JUDGMENT OF THE COURT (First Chamber)

18 July 2007 *

In Case C-490/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 November 2004,

Commission of the European Communities, represented by E. Traversa, G. Braun and H. Kreppel, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, M. Lumma and C. Schulze-Bahr, acting as Agents, assisted by T. Lübbig, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by:

French Republic, represented by G. de Bergues and O. Christmann, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, R. Schintgen, A. Tizzano (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that by enacting a law under which:

— foreign undertakings are obliged to pay contributions to the German paid-leave fund even if the employees benefit from a comparable protection under the law of the State in which their employer is established (Paragraph 1(3) of the law on the posting of workers (Arbeitnehmer-Entsendegesetz) of 26 February 1996) (BGBl. 1996 I, p. 227) ('the AEntG');

— foreign undertakings are obliged to have the employment contract or the documents required, pursuant to Council Directive 91/533/EC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32), under the law of the State where the employee is resident, pay slips, time sheets, proof of payment of wages, and all other documents required by the German authorities, translated into German (Paragraph 2 of the AEntG);

— foreign employment agencies are obliged not only to give prior notification each time a worker is posted to a user of the worker's services in Germany, but also each time a worker starts a new job on a building site at the request of the user of his services (Paragraph 3(2) of the AEntG),

the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

Legal context

Community law

The EC Treaty

2 Article 49 EC states:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...'

Directive 96/71/EC

3 Article 1(1) 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 1996 L 18, p. 1) provides that it '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.'

4 In the wording of Article 3 of that directive, headed 'Terms and conditions of employment':

'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 or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

...

(b) minimum paid annual holidays;

...

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

...

...'

5 Article 4 of the Directive, headed 'Cooperation on information', states:

'1. For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those

authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

...'

National law

6 On the expiry of the period prescribed in the reasoned opinion, notified to the Federal Republic of Germany, the posting of workers in that Member State was governed by the AEntG.

7 Under Paragraph 1(1) of the AEntG, collective agreements in the construction industry with general compulsory application dealing with the duration of leave, paid leave, and supplementary holidays are applicable to employers established abroad who post workers in Germany.

8 Paragraph 1(3) of the AEntG states:

'When a collective agreement with generally compulsory application provides for the levying of contributions or the supply of services by a body common to the social partners in connection with the granting of holiday entitlement referred to in paragraph 1, the rules of this agreement shall also be binding on foreign employers

and those of their employees who come within the territorial scope of that agreement, in so far as that agreement or any other provision guarantees that:

1. the foreign employer is not required to pay contributions at the same time under the present law and to a similar body in the state where it is established or where the seat of its undertaking is situated, and

2. the procedure of the body common to the social partners provides for contributions already paid by the foreign employer, in order to satisfy its employees' rights to leave provided for by statute, industrial agreement or contract.

...'

9 Paragraph 2(3) of the AEntG states:

'Every employer established abroad is required to retain in Germany the necessary documents, in German, for the monitoring of compliance with the legal obligations arising from the second sentence of Paragraph 1(1), from the second sentence of Paragraph 1(2a) and from the fifth sentence of Paragraph 1(3a), throughout the whole period for which the employee remains within the scope of the present law and for at least the duration of the building project, without, however, exceeding a period of two years, so as to be able to present those documents at the building site at the request of the supervisory authorities.'

10 Finally, Paragraph 3(2) of the AEntG is worded as follows:

'Temporary employment agencies established abroad, which make one or more workers available to a user undertaking within the scope of the present law must ... send in writing, before each building project is begun, to the competent customs authorities a declaration in German containing the following information:

1. surname, first name and date of birth of the workers made available within the scope of the present law,

2. start and finish dates of the placement,

3. place of work (site),

...'

Pre-litigation procedure

11 Following the examination of numerous complaints, the Commission, by letter of formal notice of 12 November 1998 and by an additional letter of formal notice of 17 August 1999, brought to the attention of the German authorities the incompatibility of some of the provisions of the AEntG with Article 59 of the EC Treaty (now, after amendment, Article 49 EC).

12 Not being satisfied with the explanations provided by the Federal Republic of Germany in letters of 8 March, 4 May and 25 October 1999, the Commission on 25 July 2001 sent a reasoned opinion to that Member State requesting it to take the necessary measures in order to comply with the opinion within a period of two months from the date of that notification.

13 By letters of 1 October 2001, 10 December 2001, 3 February 2003 and 4 December 2003, the Federal Republic of Germany informed the Commission of its observations on the reasoned opinion. By letter of 23 January 2004 that Member State notified the Commission of an amended version of the AEntG following the adoption of the third law on the modern provision of services on the work market (Drittes Gesetz für moderne Dienstleistungen am Arbeitsmarkt), of 23 December 2003 (BGBl. 2003 I, p. 2848).

14 Having determined that only some of the infringements initially complained of had been eliminated as a result of the amendment of the AEntG, the Commission decided to bring the present proceedings.

The action

Admissibility

15 The German Government raises four pleas of inadmissibility, concerning, respectively, the choice of Article 49 EC as the relevant provision for determining whether the AEntG complies with Community law, the excessive length of the pre-litigation procedure, the application's lack of precision, and the amendment of the subject-matter of the first complaint put forward by the Commission.

The choice of Article 49 EC as the relevant provision for determining whether the AEntG complies with Community law

16 The German authorities claim that the disputed provisions of the AEntG should have first been examined in light of Directive 96/71 which specifically concerns the posting of workers in the framework of the provision of services. In particular, the German authorities claim the Commission should have shown that Germany failed to implement that directive correctly or that those provisions have not been applied in accordance with that directive.

17 In this regard, it should be noted that Directive 96/71 seeks to coordinate the laws of the Member States by establishing a list of national rules that a Member State must apply to undertakings established abroad which post workers on that Member State's territory in the framework of the provision of transnational services.

18 Thus, the first subparagraph of Article 3(1) of that directive stipulates that Member States are to ensure that, whatever the law applicable to the employment relationship, those undertakings guarantee the posted workers the terms and conditions of employment, involving those matters covered by that article, which are established in the Member State in which the work is carried out.

19 Nevertheless, Directive 96/71 did not harmonise the material content of those national rules (see, to that effect, the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, of 25 July 2003, on the implementation of Directive 96/71 in the Member States, COM(2003) 458 final, p. 7). That content may accordingly be freely defined by the Member States, in compliance with the Treaty

and the general principles of Community law, including therefore, for the purposes of the present case, Article 49 EC.

20 In its action the Commission contests the compatibility of Paragraphs 1(3), 2 and 3(2) of the AEntG with the Treaty, in so far as those provisions contain unlawful restrictions on the freedom to provide services within the Community.

21 It is agreed that restrictions on that fundamental freedom are prohibited by Article 49 EC. The Commission is therefore fully entitled to rely on that article to contest the compatibility of the disputed provisions with Community law.

22 It follows that the first plea of inadmissibility raised by the Federal Republic of Germany must be rejected.

The excessive length of the pre-litigation proceedings

23 The Federal Republic of Germany claims that the action is inadmissible by reason of the delays, attributable to the Commission, which have affected the current action for failure to fulfil obligations. Although the letter of formal notice, which was sent to the German authorities by the Commission, dates back to 12 November 1998, the latter did not commence its action until 29 November 2004, more than six years after sending that letter. The negligence arising from these delays entails an infringement, on the one hand, of the obligation on the Commission to act within a reasonable period of time, and on the other hand, of the requirement of legal certainty which the Member State and the workers protected under the AEntG can claim.

24 According to the German authorities, the conduct of proceedings should have been accelerated by the Commission, which had the power to do so. Since the commencement of the proceedings, the Court has given judgment in several cases involving the posting of workers generally, as well as one judgment on the AEntG specifically (Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831). Those judgments should have enabled a quicker resolution of the present action.

25 In this regard, it should however be recalled that the objective of the pre-litigation proceedings provided for in Article 226 EC is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraph 35).

26 It should also be recalled that according to the Court's case-law the rules of Article 226 EC must be applied and the Commission is not obliged to act within a specific period, save where the excessive duration of the pre-litigation procedure in that provision 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 (Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16; Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraph 25, and *Commission* v *Austria*, paragraph 36).

27 Without it being necessary to examine if, having regard to the judgments given by the Court on the issue of posting of workers, the length of time between the issuing of the letter of formal notice to the Federal Republic of Germany and the commencement of the present action can be considered as excessive in this case, it

must be stated that the Member State has neither alleged an infringement of its rights of defence arising from the length of the pre-litigation proceedings, nor put forward any other matter capable of constituting such an infringement.

28 Therefore, the second plea of inadmissibility raised by the German Government must be rejected.

The application's lack of precision

29 The German Government claims that the action is inadmissible because it does not clearly indicate the complaints on which the Court is called to rule. In particular, the Commission fails to take a view on the question whether it intends to contest solely the provisions of the AEntG themselves or the application of those provisions by the German administrative and judicial authorities in specific cases as well.

30 In this regard, it should be noted that Article 38(1)(c) of the Rules of Procedure state that any application must contain, in particular, the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. Accordingly, in any application made under Article 226 EC, the Commission must set out the complaints coherently and precisely to enable the Member State to prepare its defence and the Court to determine whether there is a breach of obligations as alleged (see, to that effect, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28, and Case C-98/04 *Commission* v *United Kingdom* [2006] ECR I-4003, paragraph 18).

31 In the present case, both the reasoning of and the forms of order sought in the Commission's application demonstrate sufficiently clearly and precisely that the application concerns the compatibility of Paragraphs 1(3), 2 and 3(2) of the AEntG with Article 49 EC. The action is therefore unambiguous.

32 Accordingly the third plea of inadmissibility raised by the German Government must be rejected.

The amendment of the subject-matter of the first ground for complaint

33 The German Government maintains that the first complaint is inadmissible in so far as the subject-matter of that complaint is not set out in the same way in the reasoned opinion and in the application.

34 On the one hand, the Commission stated in the reasoned opinion that Germany had failed to fulfil its obligations under Article 49 EC in requiring foreign undertakings to contribute to the German construction industry paid-leave fund, 'while they are still required to pay holiday pay directly to their employees in the Member State of establishment'. On the other hand, in the application it alleged an infringement of the Treaty arising from the requirement imposed on foreign undertakings to contribute to that fund 'even if the workers' of that undertaking 'essentially benefited from comparable protection in accordance with the laws of the Member State of establishment'. The German Government claims the Commission thus amended and enlarged the subject-matter of the action.

35 The Commission retorts that the differences in formulation between the content of the reasoned opinion and the forms of order sought in the application did not involve any amendment of the subject-matter of the action.

36 In this regard, it is true that, according to the case-law of the Court, the subject-matter of an application under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that article, and that the Commission's reasoned opinion and the application to the Court must therefore be based on the same objections (Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, paragraph 12, and Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, paragraph 73).

37 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56, and Case C-358/01 *Commission* v *Spain* [2003] ECR I-13145, paragraph 28).

38 In the circumstances, it is apparent from the reasoned opinion that the criticisms made by the Commission in the course of the pre-litigation procedure related to the fact that the obligation to contribute to the German paid-leave fund imposed on foreign undertakings by Paragraph 1(3) of the AEntG resulted in a double payment of holiday pay, in the Member State of establishment and in that of the posting, and that those undertakings were relieved from the necessity of making double payment only in cases where there was a fund similar to the German fund in the Member State of establishment. Likewise, in its application the Commission contests the double economic burden on employers who post workers in Germany, as well as the overly restrictive method provided for in Paragraph 1(3) of the AEntG for exemption from the requirement to contribute.

39 Accordingly it must be stated that the Commission has not extended or amended the subject-matter of the action, and has not infringed Article 226 EC.

40 It follows that the fourth plea of inadmissibility raised by the German Government must also be rejected and that therefore the action brought by the Commission is admissible.

Substance

The obligation to contribute to the German paid-leave fund (Paragraph 1(3) of the AEntG)

Arguments of the parties

41 The Commission claims that the exemption from the requirement to contribute, provided for in the first sentence of Paragraph 1(3) of the AEntG, is too restrictive, so that it can result in a double financial burden, inconsistent with Article 49 EC, for the employer posting workers in Germany. According to the Commission, the AEntG should exempt undertakings established in another Member State, which post workers, from the requirement to contribute, not only when it is guaranteed that they contribute to a similar scheme in the Member State of establishment, but also when rules exist in that Member State, which even if they are not based on contributions paid by the employer, offer to the employee rights to paid leave equivalent to those provided for by the German rules.

42 The German Government contends that the Commission has not produced specific proof to show that Paragraph 1(3) of the AEntG is inconsistent with the Treaty. It adds that that provision is applied by national authorities and courts in a manner that is consistent with the obligations arising under Community law.

43 In order to avoid a double financial burden for undertakings established in another Member State, Germany has put in place a pragmatic cross-border arrangement with other Member States, even concluding bilateral agreements with some of them, on the mutual recognition of national paid leave schemes.

44 Moreover, the German courts, and in particular the Bundesarbeitsgericht (Federal Labour Court), have always respected the principles established by the Court regarding posted workers. Specifically, in addition to ascertaining whether there is a bilateral agreement, the German courts have always ensured that the posted worker benefits from the application of the German law on the right to paid leave, by applying that law only if it results in a real advantage for the worker compared with applying the provisions in force in the Member State of origin.

Findings of the Court

45 It should, first of all, be noted that the first sentence of Paragraph 1(3) of the AEntG obliges foreign employers to contribute to the German paid-leave fund, in so far as they are not required to pay contributions, at the same time, to that fund and also to a similar body in the Member State where the undertaking's seat of business is located (first sentence), and that the payments already made by those employers, to satisfy the rights of their employees to legal and contractual leave, are taken into account (second sentence).

46 It should also be noted that the Court has already ruled on the compatibility with the Treaty of that provision of the AEntG in the *Finalarte and Others* case, cited above. Specifically, at paragraphs 45, 49 and 53 of that judgment, the Court emphasised that the consistency of Paragraph 1(3) of the AEntG with Community law depends on two conditions, and it is for the national court to determine whether they have been fulfilled. That court must also consider whether the German law relating to paid leave confers real additional protection on workers, posted by service providers established outside Germany, and whether the application of that law is proportionate to the attainment of the objective of the social protection of those workers.

47 The parties agree that in the present action for failure to fulfil obligations it was for the Commission to determine whether those conditions had been satisfied and to provide the Court with all the necessary proofs for determining the consistency of the relevant provision with Article 49 EC.

48 According to settled case-law, in the context of an action for failure to fulfil obligations brought under Article 226 EC the Commission is required to prove the allegation that the obligation has not been fulfilled. It is the Commission which must provide the Court with the necessary evidence for the Court to establish that the obligation has not been fulfilled, and it may not rely on any presumption (see, in particular, Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37, and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 35).

49 Furthermore, it is necessary to recall that, according to settled case-law of the Court, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, in particular, Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 36, and Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37).

50 It must be stated that in the present action the Commission has not provided the necessary evidence to prove that Paragraph 1(3) of the AEntG is not consistent with Article 49 EC. It restricted itself to a literal interpretation of the first paragraph of that provision of the AEntG without taking a view on the fulfilment of the two conditions laid down in the *Finalarte* judgment, mentioned at paragraph 46 of this judgment. Moreover, in support of its action, the Commission put forward no line of argument and made no reference to national court decisions or any other evidence to show that, contrary to what the German authorities contend, Paragraph 1(3) of the AEntG is, in practice, applied or interpreted in a manner that is not consistent with Community law.

51 According to the Commission, its literal interpretation of the first sentence of Paragraph 1(3) of the AEntG is, however, confirmed by an example taken from Danish law. In Denmark, entitlement to paid leave is not paid to the employee by a body similar to the German paid-leave fund. Thus, if no payment is made in this respect by the employer itself, the employee can always receive payment from an employers' syndicate. Despite the existence of this guarantee, an employer established in Denmark, which posts workers in Germany, is nevertheless required to contribute to that fund. According to the Commission, this obligation to contribute can be avoided only by virtue of an administrative agreement on the mutual recognition of national paid-leave schemes which was concluded between the Kingdom of Denmark and the Federal Republic of Germany. The principle of legal certainty prohibits rights under the Treaty from depending upon the conclusion of administrative agreements.

52 That line of argument cannot, however, be accepted. It is apparent from the documents before the Court that in Denmark there is the Arbejdsmarkedets Feriefond (paid-leave fund) similar to the German paid-leave fund and that the first line of Paragraph 1(3) of the AEntG, as applied under the administrative agreement, exempts Danish undertakings that contribute to the fund in Denmark from the requirement to contribute to the German fund.

53 In addition, while it is true that the requirement of legal certainty prevents the exercise of individual rights arising from Community law from being subject to conditions and limits set by national administrative rules (see, to that effect, Case C-306/91 *Commission* v *Italy* [1993] ECR I-2133, paragraph 14, and Case C-354/98 *Commission* v *France* [1999] ECR I-4927, paragraph 11), the fact remains that, in the context of transnational posting of workers, the difficulties likely to arise when comparing national paid-leave schemes cannot be resolved — in the absence of harmonisation in that area — without effective cooperation between the authorities of those Member States (see, to this effect, the Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions of 25 July 2003). The conclusion of administrative agreements aimed at ensuring the mutual recognition of such schemes is part of that cooperation, and more generally, part of the need for cooperation in good faith between Member States in the areas covered by Community law.

54 In those circumstances, it must be held that the Commission has not established that foreign undertakings are required to contribute to the German paid-leave fund even when the workers they employ benefit from comparable protection in accordance with the laws of the Member State of establishment of those undertakings.

55 The first head of claim put forward by the Commission must therefore be rejected.

The obligation to retain specific documents in German at the building site (Paragraph 2(3) of the AEntG)

Arguments of the parties

56 According to the Commission, the obligation imposed on foreign undertakings to translate into German all the documents required under Paragraph 2(3) of the

AEntG, namely, the employment contract (or an equivalent document within the meaning of Directive 91/533), pay slips, time-sheets and proof of payment of wages as well as any other document required by the German authorities, constitutes an unjustified and disproportionate restriction on the freedom to provide services guaranteed in Article 49 EC.

57 As regards the unjustified nature of that provision of the AEntG, the Commission points out that in the judgment in Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453 the Court ruled that the obligation on foreign undertakings to retain documents, on the territory of the host State, cannot be based on the objective of facilitating the general supervisory task of the authorities of that State. In the opinion of the Commission, if that obligation cannot be justified by that objective, the obligation to translate all the relevant documents — which is at least as demanding — is equally unjustifiable.

58 As regards the proportionality of the disputed provision, referring again to *Arblade and Others*, the Commission points out that the general obligation to translate the relevant documents has been made superfluous by the system of cooperation between the Member States provided for in Article 4 of Directive 96/71.

59 The Federal Republic of Germany, supported by the French Republic, considers that the obligation to translate provided for in Paragraph 2(3) of the AEntG is consistent with Article 49 EC.

60 According to the German authorities, that obligation is based on the need to allow effective monitoring of compliance with legal obligations under the AEntG and therefore to ensure effective protection for employees. The supervisory authorities must be able to read and understand the relevant documents, which means that they

need to be translated. The effectiveness of monitoring cannot therefore depend on the linguistic competence of the authorities who supervise the relevant building sites.

61 The German and French Governments add that *Arblade and Others* does not allow direct conclusions to be drawn regarding the justification and the proportionality of Paragraph 2(3) of the AEntG.

62 Lastly, those Governments consider that the cooperation between national authorities, provided for in Article 4 of Directive 96/71, cannot replace the obligation to translate imposed on foreign employers.

Findings of the Court

63 It is settled case-law that Article 49 EC requires not only the elimination of all discrimination against service providers on the ground of their nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a service provider established in another Member State where it lawfully provides similar services (Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10, and Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 30).

64 Even in the absence of harmonisation on the issue, the freedom to provide services, as a fundamental principle of the Treaty, can be limited only by legislation justified

by overriding requirements relating to the public interest, and applicable to all individuals and undertakings carrying on business in the territory of the host State, to the extent that that interest is not safeguarded by the rules to which such a service provider is subject in the Member State in which it is established (see, in particular, *Arblade and Others*, paragraphs 34 and 35; Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 19, and Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 21).

65 Finally, the application of the national rules of a Member State to service providers established in another Member State must be appropriate for ensuring attainment of the objective they pursue and must not go beyond what is necessary for that purpose (see, in particular, *Säger*, paragraph 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

66 In this case, it is clear from Paragraph 2(3) of the AEntG that when an employer established outside of Germany employs workers in Germany it is required to retain specific documents, in German, for the duration of the posted worker's stay and for, at least, the duration of the building project, without, however, this obligation running beyond a period of two years, so that the documents can be presented at the building site at the request of the supervisory authorities. As the German Government explained at the hearing, without being contradicted by the Commission, the relevant documents are the employment contract, the pay slips and time-sheets and proof of payment of wages.

67 Given that there are no Community harmonisation measures in this area, in order to examine the merits of the Commission's second head of claim, it is necessary to first of all examine if the requirements imposed by the relevant provision of the AEntG have a restrictive effect on the freedom to provide services and then, if necessary, in the relevant business sector, whether overriding requirements in the public interest

justify those restrictions on the freedom to provide services. If so, then it is finally necessary to ascertain whether the same result could not be obtained using less stringent measures.

68 Firstly, it must be stated that, by requiring the relevant documents to be translated into German, the disputed provision constitutes a restriction on the freedom to provide services.

69 The obligation thus imposed involves additional expenses and an additional administrative and financial burden for undertakings established in another Member State, so that those undertakings do not find themselves on an equal footing, from a competitive point of view, with employers established in the host Member State and may thus be dissuaded from offering the services in that Member State.

70 Secondly, it is nevertheless necessary to recall that Paragraph 2(3) of the AEntG pursues a general-interest objective linked to the social protection of workers in the construction industry and the monitoring of that protection. The Court has already recognised this objective as among the overriding requirements which justify such restrictions on the freedom to provide services (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18; *Guiot*, paragraph 16, and *Arblade and Others*, paragraph 51).

71 By requiring the relevant documents in the language of the host Member State to be kept on the building site, Paragraph 2(3) of the AEntG is designed to enable the competent authorities of that Member State to carry out the monitoring, at the building site, necessary to ensure compliance with the national provisions regarding worker protection, in particular those relating to pay and working hours. This type

of on-site supervision would become extremely difficult, even impossible, in practice, if those documents could be presented in the language of the Member State in which the undertaking is established, as that language would not necessarily be understood by the civil servants of the host Member State.

72 It follows that the obligation laid down in Paragraph 2(3) of the AEntG is justified.

73 This conclusion cannot be called into question by the decision in *Arblade and Others*

74 While it is true that at paragraph 76 of that judgment the Court considered that it is not sufficient, for the purposes of justifying a restriction of freedom to provide services — involving retaining certain documents at the address of a natural person residing in the host Member State — that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task, that paragraph of that judgment, however, involved the obligation on the employer to make those documents available to the competent authorities, even after the employer had ceased to employ workers in that State.

75 This is not the case in the present action, since Paragraph 2(3) of the AEntG imposes an obligation to retain documents in the German language for the duration of the posted workers' time in Germany and for the duration of the building project. Moreover, as is apparent from paragraph 74 above, that provision is not limited to facilitating the performance of the supervisory task of the competent German authorities, but is also intended to make it possible, in practice, for the authorities to carry out that supervision on site.

76 Thirdly, it should be stated that the provision requires translation of only four documents (the employment contract, pay slips, time-sheets and proof of payment of wages) which are not excessively long and for which standard forms are generally used. Consequently, given that they do not involve a heavy financial or administrative burden for the employer posting workers in Germany, Paragraph 2(3) of the AEntG does not go beyond what is necessary to achieve the objective sought, which is social protection.

77 Finally, it should be pointed out that, as the law now stands, there are no less restrictive measures which would ensure that this objective is attained.

78 The organised system of cooperation and exchange of information between national administrations provided for in Article 4 of Directive 96/71 does not render superfluous the obligation to translate, which is imposed on employers established outside Germany. It is clear from the file before the Court that the documents required from employers by the AEntG are not retained by those administrations, which therefore are not able to send them, with a translation, within a reasonable period to the competent authorities of other Member States.

79 Moreover, as the Advocate General has pointed out at point 86 of his Opinion, there is no standardised Community instrument which requires the use of multilingual documents in cases of transnational posting of workers.

80 It follows from the above that the second complaint brought by the Commission must be rejected.

The obligation imposed on foreign employment agencies to make a declaration relating to the place to which workers are posted (Paragraph 3(2) of the AEntG)

Arguments of the parties

81 The Commission claims that the obligation imposed on foreign employment agencies to declare to the competent authorities not only the placing of a worker with a user of his services but also any changes in the placement of that worker from one place of employment to another — when such a supplementary obligation is not imposed on the employment agencies established in Germany — represents a measure which makes transnational provision of services more difficult than the internal provision of services. According to the Commission there is no valid reason justifying that difference in treatment.

82 The Federal Republic of Germany retorts that the obligation to make that declaration laid down in Paragraph 3(2) of the AEntG is compatible with Article 49 EC. This obligation is justified by the need to carry out effective monitoring in the interest of the better protection of workers. Furthermore, it does not place any excessive burden on the relevant temporary employment undertaking.

Findings of the Court

83 It is clear from settled case-law that 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 (Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 10; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 14, and Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 13).

84 It should be pointed out in this regard that the effect of Paragraph 3(2) of the AEntG is to discriminate against service providers established outside Germany.

85 That provision requires temporary employment agencies established in other Member States to communicate in writing to the competent German authorities not only the start and end dates of the placement of a worker with a user of his services in Germany, but also the place of employment of that worker and any changes in that place, while similar undertakings established in Germany are not required to fulfil this supplementary obligation which is always imposed on the user undertakings.

86 The Court has already held that national rules that, whatever their origin, are not universally applicable to service providers are not consistent with Community law unless they fall within an express derogating provision such as Article 46 EC, replacing Article 55 EC (Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 24; *Collectieve Antennevoorziening Gouda*, paragraph 11; and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 31). 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.

87 In this regard it is sufficient to note that the German Government has not pleaded anything that could be covered by one of those reasons.

88 It follows that the third complaint brought by the Commission is valid.

89 Consequently, it is necessary to state that in enacting a provision, such as Paragraph 3(2) of the AEntG, under which foreign temporary employment agencies are required to declare, not only the placement of a worker with a user of his services in Germany, but also any change relating to the place of employment of that worker, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

Costs

90 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.

91 In the circumstances of the case, the Commission, which has been unsuccessful in two of the three complaints brought, must be ordered to pay two thirds of the costs and the Federal Republic of Germany ordered to pay one third.

92 In accordance with Article 69(4) of the Rules of Procedure, the French Republic is to bear its own costs.

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

1. **Declares that in enacting a provision, such as Paragraph 3(2) of the law on posting workers (Arbeitsnehmer-Entsendegesetz) of 26 February 1996, under which foreign temporary employment agencies are required to declare, not only the placement of a worker with a user of his services in Germany, but also any change relating to the place of employment of that worker, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC;**

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

3. **Orders the Commission of the European Communities to bear two thirds of the costs and the Federal Republic of Germany to bear one third of the costs;**

4. **Orders the French Republic to bear its own costs.**

[Signatures]