

Case C-161/07

Commission of the European Communities

v

Republic of Austria

(Failure of a Member State to fulfil obligations — Article 43 EC — National legislation laying down the conditions for registration of partnerships or companies on application by nationals of the new Member States — Procedure for certification of self-employed status)

Opinion of Advocate General Poiares Maduro delivered on 18 September
2008 I - 10673
Judgment of the Court (First Chamber), 22 December 2008 I - 10685

Summary of the Judgment

*Freedom of movement for persons — Freedom of establishment — Restrictions
(Arts 43 EC and 46 EC)*

A Member State fails to fulfil its obligations under Article 43 EC where its national legislation requires, for the registration of partnerships or companies in the commercial register on application by persons who are nationals of the Member States which acceded to the European Union on 1 May 2004 — with the exception of the Republic of Cyprus and the Republic of Malta — and are members of a partnership or have minority holdings in a limited liability company, a determination by a labour market service that they are self-employed or the presentation of a work permit exemption certificate. Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for their own nationals. Thus, requiring only nationals of those eight new Member States to comply, with regard to their access to those activities, with formalities which go beyond those applicable to nationals of the host State, clearly infringes that rule.

The only derogation under which the difference in treatment may fall is provided for in

Article 46 EC, according to which discriminatory measures can be justified only on grounds of public policy, public security or public health. In that regard, even supposing that a danger of circumvention of the transitional rules governing the freedom of movement for workers from those eight new Member States is liable to interfere with the public policy of the Member State concerned, in the absence of proof by the latter to the requisite legal standard that the objective concerning the proper working of the labour market which is pursued by the legislation in question makes it necessary to put in place a general system of prior authorisation, applying to all economic operators concerned from those eight new Member States, and that that objective cannot be achieved by measures less restrictive of the freedom of establishment, the restriction on the freedom of establishment at issue is not justified.

(see paras 28-30, 32, 38, 41, 42, operative part)