

Case C-208/05

ITC Innovative Technology Center GmbH

v

Bundesagentur für Arbeit

(Reference for a preliminary ruling
from the Sozialgericht Berlin)

(Freedom of movement for workers — Freedom to provide services — National
legislation — Payment by the Member State of the fee due to a private-sector
recruitment agency in respect of recruitment — Employment subject to compulsory
social security contributions in that Member State — Restriction —
Justification — Proportionality)

Opinion of Advocate General Léger delivered on 5 October 2006	I - 184
Judgment of the Court (Third Chamber), 11 January 2007	I - 213

Summary of the Judgment

1. *Freedom of movement for persons — Workers — Provisions of the Treaty — Scope ratione personae*
(Art. 39 EC)

2. *Freedom of movement for persons — Workers — Equal treatment — Freedom to provide services — Restrictions*
(Arts 39 EC, 49 EC and 50 EC)
3. *Community law — Direct effect — Directly applicable provision of the Treaty — Obligations of national courts*

1. It is possible that a private-sector recruitment agency may, in certain circumstances, rely on the rights directly granted to Community workers by Article 39 EC, where that agency acts as a mediator and intermediary between those applying for and those offering positions of employment and a recruitment contract concluded with a person seeking employment confers on such an agency the role of intermediary, inasmuch as it represents the applicant and seeks employment on his behalf.

with the rules governing the freedom of movement for workers.

(see paras 24-26)

2. Articles 39 EC, 49 EC and 50 EC prohibit national legislation which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State.

In order to be truly effective, the right of workers to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State without discrimination must also entail as a corollary the right of intermediaries, such as a private-sector recruitment agency, to assist them in finding employment in accordance

In so far as national legislation provides that a Member State will pay a fee which is owed to a private-sector recruitment agency only where the employment found by that agency is subject to compulsory social security contributions in that State, a person seeking employment for whom that agency has found a

job subject to compulsory social security contributions in another Member State is placed in a less favourable situation than if the agency concerned were to have found a job in that Member State, because he would, in the latter case, have been entitled to payment of the fee due to the recruitment agency in respect of his recruitment. Such legislation thus creates an obstacle to the free movement of workers which is capable of discouraging persons seeking employment, particularly those whose financial resources are limited, and, accordingly, private-sector recruitment agencies, from looking for work in another Member State because the recruitment fee will not be paid by the Member State of the person's origin.

The fact that such a system is designed to improve workers' recruitment and to reduce unemployment, to protect the national social security system or to protect the national labour market against the loss of qualified workers cannot justify such an obstacle. By systematically refusing the benefit of that system to persons seeking employment who are recruited in other Member States, the legislation in any case goes beyond what is necessary to attain the objectives pursued.

(see paras 35, 36, 38, 42, 44, 45, 57-59, 61, 62, operative part 1)

Moreover, such legislation gives rise to a restriction on the freedom to provide services based on the place where that service is provided, since it is capable of affecting the recipient of the services, that is to say the person seeking employment, who must himself, where the job found by the private-sector recruitment agency is in another Member State, pay the fee due to the agency. As regards the private-sector recruitment agency, which is the provider of the services, the opportunity to extend its activity to other Member States will be restricted, since the use by many employers of the services of such an agency will largely be dependent on the existence of the system in question, and it will also be by virtue of that system that the agency will be able to find a job for a person seeking employment in another Member State without incurring the risk that it will not be paid.

3. It is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions.

(see para. 70, operative part 2)