JUDGMENT OF THE COURT (First Chamber)

14 April 2005 *

In Case C-341/02,

ACTION for failure to fulfil obligations under Article 226 EC, brought on 25 September 2002,

Commission of the European Communities, represented by J. Sack and H. Kreppel, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and A. Tiemann, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), K. Lenaerts, S. von Bahr and K. Schiemann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and following the hearing held on 29 April 2004,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by not recognising as constituent elements of the minimum wage all of the allowances and supplements paid by employers in other Member States to their employees in the construction industry who are posted to Germany — with the exception of the bonus granted to workers in that industry — and consequently by leaving out of account the wage elements actually paid by such employers to their employees thus posted, the Federal Republic of Germany has

failed to fulfil its obligations under Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The Federal Republic of Germany claims that the Court should dismiss the application and order the Commission to pay the costs.

The legal framework

Community legislation

3 The 12th recital in the preamble to Directive 96/71 states that Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although that person's employer is established in another Member State.

4 Paragraph 1 of Article 1 of Directive 96/71, which is entitled 'Scope', provides:

'This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers ... to the territory of a Member State.'

5 Article 3 of Directive 96/71, entitled 'Terms and conditions of employment', provides as follows in paragraphs 1 and 7:

'1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

— by law, regulation or administrative provision, and/or

— by collective agreements ... which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

— ...

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary ocupational retirement schemes;

...

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.'

National legislation

6 The Law on the Posting of Workers (Arbeitnehmer-Entsendegesetz) of 26 February 1996 (BGBl. 1996 I, p. 227), in the version in force at the expiry of the period set in the reasoned opinion (hereinafter 'the AEntG'), applies to the construction industry.

7 Paragraph 1(1) of the AEntG extends to employers established outside Germany and to their workers posted to Germany the applicability of certain collective agreements that are of universal application. That provision is worded as follows:

'The legal rules resulting from a collective agreement governing the construction industry which is declared to be universally applicable ... , which relate to minimum pay, including pay for overtime ... shall also apply ... to an employment relationship linking an employer established outside Germany and his employee working within the territory covered by that collective agreement. An employer within the terms of the first sentence shall, as a minimum, grant to his employee working within the territory covered by a collective agreement such as that referred to in the first sentence the working conditions established in that collective agreement.'

8 The list of the collective agreements that are applicable in each case, in accordance with the AEntG, is set out in the explanatory notes on the posting of workers for the use of employers established outside Germany (Merkblatt für Arbeitgeber mit Sitz im Ausland zum Arbeitnehmer-Entsendegesetz) (hereinafter 'the explanatory notes').

9 Paragraph 2 of the collective agreement providing for a minimum wage in the construction industry within the Federal Republic of Germany (Tarifvertrag zur Regelung eines Mindestlohnes im Baugewerbe im Gebiet der Bundesrepublik Deutschland) of 26 May 1999 (hereinafter 'the collective agreement on the minimum wage') provides that the minimum wage consists of the hourly pay provided for by that agreement and the bonus granted to workers in the construction industry, which together make up the total hourly pay under the agreement. The provisions of that agreement were declared to be of universal application by the regulation on working conditions mandatorily applicable in the

construction industry (Verordnung über zwingende Arbeitsbedingungen im Baugewerbe) of 25 August 1999 (BGBl. 1999 I, p. 1894).

10 For the period from 1 September 2000 to 31 August 2002, the collective agreement on the minimum wage which was in force was that of 2 June 2000, which was declared to be universally applicable on 17 August 2000.

11 Rules on holidays, on remuneration payable in respect of holidays, on paid holiday fund schemes and on additional bonuses for, inter alia, heavy work and additional working hours were laid down by other collective agreements declared to be of universal application.

12 Annex 4 to the explanatory notes, in the version applicable at the date on which the period set in the reasoned opinion expired, provided that allowances and supplements paid by an employer, with the exception of the general bonus granted to workers in the construction industry, were not to be regarded as constituent elements of the minimum wage. That annex stated that those supplements include in particular allowances in respect of overtime, night and Sunday work or work on public holidays, in addition to bonuses for travel and for heavy work.

Pre-litigation procedure

13 Following a complaint, the Commission concluded that the method applied in Germany of not recognising all allowances and supplements paid by employers

established in other Member States to their employees in the construction industry who are posted to the Federal Republic of Germany as being integral components of the minimum wage was incompatible with the provisions of Directive 96/71 and that this affected the freedom to provide services under Article 49 EC. The Commission accordingly sent a letter of formal notice to that Member State on 3 April 2000 requesting it to set out its views in that regard.

14 By letter of 21 June 2000, the German Government denied that there was any failure as alleged, invoking in particular the second subparagraph of Article 3(1) of Directive 96/71. The concept of 'minimum rates of pay', it argued, was defined by the national law or practice of the Member State to the territory of which a worker is posted. Within the context of monitoring compliance in regard to that minimum pay, no account could be taken, under the provisions in force in Germany, of bonuses which affected the relationship between pay and work, as defined by the applicable collective agreement. The German Government did, however, state that it was prepared to take account of a number of allowances which did not alter that relationship and, if necessary, to amend the explanatory notes accordingly.

15 As it was not satisfied by the explanations provided by the Federal Republic of Germany, the Commission sent a reasoned opinion to that Member State on 2 April 2001 in which it called on it to comply with the opinion within two months of its notification.

16 Following a reply by the German Government to that reasoned opinion by letter of 31 May 2001, in which it repeated, on several points, its previous arguments, while at the same time acknowledging that some of the content of the explanatory notes was not entirely in line with the provisions of Directive 96/71, the Commission decided to bring the present action.

The action

Arguments of the parties

17 The Commission submits that the German legislation, which, in regard to allowances and supplements, tends to take account only of the general bonus granted to workers in the construction industry as a constituent element of the minimum wage in the comparison between on the one hand, the minimum rate of pay established by the German provisions and, on the other, the remuneration actually paid to posted workers by their employers established in other Member States, is contrary to the provisions of Directive 96/71 and Article 49 EC.

18 According to the Commission, employers established in other Member States may be obliged, under the provisions applicable in those States, to provide other elements of remuneration in addition to the normal hourly pay. Under the German legislation, those elements cannot be taken into account for the purpose of calculating the minimum wage. The Commission contends that the failure to take account of those allowances and supplements results in higher wage costs than those which German employers are required to pay to their employees and that employers established in other Member States are thus prevented from offering their services in Germany. While it is true that the Member State to the territory of which a worker is posted is allowed to determine, under Directive 96/71, the minimum rate of pay, the fact none the less remains that that Member State cannot, in comparing that rate and the wages paid by employers established in other Member States, impose its own payment structure.

19 More particularly, the Commission criticises the Federal Republic of Germany for not recognising, as constituent elements of the minimum wage, certain bonuses, such as bonuses in respect of the 13th and 14th salary months, or the contributions paid by employers established in other Member States to holiday and compensation funds comparable to the German funds, in so far as those amounts are received directly or indirectly by the worker posted in the other Member State.

20 The German Government refers to a forthcoming amendment to the explanatory notes with regard to the allowances and supplements paid by an employer established in another Member State which are different from those which alter the relationship between the service provided by the worker and the payment which he receives. Those allowances and supplements ought, in principle, to be recognised as constituent elements of the minimum wage.

21 By contrast, allowances and supplements which alter the balance between the service provided by the worker and the consideration which he receives in return cannot, according to the German rules, be recognised as forming part of the minimum wage and cannot be treated as constituent elements of that wage when the rate due under the German provisions is compared with the remuneration paid by employers established in other Member States. The collective agreement on the minimum wage is not confined to fixing an absolute amount, but contains other rules concerning the relationship between the remuneration payable by the employer and the service to be provided by the worker. Special bonuses are governed by a framework collective agreement which is different from the collective agreement on the minimum wage.

22 The German Government argues that hours worked outside the normal working hours, which involve requirements of a particularly high degree in terms of quality of results or which involve special constraints or dangers, have a greater economic value than that of normal working hours and that the bonuses relating to such hours must not be taken into account in the calculation of the minimum wage. If those amounts were taken into account for the purposes of that calculation, the worker

would be deprived of the economic countervalue corresponding to those hours of work.

23 The German Government submits that the Commission bases itself, in its application, on a misconstruction of the German rules. It argues that the Commission incorrectly assumes that an employer established in another Member State is, by reason of the German rules, obligated, in the case of work featuring special difficulties, to pay the additional German bonuses as well as the minimum wage.

Findings of the Court

24 It must first be borne in mind that, according to established case-law, Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first Member State to pay its workers the minimum remuneration laid down by the national rules of that State (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 12; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must be appropriate for securing the attainment of the objective which they pursue, that is to say, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see to that effect, inter alia, *Arblade and Others*, cited above, paragraph 35, *Mazzoleni and ISA*, cited above, paragraph 26, and Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 34).

25 That case-law is enshrined in Article 3(1)(c) of Directive 96/71, under which Member States are required to ensure that, whatever the law applicable to the employment relationship, the undertakings covered by that directive guarantee to workers posted to their territory the terms and conditions of employment covering, inter alia, minimum rates of pay, including overtime rates, which are laid down by the rules of the Member State where the work is carried out. The second subparagraph of Article 3(1) states that the concept of 'minimum rates of pay' is to be defined 'by the national law and/or practice of the Member State to whose territory the worker is posted'.

26 In the present case, it is common ground that the Federal Republic of Germany exercised, within the framework of the AEntG, the option provided for by Directive 96/71 to adopt provisions governing the minimum rate of pay within its national territory. As will be clear from paragraphs 7 to 10 of this judgment, the applicability of certain collective agreements of universal application, such as that relating to the minimum wage, has been extended, by Paragraph 1(1) of the AEntG, to employers established outside Germany and their employees posted to Germany. The list of agreements to be applied in each case, in accordance with the provisions of the AEntG, is set out in the explanatory notes.

27 The parties to the present case are, however, in disagreement as to the method to be applied for the purpose of comparing the minimum rate of pay due under the German provisions and the remuneration actually paid by employers established in other Member States to their posted employees. The question that arises is therefore as to which allowances and supplements a Member State must take into account, as component elements of the minimum wage, when it checks whether that wage has been correctly paid.

28 Under the terms of Annex 4 to the explanatory notes, the allowances and supplements paid by an employer are not regarded in Germany as being component

elements of the minimum wage, with the exception of the general bonus granted to workers in the construction industry. According to the case-file, apart from this latter bonus, account is taken in this regard of payments envisaged by the contract of employment as compensation for the difference between the national wage and that due by reason of the AEntG. According to the Commission, all of the allowances and supplements paid to posted workers by their employers established outside Germany must, in principle, be taken into account for the purpose of calculating the minimum wage.

29 It is necessary, first, to point out that the parties are in agreement that, in accordance with Article 3(1)(c) and 3(7), second subparagraph, of Directive 96/71, account need not be taken, as component elements of the minimum wage, of payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross amounts of wages that must be taken into account.

30 Next, it must be pointed out that the German Government does not deny that the explanatory rules do not conform in full to the provisions of Directive 96/71. It did, moreover, amend those explanatory rules after the period laid down in the reasoned opinion, in the manner suggested by the Commission, by reversing the 'rule-exception' relationship for taking account of allowances and supplements. Following that amendment, account was to be taken, in the monitoring of the payment of the minimum wage, of all additional payments made by employers established in another Member State, in so far as the relationship between the service provided by the worker and the consideration which he receives in return is not altered in a manner detrimental to the worker.

31 The German Government also states in its defence that it envisages supplementing the wording of the explanatory notes in order to recognise bonuses in respect of the 13th and 14th salary months as being constituent elements of the minimum wage, on condition that they are paid regularly, proportionately, effectively and irrevocably during the period for which the worker is posted to Germany and that they are made available to the worker on the date on which they are supposed to fall due. In its reply, the Commission expresses the view that this proposed amendment could bring the national scheme into line with Directive 96/71 in that regard.

32 The amendments thus adopted and proposed by the German Government are indeed of such a kind as to remove several inconsistencies between the national rules in question and the provisions of Directive 96/71.

33 It is, however, necessary to point out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-63/02 *Commission* v *United Kingdom* [2003] ECR I-821, paragraph 11, and judgment of 16 December 2004 in Case C-313/03 *Commission* v *Italy*, not published in the ECR, paragraph 9). Subsequent changes cannot be taken into account by the Court (see, inter alia, judgment of 18 November 2004 in Case C-482/03 *Commission* v *Ireland*, not published in the ECR, paragraph 11).

34 In regard to contributions paid by employers established in other Member States to holiday and compensation funds comparable to the German funds, it is clear from the German Government's reply to the reasoned opinion that these correspond, in Germany, to paid leave and holiday bonuses. The German Government submits, in

its rejoinder, that the dispute ought to be resolved on this point in the light of its arguments concerning proportionate payment of the holiday bonus and the rules on the due date for payment. It explained at the hearing that that bonus has to be paid *pro rata temporis* and on the due date for payment of the wages.

35 According to settled case-law, in an action for failure to fulfil obligations it is for the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the evidence necessary for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (see, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and Case C-194/01 *Commission* v *Austria* [2004] ECR I-4529, paragraph 34).

36 Neither the reasoned opinion, the application nor the reply lodged by the Commission make it possible to appraise whether the failure to take into account, in the calculation of the minimum wage, of contributions paid by employers established in other Member States to holiday and compensation funds comparable to the German funds constitutes a separate head of complaint or, on the contrary, forms part of the complaint concerning the failure to take account, in that calculation, of the bonuses in respect of the 13th and 14th salary months. The difficulties experienced by the German Government in responding to the Commission's allegations concerning contributions to holiday funds confirms the lack of clarity of those allegations.

37 In those circumstances, it appears that the Commission has not set out in sufficiently clear terms the precise scope of its head of complaint and has failed to provide the Court with the elements necessary to enable it to establish whether the failure by Germany to take account of contributions, such as those here in issue, in the definition of the minimum wage, does or does not constitute a failure to meet its obligations under Article 3 of Directive 96/71.

38 Finally, it is necessary to analyse the main question which remains in dispute as to whether the allowances and supplements paid by an employer which, according to the German Government, alter the balance between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, have to be treated as constituent elements of the minimum wage. In issue here, in particular, are quality bonuses and bonuses for dirty, heavy or dangerous work.

39 Contrary to what the Commission submits, allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.

40 It is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.

41 However, it follows from paragraphs 30 to 33 of this judgment that the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71.

42 As a failure to fulfil obligations on the basis of that directive has thus been established, it is unnecessary to examine the action in respect of Article 49 EC.

43 In those circumstances, it must be held that, by failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71.

44 The remainder of the action is dismissed.

Costs

45 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. However, under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the parties bear their own costs if each party succeeds on some and fails on other heads. As the Commission and the Federal Republic of Germany have each been unsuccessful in part, each must be ordered to bear its own costs.

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

1. **Declares that, by failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services;**

2. **Dismisses the remainder of the action;**

3. **Orders each party to bear its own costs.**

[Signatures]