OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 30 September 2009 [1]

I — Introduction

1. By the present action, the Commission is seeking a declaration that the Federal Republic of Germany has infringed its obligations under Article 49 EC, as well as under the standstill clause laid down in Paragraph 13 of Chapter 2 of Annex XII to the Act of 16 April 2003 by which the Republic of Poland acceded to the European Union [2] ('the standstill clause'), in that:

— in its administrative practice, the Federal Republic of Germany interprets as meaning 'German undertakings' the term 'Unternehmen der anderen Seite' ('an enterprise of the other side'), as used in Article 1(1) of the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Poland of 31 January 1990 concerning the detachment of workers from Polish enterprises for the execution of work contracts [3] ('the Agreement'), and

— by means of the 'Arbeitsmarktschutzklausel' (the labour market protection clause), the Federal Republic of Germany widened the regional restrictions on access for foreign workers after 16 April 2003, that is to say, after the date on which the 2003 Act of Accession — entailing the accession of Poland to the European Union — was signed.

2. The present case raises essentially two legal issues. First, it is necessary to consider under what conditions, in the light of the relevant

1 — Original language: English.

2 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 875; 'the 2003 Act of Accession').

3 — BGBl. 1990 II, p. 602, in the version of 8 December 1990 (BGBl. 1992 II, p. 93). As the amendment of 8 December 1990 deleted paragraph 2 of Article 1 of the Agreement, I shall in the following refer to Article 1, not Article 1(1) of the Agreement. Only the German and the Polish versions are authentic; the English translation as quoted in this Opinion is based on that published in the UN Treaty Series (*United Nations Treaty Series*, Vol. 1708, No I-29540).

case-law of the Court, a Member State may, in the context of the provision of services, refuse to extend to undertakings resident in another Member State the advantages which undertakings resident in its own territory derive from a bilateral treaty.

3. Secondly, it is necessary to examine whether the standstill clause precludes Germany only from adopting new (legislative or administrative) measures in that field which are more restrictive than those that were in force on the date of signature of the 2003 Act of Accession, or whether, more generally, it precludes any widening of the restrictions on access to the national labour, not as a result of the adoption of new measures, but rather as a function of changes in the relevant factual circumstances to which the existing measures apply.

II — Legal framework

A — *The 2003 Act of Accession*

4. By virtue of transitional provisions laid down in the 2003 Act of Accession, Germany and Austria are entitled, inter alia, to maintain — in derogation from the Treaty provisions on the free movement of services — national measures, or measures resulting from bilateral agreements, restricting the use of contract workers employed by undertakings established in Poland. In Annex XII (entitled 'List referred to in Article 24 of the Act of Accession: Poland') to the 2003 Act of Accession, Paragraph 13 of Chapter 2 (entitled 'Freedom of Movement of Persons') reads, so far as is relevant, as follows:

'In order to address serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive 96/71/EC, and as long as they apply, by virtue of the transitional provisions laid down above, national measures or those resulting from bilateral agreements to the free movement of Polish workers, Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Article 49 of the EC Treaty with a view to limit in the context of the provision of services by companies established in Poland, the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.

…'

5. That paragraph goes on to lay down the following standstill clause:

'The effect of the application of this paragraph shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Poland which are more restrictive than those prevailing on the date of signature of the Treaty of Accession.'

B — *National legislation*

6. Article 1 of the Agreement provides as follows:

'Work permits shall be issued to Polish workers who are detached for temporary employment on a work contract between a Polish employer and an enterprise of the other side (contractual workers) regardless of the situation and trends of the labour market.'

7. Article 2 of the Agreement fixes a quota with respect to Polish contract workers. Article 2(5) provides:

'In implementing this Agreement in co-operation with the Ministry of Labour and Social Policy of the Republic of Poland, the Federal [Employment] Office of the Federal Republic of Germany [Bundesanstalt für Arbeit] shall ensure that the concentration of employed contractual workers in a given region or sector does not occur.

…'

8. The implementing instructions adopted by the Bundesagentur für Arbeit (Federal Employment Agency) include those set out in Leaflet 16a, 'Employment of foreign workers from the new Member States of the EU under work contracts in the Federal Republic of Germany' (Annex XI). That leaflet contains a labour market protection clause, under which contracts involving foreign workers are in principle prohibited where the work is to be carried out in districts of the Federal Employment Agency in which the average unemployment rate for the previous six months has been at least 30% higher than the unemployment rate for the Federal Republic of Germany as a whole. The list of the districts to which that clause applies is updated every quarter (Annex XII).

III — Pre-litigation procedure and judicial proceedings

9. By letter of 3 April 1996, the Commission drew the attention of the Federal Government of Germany to the fact that its interpretation of the Agreement appeared to be in breach of Article 49 EC. In its letter of 28 June 1996, the German Government disputed the Commission's view.

10. On 12 November 1997, the Commission issued a reasoned opinion, giving Germany a period of 12 months in which to reply. Following a meeting with representatives of the Commission on 5 May 1998, Germany stated, in its letter of 19 July 1998, that efforts were being made to find a political solution in the context of the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part. However, the attempts to solve the difficulty at political level were unsuccessful.

11. Poland acceded to the European Union on 1 May 2004. In reply to an enquiry from the Commission of 15 June 2004, the Federal Government of Germany stated by letter of 6 December 2004 that it stood by its interpretative practice as regards the Agreement; moreover, in view of the time that had passed, it could legitimately suppose that there was no longer any basis for continuing the procedure for failure to fulfil obligations.

12. In a supplementary letter of formal notice of 10 April 2006, the Commission drew the attention of the German Government to the fact that, in addition to the apparent infringement of Article 49 EC, the German administrative practice concerning the application of the Agreement seemed to be incompatible with the standstill clause. According to the Commission, the extension of the regional restrictions under the labour market protection clause, based on Article 2(5) of the Agreement and contained in the implementing instructions of the Federal Employment Agency, infringed the prohibition on widening existing restrictions.

13. By letter of 8 June 2006, the German Government contested that view, arguing that application of the bilateral agreement to all Member States and their undertakings was not appropriate.

14. In its supplementary reasoned opinion of 15 December 2006, the Commission repeated its complaints. Since, by letter of 19 February 2007, the Federal Government of Germany maintained its point of view, the Commission brought the present action by application lodged at the Court Registry on 5 December 2007.

IV — Analysis

A — *Admissibility*

1. Main arguments of the parties

15. The German Government contends, in the first place, that the action is inadmissible, in any event so far as the alleged infringement of Article 49 EC is concerned.

16. In its view, the Commission has lost its right to institute proceedings since it did nothing for almost seven years in respect of the alleged infringement of Article 49 EC. In view of the procedural delays and the specific circumstances of the present case, the German Government could in fact legitimately assume that the Commission had dropped that complaint. That legitimate expectation was reinforced by the letter sent by Commissioner Monti in July 1998 in which he indicated that he would not welcome rescission of the Agreement and that he would wait until November 1998 to see if another solution was possible. However, no further steps were taken until April 2003, when it was clear that Germany could no longer rescind the Agreement without contravening the standstill clause. In this way, the Commission, in the opinion of the German Government, deliberately abused its trust.

17. The Commission rejects that view, arguing that its way of proceeding could not confer on Germany a legitimate expectation that the procedure had come to an end. Emphasising the discretion enjoyed by the Commission as regards the time at which it decides to bring an action for failure to fulfil obligations, it maintains that the delays in the procedure were appropriate in view of the circumstances of the case.

2. Appraisal

18. It should be recalled at the outset that, under the system laid down in Article 226 EC, the Commission has a discretion, recognised by the case-law, in deciding, first, whether it is going to bring an action for failure to fulfil obligations and, secondly, at what time it will bring such an action. [4]

19. Thus, as regards, more specifically, the latter aspect, the Commission is not obliged to

4 — See, to that effect, inter alia, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 20, and Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 15.

institute proceedings within a specific period, save where the excessive duration of the pre-litigation procedure laid down in Article 226 EC is capable of making it more difficult for the Member State concerned to refute the Commission's arguments, and of thus infringing the rights of the defence. It is for the Member State concerned to provide evidence that it has been so affected. [5]

20. In my view, however, the German Government has not indicated circumstances capable of showing that the duration of the pre-litigation procedure in the present case compromised its right of defence.

21. In that regard, it should first be noted that the fact, referred to by the German Government, that while the pre-litigation procedure was under way, the standstill clause entered into force — with the effect that Germany could no longer rescind the Agreement with Poland — could not, as such, make it more difficult for the German Government to refute the Commission's complaints and arguments. Secondly, in 2006 the Commission issued a supplementary letter of formal notice and a supplementary reasoned opinion in which the original complaints were essentially repeated, thus giving the German Government a fresh opportunity to defend its case.

22. Next, as regards the German Government's argument that, in the circumstances of the present case, it could legitimately assume that the procedure had come to an end, it follows from the discretion enjoyed by the Commission as regards the commencement of infringement proceedings that a period of inaction on the part of the Commission in the framework of the pre-litigation procedure cannot of itself — even if it lasts for several years — confer on the Member State concerned a legitimate expectation that the Commission is not going to continue the procedure. This is particularly so in a case such as that at issue where, as is clear from the case-file, during the period referred to by the German Government, between 1997 and the accession of Poland, efforts were being made to find a political solution in the context of the Europe Agreement of 16 December 1991 and, in that way, to bring the alleged infringement to an end.

23. Lastly, in this context, as regards the letter sent by Commissioner Monti in July 1998, upon which the German Government also relies, it is settled case-law that — even supposing that a Member State can rely on the principle of protection of legitimate expectations in order to preclude a declaration, pursuant to Article 226 EC, that it has

5 — See, inter alia, Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 26, and Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraph 36.

failed to fulfil its obligations [6] — it may not plead breach of that principle unless it was given precise assurances by the Community authorities concerned. [7]

24. It suffices to note in that respect that the German Government has not even claimed that the Commission gave a precise assurance in the above letter to the effect that the complaints at issue would be dropped or that the proceedings would be brought to a halt. Rather, Commissioner Monti essentially indicates in that letter that, instead of a rescission of the Agreement, he would prefer a constructive solution to the problem raised by the way that agreement is applied in Germany, while at the same time making it clear that, in that situation, it was not possible to drop the case.

25. In my view, it follows from the foregoing considerations that the plea of inadmissibility raised by the German Government should be rejected.

6 — See, in this context, Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 25, and Case 288/83 *Commission* v *Ireland* [1985] ECR 1761, paragraph 22.

7 — See, to that effect, inter alia, Case C-47/07 P *Masdar* [2008] ECR I-9761, paragraph 81, and Case C-213/06 P *EAR* [2007] ECR I-6733, paragraph 33.

B — *Substance*

1. Infringement of Article 49 EC

(a) Main arguments of the parties

26. By the first part of its complaint, the Commission maintains essentially that it is German administrative practice to interpret Article 1 of the Agreement in such a way that only German undertakings can conclude work contracts within the meaning of that Agreement. As a consequence, undertakings from other Member States are prevented — unless they establish a subsidiary in Germany — from taking advantage of the freedom to provide services granted to them under Article 49 EC by concluding contracts under the Agreement, for works to be carried out in Germany, with Polish undertakings and by making use, in that way, of the quota of Polish contract workers.

27. According to the Commission, this amounts to direct discrimination on grounds of the nationality of an undertaking, or the location of its seat, which is not justified on grounds of public policy, public security or public health under Article 46 EC, read in conjunction with Article 55 EC.

28. In that regard, the Commission rejects, in particular, the argument that the contested rule, according to which a contracting/client undertaking must have its seat in Germany, is necessary in order to supervise properly the correct implementation of the Agreement; to ensure effective enforcement of the undertaking's liability for payment of social security contributions and penalties for infringing the law; or to prevent the incorrect application or the circumvention of the transitional provisions laid down in the Act of Accession.

29. Finally, the Commission recalls that, according to the case-law of the Court, the fundamental principle of equal treatment requires a Member State which is party to a bilateral treaty to grant nationals of another Member State the same advantages as those which its own nationals enjoy under that treaty unless it can provide objective justification for refusing to do so. [8] Such objective justification does not exist, however, in the present case.

30. The Polish Government, which was granted leave by order of the President of the Court of 2 July 2008 to intervene in support of the Commission, concurs essentially with those arguments. It points out, in particular, that the Agreement is not of such a nature that the extension of its benefits to nationals of other Member States would disturb the balance and reciprocity of that agreement within the meaning of the relevant case-law of the Court. [9] The Agreement is, in fact, not based on the principle of reciprocity.

31. The German Government contests the view taken by the Commission and the Polish Government. It underlines, first of all, that it is correct, in the light of its wording, to interpret Article 1 of the Agreement as referring to German undertakings. Furthermore, that rule does not amount to discrimination as prohibited under Article 49 EC as, in particular, undertakings from other Member States and German undertakings are not in comparable situations in relation to the Agreement.

32. The German Government argues that, given the special nature of the bilateral agreement at issue and the reciprocity on which it is based, the benefits under that agreement cannot be granted to nationals or undertakings of all other Member States. [10] Moreover, the transitional provisions laid down in the 2003 Act of Accession would be undermined. In any event, even if the way in which the Agreement is applied in Germany were to be regarded as a restriction of the

8 — By reference, in particular, to Case C-55/00 *Gottardo* [2002] ECR I-413, paragraphs 32 to 34.

9 — It refers in that regard, inter alia, to *Gottardo*, cited in footnote 8; Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855; and Case C-376/03 *D.* [2005] ECR I-5821.

10 — By reference, in particular, to the Opinion of Advocate General Van Gerven in Case C-23/92 *Grana-Novoa* [1993] ECR I-4505, point 12, and *D.*, cited in footnote 9, paragraph 61 et seq.

freedom to provide services, that restriction would be justified under Article 46 EC, read in conjunction with Article 55 EC, by the need to supervise properly the implementation of the Agreement and to ensure, inter alia, the effective enforcement of the contracting/client undertaking's liability for social security contributions and penalties for infringing the law.

(b) Appraisal

33. It should be recalled at the outset that, according to settled case-law, the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided. [11]

34. In the present case, it is common ground that under the German administrative practice criticised by the Commission, only German undertakings — that is to say, undertakings which have their seat in Germany — can conclude work contracts with Polish undertakings within the meaning of the Agreement and thereby benefit — despite the provisional arrangements under the 2003 Act of Accession concerning the temporary movement of workers — when providing services in Germany, from the Polish workers quota allowed under that agreement, whereas that option is unavailable to undertakings established in other Member States when providing services in Germany, unless they establish a subsidiary in that Member State.

35. Clearly, therefore, so far as concerns the conclusion of work contracts with Polish undertakings for the provision of services in Germany, the contested administrative practice draws a distinction based on the seat of the undertaking providing the service and is thus liable — in so far as the seat of an undertaking determines its 'nationality' [12] — to constitute discrimination on grounds of nationality, as prohibited under Article 49 EC.

36. It is necessary, therefore, to examine whether the German Government has put forward reasons which may nevertheless

11 — See, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 14; Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 13; and Case C-490/04 *Commission* v *Germany*, cited in footnote 5, paragraph 83.

12 — See to that effect, for example, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18, and Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 15.

provide a valid justification for the fact that Germany allows only its own undertakings the possibility of carrying out works in its national territory in cooperation with Polish undertakings and their employees as subcontractors pursuant to the Agreement.

37. In that regard it should be noted, first of all, that the fact that undertakings established in other Member States can also benefit under the Agreement by setting up subsidiaries in Germany cannot justify the different treatment at issue since, as the Court has consistently held, the requirement of setting up a permanent branch or subsidiary runs directly counter to the essence of the freedom to provide services. [13]

38. In so far as, next, the German Government seeks to justify its refusal to extend the benefit at issue to undertakings established in other Member States on the grounds that that benefit arises under the provisions of an international bilateral agreement, it should be noted that — as follows from the principle of the primacy of Community law and as the Court has confirmed in its case-law — when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. [14]

39. Accordingly, the Court has consistently held that, even when implementing an international agreement, a Member State remains bound by the principle of equal treatment as enshrined in the fundamental freedoms and is therefore in principle required to grant nationals of other Member States or, as the case may be, undertakings which are established or resident in other Member States the same advantages as those which its own nationals or undertakings enjoy under a given agreement.

40. Thus, the Court has held in *Matteucci*, with regard to a cultural agreement between two Member States under which certain scholarships were reserved exclusively for nationals of those two States that, on account of the principle of equal treatment vis-à-vis national workers laid down by the rules on the freedom of movement for workers, the authorities of those two Member States were obliged to extend the benefit of those scholarships to Community workers established within their territory. [15] The Court has also consistently held, starting with *Saint-Gobain ZN*, that the principle of national treatment laid down in Article 43 EC

13 — See to that effect, for example, Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 27, and Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 52.

14 — See to that effect *Gottardo*, cited in footnote 8, paragraph 33; see, in this connection, also my recent Opinion in Case C-301/08 *Bogiatzi*, case pending before the Court, point 55.

15 — Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 16.

requires a Member State which is party to a bilateral international treaty concluded with a non-member country for the avoidance of double taxation to grant to permanent establishments of undertakings resident in another Member State the advantages provided for under that treaty on the same conditions as those which apply to undertakings resident in the Member State that is party to the treaty. [16] Likewise, in *Gottardo*, the Court ruled in respect of a bilateral international social security convention concerning the taking into account of periods of insurance that the fundamental principle of equal treatment requires that Member State to grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so. [17]

41. It follows from that case-law that, pursuant to the principle of national treatment also laid down, as indicated above, in Article 49 EC, [18] Germany is in principle required to grant undertakings which are established in another Member State and do not have their seat or a subsidiary in Germany the advantages — on the same conditions as those which apply to undertakings which have their seat in Germany — provided under the Agreement, that is to say, the possibility of concluding, with undertakings established in Poland, work contracts to be carried out in Germany, using Polish workers in accordance with the quota fixed by that agreement.

42. Admittedly, as the German Government has submitted, the Court has held that the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive thereunder. [19]

43. It should be noted, however, that that justification was formulated with regard to international agreements concluded with one or more non-member countries and thus with a view to preventing, pursuant to the exception laid down in Article 307 EC, the rights of a non-member country arising under such an agreement from being affected or new obligations from being imposed on that non-member country. [20]

44. By contrast, the Agreement is an agreement between only two Member States, which are thus both under a duty, pursuant to Article 10 EC, to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and to assist each other to that end. [21]

16 — See Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraphs 57 to 59; Case C-476/98 *Commission* v *Germany*, cited in footnote 9, paragraph 149; and *Gottardo*, cited in footnote 8, paragraph 32.

17 — *Gottardo*, cited in footnote 8, paragraph 34.

18 — See point 33 above.

19 — See, to that effect, *Gottardo*, cited in footnote 8, paragraph 36, and *Saint-Gobain ZN*, cited in footnote 16, paragraphs 59 and 60.

20 — See, to that effect, *Gottardo*, cited in footnote 8, paragraphs 36 and 37; *Saint-Gobain ZN*, cited in footnote 16, paragraph 59; see also, as to the purpose of Article 307 EC, Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraphs 55 and 56.

21 — See, in this context, *Matteucci*, cited in footnote 15, paragraphs 19 to 22: it does not make a difference in that regard that the Agreement had been concluded before Poland became a Member State.

45. It should be observed in this context, moreover, that, as the Polish Government has rightly pointed out, the extension, to undertakings established in other Member States, of the possibility under the Agreement to conclude work contracts with Polish undertakings does not, as such, affect the quota fixed with respect to Polish contract workers under Article 2(5) of the Agreement. Apart from that, even if Germany concluded the Agreement on the understanding that only German undertakings would benefit from it, that circumstance cannot be sufficient to override the application, in the present context, of a fundamental principle laid down in the Treaty.

46. In consequence, the arguments put forward by the German Government based on the character and the reciprocal nature of the bilateral agreement at issue should, in my view, be rejected.

47. Next, in so far as the German Government disputes the obligation to extend the advantage provided for under the Agreement to undertakings established in other Member States on the grounds that such undertakings are not in a situation comparable with that of German undertakings covered by the Agreement, the Court has held, in a number of judgments concerning benefits granted under bilateral tax conventions, that Community law does not preclude the benefit in question from being withheld from residents of a third Member State, in so far as those residents are not in a situation comparable with that of residents covered by the convention in question. [22]

48. That case-law must, however, be read in the light of the specific circumstances underlying it and, in my view, cannot simply be transposed to the circumstances of the present case. In particular, it should be pointed out in that regard that those cases concerned bilateral tax conventions and that, as is clear from the case-law of the Court, in the area of tax law, the place of residence or establishment may serve as a connecting factor for the purposes of allocating powers of taxation. [23] It follows that, as far as benefits granted under tax conventions are concerned, a resident of another Member State, or an undertaking established there, may be in a situation which is objectively different from that of residents or undertakings established in the Member State which is party to such a convention with the effect that, accordingly, equal treatment as regards the benefits granted under the convention is not required. [24]

49. In the present case, by contrast, there appears to be no good reason to assume that

22 — See, to that effect, *D.*, cited in footnote 9, paragraphs 59 to 63; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraphs 88 to 93; and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 51.

23 — See, to that effect, *D.*, cited in footnote 9, paragraph 52; *Saint-Gobain ZN*, cited in footnote 16, paragraph 56.

24 — See in this context also Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 30, and Case 270/83 *Commission* v *France*, cited in footnote 12, paragraph 19.

the situation of an undertaking established in another Member State and having no subsidiary in Germany is not comparable with that of undertakings with a seat in Germany so far as concerns the possibility of concluding work contracts with Polish undertakings, with a view to providing services in Germany. To my mind, it cannot therefore be maintained that, owing to the lack of comparability of the undertakings concerned, the difference in treatment at issue vis-à-vis the Agreement is not liable to constitute discrimination.

50. Finally, in so far as the German Government seeks to justify the practice at issue on the basis of Article 46 EC, read in conjunction with Article 55 EC, it should be recalled that the Court has already held that national rules which, whatever their origin, are not universally applicable to service providers are not consistent with Community law unless they fall within the purview of an express derogating provision such as Article 46 EC, to which Article 55 EC refers. In that regard, it follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health. [25] Moreover, the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated. [26]

51. In the present case, the German Government has essentially invoked difficulties, in the implementation of the Agreement, regarding the effective application and enforcement of national legislation and, in particular, the enforcement of the liability of undertakings for payment of social security contributions and penalties.

52. However, those considerations are not covered by any of the grounds expressly mentioned in Article 46 EC. In so far as those considerations could be understood as relating to public policy within the meaning of Article 46 EC, the Court has interpreted that concept strictly, requiring, in particular, a genuine and sufficiently serious threat to a fundamental interest of society. [27] The circumstances invoked by the German Government do not meet those requirements and cannot be considered sufficient to justify a derogation from the fundamental principle of freedom to provide services. Moreover, as the Commission and the Polish Government have

25 — See, inter alia, Case C-490/04 *Commission* v *Germany*, cited in footnote 5, paragraph 86, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 31.

26 — See to that effect, for example, Case C-319/06 *Commission* v *Luxemburg* [2008] ECR I-4323, paragraph 51.

27 — See, to that effect, for example Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21, and *Commission* v *Luxemburg*, cited in footnote 26, paragraph 50.

pointed out, neither considerations of an economic nature, nor practical administrative difficulties can constitute grounds of public policy within the meaning of Article 46 EC. [28]

53. It follows from all the foregoing that the contested administrative practice, under which Article 1 of the Agreement is interpreted as meaning that only German undertakings can conclude work contracts within the meaning of that Agreement, constitutes an infringement of the obligations under Article 49 EC. It would seem, therefore, that the first part of the complaint brought by the Commission is well founded.

2. Infringement of the standstill clause

(a) Main arguments of the parties

54. By the second part of its complaint, the Commission claims that the labour market protection clause, as it is used in German administrative practice, contravenes the standstill clause. The Commission maintains that the wording of the standstill clause makes it clear that the obligation is absolute, and any restriction on the access of Polish contract workers to the German labour market which places them in a situation worse than the one they were in on 16 April 2003 — whether or not there has been a change in the legal situation or the administrative practice — is prohibited.

55. The Commission points out that pursuant to the labour market protection clause, which is continuously applied in the administrative practice of the Federal Employment Agency, work contracts are in principle not permitted if they are to be carried out in an agency district in which the average unemployment rate over the last six months has been at least 30% above the overall unemployment rate in Germany. The list of the agency districts covered by that rule is updated quarterly. Consequently, the standstill clause has been infringed to the extent that new agency districts have been added to the list of 'blocked' districts after 16 April 2003 and access to the German labour market has *de facto* become more restricted.

56. The Polish Government essentially concurs with the Commission and maintains that Article 2(5) of the Agreement does not provide a sound legal basis for the labour market protection clause.

28 — See, to that effect, *Distribuidores Cinematográficos*, cited in footnote 11, paragraph 21; Case C-288/89 *Mediavet* [1991] ECR I-4007, paragraph 11; and Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 24.

57. The German Government emphasises, by contrast, that neither the legal situation in Germany nor the administrative practice by means of which Article 2(5) of the Agreement is implemented has been amended since 4 January 1993 as regards access to the labour market under that agreement. In those circumstances, it cannot be maintained that the standstill clause has been infringed, as such an infringement would presuppose the adoption of legislative or administrative measures by the Member State concerned. In the present case, however, only the factual circumstances have changed, namely the situation on the German employment market.

59. In that regard, it should be noted that it is undisputed that the labour market protection clause was already in force, and applied by the German authorities, before the date of signature of the 2003 Act of Accession and has remained unchanged since that date.

60. The Commission's complaint refers, however, more specifically to the fact that, since 16 April 2003, new agency districts have been added to the list of districts in relation to which work contracts under the Agreement are not permitted, with the effect that access to German labour market has *de facto* become more restricted.

(b) Appraisal

61. I do not share the Commission's view that this amounts to an infringement of the standstill clause.

58. It should be observed at the outset that here it is not for the Court to determine the issue whether the labour market protection clause contained in the implementing instructions of the Bundesagentur für Arbeit and its application in German administrative practice constitutes a correct implementation of Article 2(5) of the Agreement, which fixes the quota for Polish contract workers, [29] but whether that administrative practice infringes the standstill clause.

62. As the German Government has emphasised, according to the implementing instructions applied by the German authorities, the districts covered by the labour market protection clause are published in a list which is updated every quarter. That list and its updates are therefore merely the consequence of the application of the rule, laid down in the implementing instructions, according to which work contracts are not permitted if

29 — See, in this context, *Centro-Com*, cited in footnote 20, paragraph 58; Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 29; and Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 18.

they are to be carried out in an agency district in which the average unemployment rate over the last six months has been at least 30% above the average unemployment rate of Germany: accordingly, in that sense, it is merely declaratory in nature. In other words, the contested addition of 'blocked' districts after 16 April 2003 comes about only as a result of the application to changing factual circumstances — namely a rise in the unemployment rate for certain districts — of the same conditions or restrictions as were already applied in administrative practice before that date.

63. Although, admittedly, its result may be that *de facto* fewer Polish workers can be posted in the context of the provision of services in Germany,[30] that addition of districts cannot be regarded as amounting to more restrictive 'conditions' for the temporary movement of workers which the standstill clause intends to preclude. It is generally inherent in the nature of legal conditions that they may also operate to the disadvantage of those to whose right they apply if there is a change as regards the pertinent facts, without, however, the conditions themselves having changed or having become more restrictive.

64. In the light of the foregoing, the second part of the action, by which the Commission claims that Germany has infringed the standstill clause, should be dismissed as unfounded.

V — Costs

65. 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. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

66. In the circumstances of the present case, in so far as the Commission has been successful on one of the two heads of complaint, the Commission should be ordered to pay one half of the costs and the Federal Republic of Germany the other half.

67. In accordance with Article 69(4) of the Rules of Procedure, the Republic of Poland should be ordered to bear its own costs.

30 — But also the other way round.

VI — Conclusion

68. I therefore propose that the Court:

(1) declare that the Federal Republic of Germany has infringed its obligations under Article 49 EC by its administrative practice of interpreting as meaning 'German undertakings' the term 'Unternehmen der anderen Seite' ('an enterprise of the other side') in Article 1 of the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Poland of 31 January 1990 concerning the detachment of workers from Polish enterprises for the execution of work contracts;

(2) dismiss the action as to the remainder;

(3) order the Commission of the European Communities and the Federal Republic of Germany each to bear one half of the costs;

(4) order the Republic of Poland to bear its own costs.