2a. Assuming that national legislation governing gaming policy is compatible with Article 49 EC, is it for the national courts to determine, on every occasion on which they apply that legislation in practice in an actual case, whether the measure to be imposed, such as an order that a particular website be made inaccessible to residents of the Member State concerned by means of software designed for that purpose, in order to prevent them from participating in the games of chance offered thereon, in itself and as such satisfies the condition, in the specific circumstances of the case, that it should actually serve the objectives which might justify the national legislation in question, and whether the restriction resulting from that legislation and its application on the freedom to provide services is not disproportionate in the light of those objectives?

2b. In answering Question 2a, does it make any difference if the measure to be implemented is not ordered and imposed in the context of the application of the national legislation by the authorities, but in the context of a civil action in which an organiser of games of chance operating with the required licence requests imposition of the measure on the ground that an unlawful act has been committed in its regard under civil law, inasmuch as the opposing party contravened the national legislation in question, thereby gaining an unfair advantage over the party operating with the required licence?

3. Should Article 49 EC be interpreted in such a way that the application of that article results in the competent authority of a Member State being unable, on the basis of the closed licensing system that exists in that State for the provision of gaming services, to prohibit a service provider which has already been granted a licence in another Member State for the online provision of such services from also offering those services online in the first Member State?

Appeal brought on 24 June 2008 by Christos Michail against the judgment of the Court of First Instance (First Chamber) delivered on 16 April 2008 in Case T-486/04 Michail v Commission

(Case C-268/08 P)

(2008/C 223/42)

Language of the case: French

Parties

Appellant: Christos Michail (represented by: C Meidanis. lawyer)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— Declaration that the appeal is admissible and well-founded;

— Annulment, as necessary, of the judgment of the Court of First Instance of 16 April 2008 in Case T-486/04;

— Order as appropriate that costs be paid.

Pleas in law and main arguments

The appellant relies on three grounds in support of his appeal.

In his first ground of appeal, Mr Michail claims that the Court of First Instance erred in the interpretation and application of Community law and failed to comply with its duty to state reasons in judgments, in that the Court acknowledged, in the contested judgment, that the Commission was partly responsible for the appellant feeling that he was subject to psychological harassment, within the meaning of Article 12a of the Staff Regulations, but nonetheless rejected his action as unfounded.

In his second ground of appeal, the appellant complains that the Court of First Instance distorted the sense of the facts presented for its assessment, in particular by examining the facts individually and not in their overall context, and that the Court made several errors in the legal classification of those facts.

In his third ground of appeal, the appellant lastly criticises the decision of the Court of First Instance to reject as inadmissible, for lack of precision, the numerous pleas in law on which he relied in support of his action, alleging, inter alia, infringement of Articles 21a, 22a and 22c of the Staff Regulations and of the principles of equal treatment and proportionality. By breaking down his action into several parts, the Court of First Instance altered the essential nature of the action in its objectives and structure.

Action brought on 24 June 2008 — Commission v Germany

(Case C-271/08)

(2008/C 223/43)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: G. Wilms and D. Kukovec, Agents)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that the Federal Republic of Germany has until, 31 January 2006, infringed Article 8 in conjunction with Titles III to VI of Directive 92/50/EEC ([1]) and, since 1 February 2006, infringed Article 20 in conjunction with Articles 23 to 55 of Directive 2004/18/EEC ([2]), because local authorities and local authority undertakings with more than 1 218 employees awarded public service contracts concerning occupational pension schemes without a European call for tenders directly to the organisations and undertakings mentioned in Paragraph 6 of the Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst (TV-EUmw/VKA) (Collective agreement on the conversion of earnings into pension contributions for local authority employees);

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

Pleas in law and main arguments

In Germany, employees have the right to demand that part of their future earnings — up to 4 % of the relevant contribution assessment ceiling for the statutory pension fund — are paid into their occupational pension schemes through the conversion of earnings into pension contributions (Entgeltumwandlung). According to the Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst (Collective agreement on the conversion of earnings into pension contributions for local authority employees — 'the collective agreement') the conversion of earnings into pension contributions is the responsibility of local authorities or, as the case may be, local authority undertakings. The conversion of earnings into pension contributions has to implemented through public bodies offering supplementary private pensions or, as the case may be, undertakings that are part of the Sparkassen finance group or local authority insurance companies (Kommunalversicherer). As a general rule, local authorities or, as the case may be, local authority undertakings enter into group insurance contracts for all their employees, under which the conversion of earnings into pension contributions is agreed with one of the organisations mentioned above.

According to information available to the Commission, local authorities or, as the case may be, local authority undertakings awarded those public service contracts relating to occupational pension schemes directly to the organisations and undertakings mentioned in the collective agreement, without first issuing a European call for tenders.

Public services relating to occupational pension schemes fell within the scope of Annex I A, category 6 of Directive 92/50/EC and, since 1 February 2006, have come under Annex II Part A of Directive 2004/18/EC. They constitute insurance and pension fund services that do not fall within the scope of the statutory social security system. Therefore, the service contracts at issue, which were awarded by local authorities — in other words, contracting authorities — constitute public contracts for pecuniary interest concluded in writing within the meaning of the abovementioned directives. In addition, according to the case-law, Article 1(a) of Directive 92/50/EC does not make a distinction between contracts that a contracting authority awards in the context of carrying out its general interest functions and contracts that are not connected to those functions. Therefore, the Court of Justice rejected the idea that the nature of a contracting body can be determined by its function. The objection raised by Germany that, as regards occupational pension schemes, public authorities or, as the case may be, local authority undertakings do not — for the purposes of procurement law — carry out the functions of contracting authorities, could not be upheld.

Further, the Commission takes the view that the contracts at issue exceeded the relevant thresholds by a significant amount. Contrary to the view taken by the defendant, that calculation does not have to be done for every single contract. What matters is the duration of the framework agreement since, for the purposes of Community law on public procurement, the public contract does not concern individual agreements between the employee and the employer. Accordingly, the value of a framework agreement to be taken into account is equivalent to the estimated total value — net of value added tax — of all contracts whose implementation is envisaged throughout the entire duration of the framework agreement. According to calculations undertaken by the Commission, at least 110 cities in the Federal Republic of Germany exceeded the threshold.

Local authorities and local authority undertakings should not have awarded public service contracts relating to occupational pensions schemes to organisations and undertakings mentioned in the collective agreement, but rather after issuing a European call for tenders. This finding is not affected by the fact that continued payment of remuneration has been agreed under a collective wage agreement. First, the case-law of the Court of Justice clearly shows that Community law does not make general provisions for collective bargaining autonomy and, second, the Commission cannot see how, if contracting authorities were to fulfil their obligation to put contracts out to public tender, this would limit the application of the principle of collective bargaining autonomy enshrined in the German Basic Constitutional Law.

([1]) OJ 1992 L 209, p. 1.
([2]) OJ 2004 L 134, p. 114.

Action brought on 24 June 2008 — Commission of the European Communities v Federal Republic of Germany

(Case C-275/08)

(2008/C 223/44)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: G. Wilms and D. Kukovec, acting as Agents)

Defendant: Federal Republic of Germany