

JUDGMENT OF THE COURT (Third Chamber)

6 December 2007*

In Case C-456/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 December 2005,

Commission of the European Communities, represented by H. Støvlbæk and S. Grünheid, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and U. Forsthoff, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus, J. Klučka, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC by applying the transitional rules or 'established rights', on the basis of which psychotherapists obtain admission or authorisation to practise their profession independently of the applicable rules governing admission to practise

only to those psychotherapists who have carried out their activities under German statutory sickness insurance schemes and by not taking into account the comparable or similar professional activities performed by psychotherapists in other Member States.

Legal context

- 2 The Law of 16 June 1998 concerning the professions of psychological psychotherapist and psychotherapist specialising in children and adolescents, amending the Fifth Book of the Social Code ('Book V') and other legislation (Gesetz über die Berufe des Psychologischen Psychotherapeuten und des Kinder- und Jugendlichenpsychotherapeuten, zur Änderung des Fünften Buches Sozialgesetzbuch und anderer Gesetze) (BGBl. 1998 I, p. 1311, 'the Law on Psychotherapists') regulates access to the practice of the health professions of 'psychological psychotherapist' and 'psychotherapist specialising in children and adolescents' (section on the law governing the profession, Paragraph 1, entitled '[Law on Psychotherapists]') and the integration of new health professions in the statutory sickness insurance scheme (section dealing with sickness insurance, Paragraph 2, 'amending [Book V]').

- 3 The Law on Psychotherapists provides that, from 1 January 1999, psychotherapists wishing to practise under the statutory sickness insurance scheme are subject to a quota system structured on a regional basis. Psychotherapists who establish themselves in a particular region may practise under the statutory sickness insurance scheme only if the number of psychotherapists in that region does not exceed a number which corresponds to the needs of the region.

- 4 However, the Law on Psychotherapists contains provisions under which psychotherapists already established in a region and who practise under the statutory sickness insurance scheme may continue to practise under that scheme, even in the case where the number of psychotherapists required in the region has been exceeded, if they fulfil the conditions set out in Paragraph 95(10) and (11) of Book V ('the transitional provisions').
- 5 Paragraph 95(10) of Book V, dealing with the admission of psychotherapists, provides as follows:

'Psychotherapists are permitted to provide care under the statutory sickness insurance scheme if:

1. they have, by 31 December 1998, fulfilled the conditions concerning authorisation, in accordance with Paragraph 12 of the Law on Psychotherapists, and those concerning qualifications, in accordance with point 3 of the second subparagraph of Paragraph 95c, and have applied to be admitted to practise;
2. they have lodged a certificate of admission to practise by 31 March 1999;
3. they took part, in the period from 25 June 1994 to 24 June 1997, in psychotherapeutic out-patient treatment of persons insured under the compulsory sickness insurance scheme.

The admissions board shall rule on applications for authorisation before 30 April 1999.'

6 The provisions of Paragraph 95(11), concerning authorisations issued to psychotherapists, are as follows:

‘Psychotherapists are permitted to provide care under the statutory sickness insurance scheme if:

1. they have, by 31 December 1998, fulfilled the conditions concerning authorisation, in accordance with Paragraph 12 of the Law on Psychotherapists ... and have lodged an application for additional qualification;
2. they have lodged a certificate of admission to practise by 31 March 1999;
3. they took part, in the period from 25 June 1994 to 24 June 1997, in psychotherapeutic out-patient treatment of persons insured under the compulsory sickness insurance scheme.

The admissions board shall rule on applications for authorisation prior to 30 April 1999.’

7 The expression ‘took part’, in the period from 25 June 1994 to 24 June 1997 (‘the reference period’), in psychotherapeutic out-patient treatment of persons insured under the compulsory sickness insurance scheme, appearing in Paragraph 95(10)(3) and Paragraph 95(11)(3) of Book V, was interpreted by the Bundessozialgericht (Federal Social Court) in a judgment of 8 November 2000 (B 6 KA 52/00 R) (‘the judgment of 8 November 2000’). Thus, a psychotherapist is deemed to fulfil the

condition referred to in those subparagraphs when he has provided 250 hours of treatment during an uninterrupted period of 6 to 12 months during the reference period. In addition, the place in which those hours are provided must be the same as that in which the application for admission to practise was lodged.

Pre-litigation procedure

- 8 The Commission initiated the procedure for failure to fulfil obligations laid down in Article 226 EC by sending a letter of formal notice to the Federal Republic of Germany on 30 October 2000 in which it claimed that the transitional provisions are contrary to Article 43 EC. In the Commission's view, that Member State had failed to fulfil its obligations under that article by treating as previous activity worthy of protection solely professional activities carried out under the German compulsory sickness insurance schemes, to the exclusion of all other comparable or similar professional activity carried out in another Member State.
- 9 The Federal Republic of Germany submitted its observations in reply to that formal notice by letter of 12 January 2001.
- 10 Since it was not satisfied with that reply, the Commission issued a reasoned opinion on 21 December 2001 in which it called upon that Member State to adopt the measures necessary to comply with that reasoned opinion within two months of its receipt.
- 11 By letter of 20 March 2002, the Federal Republic of Germany replied to the reasoned opinion by reiterating its disagreement with the Commission's position.

12 Since it was not satisfied with that reply, the Commission brought the present action.

The action

Admissibility

13 The Federal Republic of Germany raises an objection of inadmissibility based on the following four grounds:

- lack of a current infringement of the EC Treaty;
- the marginal nature of the alleged failure to fulfil obligations;
- lack of *locus standi*; and
- extension of the subject-matter of the dispute.

Lack of a current infringement of the Treaty

14 The Federal Republic of Germany contends that the action is not directed against a current infringement of the Treaty rules but deals solely with past events which took place between 1 January 1997 and 31 December 1998. It points out that it has not

been possible to adopt a decision granting admission or authorisation on the basis of the transitional provisions for approximately seven years. There is thus no failure to fulfil obligations which could be the subject of an action under Article 226 EC.

- 15 It should be pointed out that, in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-525/03 *Commission v Italy* [2005] ECR I-9405, paragraph 14).
- 16 It is therefore necessary to establish whether, at that date, the contested legislation continued to produce effects (see, to that effect, Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraph 34 and 37; Case C-125/03 *Commission v Germany*, not published in the ECR, paragraphs 12 and 13; and *Commission v Italy*, paragraph 16).
- 17 It must be pointed out in this regard that the Commission's action is directed at the transitional provisions or 'established rights' to the extent to which they reserve the possibility of practising under German sickness insurance schemes solely to psychotherapists who practised under those schemes in a region of Germany during the reference period and refuse to grant that possibility to psychotherapists who practised during the same period outside Germany under the sickness insurance schemes of another Member State.
- 18 It must be stated, however, that the exclusion of the latter from the benefit of the transitional provisions is not limited in time. On the contrary, it is permanent in nature and, in particular, lasted beyond the expiry of the period laid down in the reasoned opinion.

- 19 That situation differs from that which gave rise to the judgment in *Commission v Italy*. It is clear from paragraph 16 of that judgment that the action for failure to fulfil obligations dealt only with a single ordinance, which was no longer in force at the expiry of the period laid down in the reasoned opinion, and not with contracts which had been able to be concluded on the basis of that ordinance. The present action, by contrast, is directed against the application of the transitional provisions solely to psychotherapists who had practised in a region of Germany under the German sickness insurance schemes, without any account being taken of comparable or similar professional activities carried out by psychotherapists in other Member States.
- 20 It follows that the transitional provisions at issue in this case continued to produce effects at the date relevant for assessing whether the action is admissible. The first objection of inadmissibility must therefore be rejected.

The marginal nature of the alleged failure to fulfil obligations

- 21 The Federal Republic of Germany contends that, if an infringement of the Treaty rules did occur, it was in any event marginal in nature and thus could not justify proceedings for failure to fulfil obligations.
- 22 It must be pointed out in this regard that, in accordance with the procedure laid down in Article 226 EC, the Commission may bring a matter before the Court if it considers that a Member State has failed to fulfil an obligation under the Treaty. That article contains no condition as to the degree of gravity of the infringement. As is clear from settled case-law, it is for the Commission to determine whether it is expedient to take action against a Member State, what provisions the Member State has infringed, and to choose the time at which it will bring an action for failure to

fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action (see Case C-33/04 *Commission v Luxembourg* [2005] ECR I-10629, paragraph 66). It follows that any infringement of the Treaty, irrespective of its gravity, may be the subject of an action under that article.

- 23 Consequently, the objection of inadmissibility based on the allegedly marginal nature of the infringement must be rejected.

Lack of *locus standi*

- 24 In the view of the Federal Republic of Germany, the Commission does not have *locus standi* to bring these proceedings. Its action, it is argued, is in fact intended to support the interests of two Austrian psychotherapists, whose situation it describes, who are in disagreement with the national authorities and have brought proceedings before the national courts which are still pending. The Commission is thus supporting the interests of individuals against a Member State. However, those individuals may avail themselves of remedies provided for them before the national courts.
- 25 Suffice it to note in that regard that, when exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see *Commission v Luxembourg*, paragraph 65). In addition, as has been pointed out in paragraph 22 of the present judgment, it is for the Commission to determine whether it is expedient to take action against a Member State.

26 Consequently, the objection of inadmissibility alleging lack of *locus standi* must be rejected.

Extension of the subject-matter of the dispute

27 The Federal Republic of Germany also contends that the Commission claimed for the first time in its application that the transitional provisions could constitute a hindrance to the freedom of establishment of psychotherapists established in Germany inasmuch as they appeared to constitute a hindrance to the movement of those psychotherapists to another Member State during the reference period. The Commission's argument, it is submitted, constitutes an extension of the subject-matter of the dispute as defined during the pre-litigation procedure and is for that reason inadmissible.

28 It should be pointed out that, in a letter of 10 November 1999 addressed to the Federal Republic of Germany and to which the letter of formal notice refers, the relevant Commission departments had informed that Member State of their doubt as to the compatibility of the transitional provisions with the Treaty rules on freedom of establishment in so far as those rules did not require the competent German authorities to take account of activity carried out by psychotherapists under the compulsory insurance schemes of other Member States. Similarly, reference is made in a general way in the letter of formal notice to the fact that activity performed outside the framework of compulsory insurance in Germany was not taken into account. Clearly, such a complaint could concern both psychotherapists from other Member States and German psychotherapists established in other Member States.

29 Consequently, even if the arguments put forward by the Commission during the pre-litigation procedure referred only to restrictions on the freedom of establish-

ment of psychotherapists from other Member States, the express reference in the application to a hindrance to the freedom of establishment of certain German psychotherapists does not constitute a new claim, distinct from that initially raised, but merely a development of the latter.

30 The objection of inadmissibility alleging an extension of the subject-matter of the dispute must therefore be rejected.

31 Since all the grounds of inadmissibility have been rejected, the merits of the application must be considered.

The merits

Arguments of the parties

32 The Commission claims that the terms of the transitional provisions reveal a restriction on the freedom of establishment.

33 Those provisions, it argues, constitute a derogation from the quota system which can benefit only psychotherapists who, during the reference period, treated patients under German compulsory sickness insurance schemes. By contrast, psychotherapists who had provided treatment under the compulsory sickness insurance scheme of another Member State during that period could not avail themselves of that derogation.

34 All psychotherapists who established themselves in Germany between 1 January 1997 and the end of the transitional period on 31 December 1998 were thus excluded from the benefit of the transitional provisions since, as from 1 January 1997, they could no longer fulfil the condition concerning completion of 250 hours of work under the German compulsory insurance scheme over a continuous period of at least six months during the reference period. The Commission points out that on 1 January 1997 the reference period, the end of which was fixed at 24 June 1997, had less than six months to run.

35 That exclusion affected principally psychotherapists established in other Member States who had exercised their right of free establishment by establishing themselves in Germany between 1 January 1997 and 31 December 1998. It also affected psychotherapists established in Germany who had exercised their right of free establishment by establishing themselves in another Member State during the reference period and who had returned to Germany before 1 January 1999.

36 The Commission illustrates that exclusion by reference to the cases of two Austrian psychotherapists who established themselves in Germany on 1 January 1998 and 1 October 1998 respectively in regions where the available care capacity was subsequently considered to be excessive under the Law on Psychotherapists. From those dates, the persons concerned had worked for the German compulsory sickness insurance but were unable to obtain authorisation to work in the regions of their choice as psychotherapists admitted under the terms of Paragraph 95(10) of Book V. The Commission points out that the German authorities failed to take account of the professional experience of those psychotherapists under the Austrian statutory sickness insurance scheme during the reference period, which, in terms of the number of hours of treatment, corresponded to that required by the German case-law.

- 37 In the Commission's view, it follows from the Court's case-law, in particular Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, that the activities carried out by those psychotherapists in other Member States under the social security systems of those Member States must be taken into account for the purpose of determining whether they can benefit from the transitional provisions.
- 38 The fact that the provisions which are the subject of these infringement proceedings are transitional measures designed to protect established rights does not release the Federal Republic of Germany from the obligation to comply with the Treaty rules on freedom of establishment. In this case, the application of the transitional provisions to certain psychotherapists established in other Member States would not jeopardise the objective which the provisions seek to achieve. Consequently, it is disproportionate to limit the benefit of those provisions solely to psychotherapists established in Germany.
- 39 The Commission adds, for the sake of completeness, that the discriminatory nature of the transitional provisions in regard to psychotherapists established in other Member States is particularly flagrant inasmuch as a psychotherapist established in Germany is not required, in practice, to have already worked in the region in which he wishes to become established. In other words, once he has worked under the German social security system during the relevant years and has completed the required number of hours, a psychotherapist established in Germany will be able to request permission to practise under the statutory sickness insurance scheme even if he moves to another region.
- 40 The Federal Republic of Germany contends that the transitional provisions are not discriminatory. They are intended to protect established situations considered worthy of protection, namely, the situation of psychotherapists established in a region of Germany in which they have worked for a certain time under the statutory sickness insurance scheme. The legislature sought to ensure that such persons were not forced to move and to lose their patients. It flows from the very nature of the situations at issue that they could have been attained only on German territory.

- 41 The Federal Republic of Germany points out that, in its judgment of 8 November 2000, the Bundessozialgericht interpreted the transitional provisions as applying solely to persons who wished to continue to practise under the German statutory sickness insurance scheme in the region of Germany in which they were already established and not to persons wishing to change region. Consequently, the Commission is wrong to claim that those provisions apply irrespective of the region in which a German psychotherapist wishes to become established and to deduce erroneously from this that the place, in particular, the Member State, in which work was performed under the statutory sickness insurance scheme need not be the determining factor.
- 42 In the view of the Federal Republic of Germany, the *Vlassopoulou* judgment is not relevant. The situation which gave rise to that judgment concerned the failure to take account of the professional experience of lawyers in other Member States. In the present case, the professional experience acquired in another Member State is taken fully into account in regard to the exercise of the activity of psychotherapist in Germany and the case-law flowing from the *Vlassopoulou* judgment has thus been fully complied with. The problem which arises is whether or not, under the Law of Psychotherapists, a psychotherapist has an established situation which is worthy of protection, in other words, whether or not he has practised his profession in a specific place during a given period. The *Vlassopoulou* judgment does not deal with that hypothesis.
- 43 The Federal Republic of Germany contends that, when the transitional provisions were being drafted, it was not necessary to take account of experience acquired by psychotherapists in another Member State because earlier activities performed outside Germany were specifically not relevant for the purposes of safeguarding established rights. The assessment of whether the transitional provisions are proportionate should therefore not depend on whether account was taken of those psychotherapists.
- 44 The Federal Republic of Germany adds that if the benefit of the derogation was to be extended to psychotherapists coming from other Member States by taking account of hours of work completed under the statutory sickness insurance scheme of their

Member State of origin, as the Commission claims, the latter would ultimately be more favourably treated than psychotherapists established in Germany, who could not rely on hours of work performed under a statutory sickness insurance scheme outside the region in which they sought admission to practise.

Findings of the Court

— Preliminary remark

⁴⁵ In order to examine the compatibility of the transitional provisions with Article 43 EC, it is necessary to analyse them in the light of the interpretation made by the Bundessozialgericht in its judgment of 8 November 2000.

⁴⁶ The fact that those provisions may have been incorrectly applied by the German authorities before that judgment was delivered is not relevant for the purpose of assessing the validity of the provisions in question.

⁴⁷ Consequently, the starting point must be the Bundessozialgericht's interpretation of the transitional provisions to the effect that it is a necessary condition of enjoyment of the benefit of those provisions that the place where the psychotherapist had practised during the reference period should be identical to the place where he wished to practise after 1 January 1999.

The alleged failure to fulfil obligations

48 In the absence of harmonisation of the activities of psychotherapists, the Member States remain, in principle, competent to define the conditions of access to those activities. However, they must, when exercising their powers in this area, respect the basic freedoms, in particular the freedom of establishment guaranteed by Article 43 EC (see, to that effect, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31, and *Vlassopoulou*, paragraph 9).

49 According to settled case-law, that article precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals, including those of the Member State which adopted the measure, of the fundamental freedoms guaranteed by the Treaty. The situation will be different only if such a measure may be justified by overriding reasons of general interest, provided that the measure in question is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraphs 26 and 28; and Case C-140/03 *Commission v Greece* [2005] ECR I-3177, paragraphs 27 and 34).

50 It is therefore necessary to determine whether the transitional provisions constitute a restriction on freedom of establishment and, if so, whether that restriction can be justified.

— The existence of a restriction on freedom of establishment

51 Referring in particular to the *Vlassopoulou* judgment, the Commission claims that the transitional provisions adversely affect freedom of establishment inasmuch as

they fail to take account of professional experience acquired during the reference period by psychotherapists established in other Member States under the statutory sickness insurance schemes of those States.

52 In this regard, it is common ground that psychotherapists established outside German territory who practised under sickness insurance schemes other than those in Germany and who transferred their practice to Germany between 1 January 1997 and 31 December 1998 could not avail of the derogation provided for in the transitional provisions. Furthermore, psychotherapists established in Germany who practised under the sickness insurance schemes of another Member State before returning to Germany between those two dates were in the same situation. In both hypotheses, the experience acquired under the statutory sickness insurance scheme of another Member State is not taken into account.

53 If, in the same way as the two Austrian psychotherapists referred to by the Commission, those psychotherapists chose to establish themselves in a region of Germany in which the maximum quotas laid down in the Law on Psychotherapists had been exceeded, they would not be able to continue to practise under the German statutory insurance scheme. However, without the benefit of that scheme, they could count only on private patients and offer only treatment which was not covered by the compulsory sickness insurance scheme, which could hinder their professional activity significantly or even force them to cease practising.

54 The transitional provisions do, admittedly, apply to all psychotherapists regardless of their nationality, with the result that psychotherapists established in Germany are affected by those provisions in the same way as psychotherapists established in other Member States if they changed region and established themselves, between 1 January 1997 and 31 December 1998, in a region of Germany in which the quotas had been exceeded. None the less, it must be stated that the double requirement whereby the persons concerned must have practised in a region of Germany, under the German

statutory sickness insurance scheme, during the reference period and apply for admission to practise in that same region is of its very nature liable to favour psychotherapists established in Germany over those established in other Member States during that period.

55 Thus, the requirement laid down in the transitional provisions is unfavourable to persons who have exercised their freedom of establishment and, on the contrary, benefits those who did not move their practice or who did so within the same region of Germany. It follows that that requirement produces effects which work, first of all, to the disadvantage of psychotherapists established in Member States other than the Federal Republic of Germany whose experience under the statutory sickness insurance scheme of their Member State of origin was equivalent in number of hours and in duration to that laid down in the transitional provisions and who established themselves in Germany between 1 January 1997 and 31 December 1998 and, secondly, to the disadvantage of psychotherapists established in Germany who had practised in another Member State during the reference period and who re-established themselves in Germany between those two dates.

56 It must be pointed out that the Court has already ruled that a law, even if applicable to all, which makes entitlement to a right subject to a condition of residence in a region of a Member State, and thereby favours nationals of that Member State over nationals of other Member States, runs counter to the principle of non-discrimination laid down in Article 12 EC (see, to that effect, with regard to the right to plead in one's mother tongue, Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 26).

57 In the light of that judgment, the condition requiring practice as a psychotherapist in a region of Germany under the German statutory sickness insurance scheme, which

requires the psychotherapist to be established in a region of Germany, amounts to a restriction on the freedom of establishment of psychotherapists established in another Member State.

- 58 With regard, more particularly, to the second category of persons mentioned in paragraph 55 of this judgment, that is to say, psychotherapists established in Germany who exercised their freedom of establishment during the reference period by establishing themselves in another Member State, the Court has already ruled that it would be incompatible with the right of freedom of movement were a citizen of the European Union, in the Member State of which he is a national, to receive treatment less favourable than that which he would enjoy had he not availed himself of the freedoms offered by the Treaty in relation to movement (Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30, and, to that effect, Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 20).
- 59 That reasoning is applicable by analogy to persons who have exercised their freedom of establishment. In so far as the effect of the transitional provisions is that psychotherapists established in Germany who established themselves outside that Member State during the reference period and then returned to Germany before 1 January 1999 are less favourably treated than psychotherapists who remained in Germany during the same period, those provisions are incompatible with the provisions of the Treaty concerning freedom of establishment, unless they can be justified.
- 60 The Commission was therefore correct in law to take the view that the transitional provisions amount to a restriction on the freedom of establishment of Community psychotherapists, including German psychotherapists.
- 61 It is necessary to establish whether there may none the less be justification for those provisions.

— The existence of a justification

- 62 In the view of the Federal Republic of Germany, psychotherapists established in a region of Germany during the reference period who have built up a practice consisting of patients covered by compulsory sickness insurance deserve special protection. Those patients represent an established right. It is therefore important that those psychotherapists should not be forced to close their practice from 1 January 1999 and thereby lose their patients.
- 63 The protection of an established right, namely, the retention of patients following several years of professional activity, constitutes an overriding ground of public interest. A Member State may consider it necessary in such a case to protect a practice and, by the same token, the professional activity of the persons concerned by means of the adoption of appropriate measures.
- 64 The transitional provisions, which introduced a derogation from the Law on Psychotherapists in order to protect persons who were established in Germany during the reference period and who had practised under the German statutory sickness insurance scheme, must be regarded as appropriate to preserve the established rights of those persons while limiting the number of psychotherapists practising under the German statutory sickness insurance scheme, independently of need.
- 65 It is important, however, that those provisions should not go beyond what is necessary in order to attain that objective (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

- 66 In order to assess whether or not the transitional provisions are proportionate in nature, it must be established whether it was necessary, in order to attain the abovementioned objective, to apply those provisions only to psychotherapists who had practised under the German statutory sickness insurance scheme during the reference period and to take no account of comparable activity performed by psychotherapists under the statutory sickness insurance schemes of other Member States.
- 67 In other words, it is necessary to examine whether the fact of taking account of the activities of those psychotherapists would have prejudiced attainment of the objectives of the derogating provisions.
- 68 It must be held, first of all, that taking account of those activities would not have affected the protection of the established rights of psychotherapists established in Germany during the reference period. It would have afforded protection to other psychotherapists and would have had no effect on the situation of those established in Germany during that period.
- 69 The question then arises as to whether that protection would have jeopardised the objective of limiting the number of psychotherapists practising under the statutory sickness insurance scheme independently of need.
- 70 It is not contested in this regard, that such protection could have had the effect of increasing the number of psychotherapists practising under the statutory sickness insurance scheme independently of need. However, once a derogation from the Law on Psychotherapists was accepted in order to protect psychotherapists established in Germany before the Law entered into force, the Federal Republic of Germany was required to consider whether it was necessary to accord the benefit of that derogation only to persons established on German territory during the reference period while excluding all those established in another Member State during that period. Inasmuch as the latter had merely exercised their right to a fundamental freedom, they also deserved, in principle, to have their practice under the German

statutory sickness insurance scheme protected. The position could be otherwise only if such protection prevented the transitional provisions attaining their objective, namely, to permit a limited number of psychotherapists to practise under the statutory sickness insurance scheme independently of need.

71 However, as the Commission has pointed out, and contrary to the Federal Republic of Germany's contention, the number of psychotherapists concerned was limited. It consisted of psychotherapists who had established themselves in Germany between 1 January 1997 and 31 December 1998 and, within that group, those who had exercised a professional activity under the statutory sickness insurance schemes of another Member State comparable to that required by Paragraph 95 of Book V.

72 It should also be noted that the definition of the transitional provisions by the German legislature does not include an upper numerical threshold. By requiring psychotherapists wishing to avail themselves of the transitional provisions to have practised under the German sickness insurance schemes during the reference period, that is to say, a period of three years, the German legislature merely set out a framework which could include a higher or lower number of psychotherapists. The Federal Republic of Germany has provided no evidence to suggest that taking account of psychotherapists who had practised during the same period under the compulsory insurance schemes of other Member States would have involved such a large number of persons that it would have jeopardised the objective which the transitional provisions were designed to achieve.

73 Consequently, it was disproportionate not to take account of all psychotherapists who had practised outside the German statutory sickness insurance scheme during the reference period.

- 74 The Federal Republic of Germany also contends that the effect of applying the transitional provisions to those psychotherapists would have been to place psychotherapists established in another Member State at an advantage in comparison with those established in other regions of Germany.
- 75 That argument, however, is not decisive. The application of different conditions to residents of other Member States who have exercised their freedom of establishment may be necessary in order to ensure that the rules on freedom of establishment are complied with. Thus, although psychotherapists established outside German territory during the reference period would have had an advantage over psychotherapists established in a region of Germany during that period and who subsequently changed region, that is not sufficient to alter the conclusion that the transitional provisions are disproportionate.
- 76 It follows from all of the foregoing that, by applying the transitional provisions or 'established rights', which permit psychotherapists to obtain authorisation or admission to practise independently of the applicable rules of the statutory sickness insurance scheme, solely to psychotherapists who have practised in a region of Germany under the German sickness insurance schemes and by failing to take account of comparable or similar professional activity performed by psychotherapists in other Member States, the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC.

Costs

- 77 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

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

1. **Declares that, by applying the transitional provisions or ‘established rights’, which permit psychotherapists to obtain authorisation or admission to practise independently of the applicable rules of the statutory sickness insurance scheme, solely to psychotherapists who have practised in a region of Germany under the German statutory sickness insurance schemes and by failing to take account of comparable or similar professional activity performed by psychotherapists in other Member States, the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC;**

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

[Signatures]