force of the undertaking posting the worker and this is only deemed to be the case if the worker has been employed by that undertaking for at least one year, is incompatible with Article 49 EC.

V — Conclusion

43. In the light of the foregoing considerations I conclude that the Court should:

(1) declare that

— by subjecting the posting of workers, who are nationals of a non-member country, for the provision of services on its territory to a prior authorisation procedure and

— by imposing the requirement that workers concerned belong to the permanent workforce of the undertaking providing services in Germany, which is deemed to be the case if the workers have been employed for at least one year,

the Federal Republic of Germany has failed to comply with its obligations under Article 49 EC;

(2) order the Federal Republic of Germany to pay the costs.