JUDGMENT OF THE COURT (Fifth Chamber)

25 October 2001 *

In Case C-493/99,

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

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

defendant,

APPLICATION for a declaration that, by providing in its legislation that construction undertakings established in other Member States

* Language of the case: German.

(a) may not provide transfrontier services on the German market as part of a consortium unless they have their seat or at least an establishment in Germany employing their own staff and have concluded a company-wide collective agreement for those staff;

(b) may not contract out workers from another country to other construction undertakings unless they have their seat or at least an establishment in Germany employing their own staff and, as members of a German employers' association, are covered by framework and social-welfare collective agreements;

(c) may not establish in Germany a branch recognised as a construction undertaking if its staff is entrusted solely with work on administration, marketing, planning, supervision and/or wages and salaries, but, in order to be so recognised, such an establishment must employ on the German labour market workers who spend more than 50% of the firm's total working time on building sites,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC),,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward (Rapporteur), A. La Pergola, L. Sevón and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 5 April 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 December 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by providing in its legislation that construction undertakings established in other Member States

(a) may not provide transfrontier services on the German market as part of a consortium unless they have their seat or at least an establishment in Germany employing their own staff and have concluded a company-wide collective agreement for those staff;

(b) may not contract out workers from another country to other construction undertakings unless they have their seat or at least an establishment in Germany employing their own staff and, as members of a German employers' association, are covered by framework and social-welfare collective agreements;

(c) may not establish in Germany a subsidiary recognised as a construction undertaking if its staff is entrusted solely with work on administration, marketing, planning, supervision and/or wages and salaries, but, in order to be so recognised, such an establishment must employ on the German labour market workers who spend more than 50% of firm's total working time on building sites,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC).

2 By application lodged on 18 May 2000, the Kingdom of the Netherlands sought leave to intervene in support of the Commission. However, having been granted leave to intervene in the present case by order of the President of the Court of Justice of 19 June 2000, it withdrew its intervention by letter received at the Court Registry on 24 August 2000.

The national legislation challenged by the Commission

3 By its action, the Commission calls in question Paragraph 1(1) and Paragraph 1(b) of the Gesetz zur Regulung der gewerbsmäßigen Arbeitnehmerüberlassung

(Law governing the supply of temporary labour) of 7 August 1972 (BGBl. 1972 I, p. 1393), as amended by Paragraph 63 of the Gesetz zur Reform der Arbeitsförderung (Law on the reform of promotion of employment) of 24 March 1997 (BGBl. 1997 I, p. 594, hereinafter 'the AÜG').

4 Paragraph 1(1) of the AÜG provides:

'Employers who wish, as professional suppliers of labour, to contract out workers (temporary workers) to third parties (users of labour) shall require authorisation. The secondment of workers to a consortium formed to carry out a construction project shall not constitute contracting out of labour if the employer is a member of the consortium, if the collective agreements of the same branch of industry apply to all the members of the consortium and if under the consortium agreement all members of the consortium are severally obliged to perform acts of contractual performance.'

5 Paragraph 1b of the AÜG provides:

'The contracting out, as a professional activity, of labour in the building industry for work normally performed by workers shall be prohibited. The contracting out of labour shall be allowed between undertakings in that industry if those undertakings are covered by the same framework collective agreements and social fund agreements or are subject to them through their general binding effect.'

Pre-litigation procedure

6 After reaching the view that the German legislation cited in paragraphs 4 and 5 above was contrary to Articles 52 and 59 of the Treaty, the Commission commenced the infringement procedure. By letter of 17 September 1997, it served formal notice on the Federal Republic of Germany to submit its observations on the matter.

7 The response provided by the German authorities on 21 November 1997 failed to satisfy the Commission. It therefore addressed to the Federal Republic of Germany, on 22 December 1998, a reasoned opinion allowing that Member State a period of two months in which to comply with the reasoned opinion. When the German authorities did not reply to the opinion within the time-limit allowed and since the Commission was not satisfied with the draft amendments to the legislation subsequently notified, it decided to bring these proceedings.

Substance

The first two complaints: freedom to provide services

Arguments of the parties

8 The Commission considers that the legislation at issue is incompatible with freedom to provide services, for two reasons. First, it prevents construction

undertakings not established in Germany, and consequently not subject to German industry-wide collective agreements, from participating in consortiums formed to carry out a particular building project and from contracting out workers to other construction undertakings in Germany.

9 The Commission points out that both the second sentence of Paragraph 1(1) and the second sentence of Paragraph 1b of the AÜG require that the German collective agreements covering the construction industry apply to all undertakings wishing to participate in a consortium or to contract out labour to other undertakings in the construction industry. However, only undertakings which are established in Germany and which employ workers there can be covered by those agreements. According to the Commission, undertakings not established in the Federal Republic of Germany are therefore unable to contract out workers from their headquarters or from establishments in other Member States to a consortium set up in Germany or to German construction undertakings without that consortium or those undertakings losing the possibility of relying on the second sentence of Paragraph 1(1) or the second sentence of Paragraph 1b of the AÜG.

10 Consequently, undertakings not established in Germany, to which German collective agreements covering the construction industry do not apply, are barred from the very outset from consortia formed or to be formed in Germany. They are therefore unable to exercise, in this area, the freedom to provide services guaranteed by Article 59 of the Treaty.

11 The German Government agrees that, under the German legislation in question, it is mandatory for an undertaking wishing to participate in a consortium for the purposes of carrying out a construction project or to contract out personnel to other undertakings in the industry to be subject to German collective agreements. It also accepts that, owing to their territorial scope of application, those

agreements do not apply to undertakings having no establishment in Germany and that the requirement to have an establishment in Germany in order for those agreements to apply constitutes a requirement which is more burdensome for undertakings from Member States other than the Federal Republic of Germany. However, it considers that the legislation in question is not contrary to the fundamental freedoms guaranteed by the Treaty.

12 It maintains that the requirement to have an establishment in Germany does not constitute discrimination against construction undertakings established in Member States other than the Federal Republic of Germany since German undertakings in the same industry must fulfil that same condition. It also maintains that the legislation in question is justified by the overriding public interest in providing social protection for workers in the building industry.

13 According to the German Government, the aim of the legislation in question is to prevent abusive practices in the matter of casual employment in the building industry and to provide social protection for workers employed in that industry. Besides claiming that the legislation is in conformity with the case-law of the Court, in particular the judgment in Joined Cases C-369/96 and C-376/96 (*Arblade and Others* [1999] ECR I-8453, paragraph 41), it also maintains that the legislation is proportionate, in so far as it enables the aim in view to be attained, is necessary for attainment of that aim and is appropriate in terms of the means used.

Findings of the Court

14 It is clear from the legislation in question that contracting out labour in the building industry is in principle prohibited in Germany. By way of exception, it is allowed, upon certain conditions, where it consists in contracting out workers to a consortium of undertakings or where it takes place between undertakings in that industry.

15 Thus, under Paragraph 1(1) of the AÜG, the secondment of workers within a consortium set up for a particular construction project is not regarded as contracting out labour if the employer who seconds his workers is a member of the consortium, the collective agreements covering the same branch of industry apply to all the members of that consortium and the latter are all severally liable under the consortium agreement to perform acts of contractual performance.

16 Second, under Paragraph 1b of the AÜG, contracting out labour is allowed, by way of exception, if it takes place between construction undertakings that are covered by the same framework collective agreements and social fund agreements or are subject to them owing to their general binding effect.

17 In order to fall within one or other of those provisions, the undertaking concerned must therefore in principle be subject to some degree to the German collective agreements, which, again according to the German legislation, presupposes that the undertaking has an establishment in Germany.

18 Since contracting out workers constitutes a provision of services within the meaning of the Treaty (see Case 279/80 *Webb* [1981] ECR 3305, paragraph 9), it is not disputed that the requirement to have an establishment in the territory of the Member State in which services are to be provided, laid down by the legislation at issue, constitutes an obstacle to exercise of the freedom to provide services.

19 As the Court has repeatedly held, the requirement of a permanent establishment is the very negation of the fundamental freedom to provide services in that it results in depriving Article 59 of the Treaty of all effectiveness, a provision whose

very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which their services are to be provided. If such a requirement is to be accepted, it must therefore be shown that it constitutes a condition indispensable for attaining the objective pursued (see, in particular, Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31).

20 It is true that the social protection of workers in the construction industry is one of the overriding reasons of public interest capable of justifying a restriction on the freedom to provide services (see Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 16). It is also true that, according to the case-law of the Court, overriding reasons of public interest which justify the substantive provisions of a Member State's legislation may also justify measures necessary to check compliance with it (see, to that effect, Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18).

21 However, the Court has always emphasised that considerations of a purely administrative nature cannot make lawful a restriction of the freedom to provide services (see, to this effect, in particular, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45). The Court has thus held that the Member State in which services are provided may not require an undertaking to keep documents specific to that State if that undertaking is already subject, in the Member State in which it is established, to obligations comparable, as regards their objective of safeguarding the interests of workers, in respect of the same workers and the same periods of activity, to those laid down by the legislation of the first Member State (see, in particular, *Arblade and Others*, cited above, paragraph 80).

22 As far as the present case is concerned, it must be concluded that the requirement to have an establishment in the Member State in which the services are to be provided, such as that under the legislation in question, goes beyond what is necessary to attain the objective of providing social protection for workers in the building industry.

23 It has not been shown that such a requirement, imposed without distinction on any undertaking wanting to contract out workers to a consortium or to other undertakings in the building industry is in itself necessary to achieve the aim of providing social protection for workers in the building industry.

24 It follows that the Commission's first two complaints must therefore be upheld.

The third complaint: freedom of establishment

Arguments of the parties

25 The Commission contends, that in German law, only undertakings in which more than 50% of working time is spent by workers on building sites may be regarded as construction undertakings. That condition makes it unattractive for construction undertakings established in other Member States to set up branches in the Federal Republic of Germany where those undertakings might wish to assign to their German branch only administrative or technical staff or sales staff responsible for advertising or launching projects. Since such a branch will not be considered to be a construction undertaking and cannot therefore benefit from the provisions of Paragraph 1(1) and Paragraph 1b of the AÜG, it will not, in the event of a successful bid, be able to carry out the works required by transferring workers from other branches or from the parent company where these are established in Member States other than the Federal Republic of Germany.

26 On the other hand, according to the Commission, German branches of German construction undertakings are always treated as undertakings belonging to this

sector, even if they do not strictly fulfil the rule requiring 50% of working time to be spent on building sites. The Commission adds that this difference of treatment arises from application of Paragraph 1, section IV, point 4, of the Bundesrahmentarifvertrag für das Baugewerbe (framework collective agreement for the construction industry) and Paragraph 1, section IV, of the Tarifvertrag über das Sozialkassenverfahren im Baugewerbe (collective agreement on the construction industry social fund scheme). Those provisions provide, in substance, that undertakings which, in association with other construction undertakings, carry out, exclusively or principally, management, sales, planning or accounting tasks or perform laboratory analyses for members of that association are also to be regarded as construction undertakings.

27 The Commission considers that this discrimination against undertakings established in Member States other than the Federal Republic of Germany and their branches in Germany is contrary to the freedom of establishment guaranteed by Article 52 of the Treaty.

28 The German Government acknowledges that, in order to be regarded as belonging to the construction industry, an undertaking must employ construction workers and 50% of total staff working time must be devoted to activities specific to the construction sector. It maintains, however, that the Commission has misconstrued the meaning and scope of the provisions of the collective agreements mentioned in paragraph 26 above.

29 According to the German Government, those provisions were not adopted with the aim of regulating the contracting out of workers but in order to prevent building industry workers from being excluded from collective agreements in this sector owing to a reorganisation of their undertakings.

Findings of the Court

30 It is not in dispute that, in German law, a German branch of a construction undertaking established in a Member State other than the Federal Republic of Germany is not regarded as belonging to that sector unless more than 50% of total staff working time is spent by workers on construction sites.

31 Even without determining whether, as the Commission maintains, the provisions of the two collective agreements mentioned in paragraph 26 above have a discriminatory effect on construction undertakings established in Member States other than the Federal Republic of Germany, the condition referred to in the preceding paragraph above impedes the freedom of establishment for those undertakings through the creation of branches.

32 For one thing, that condition complicates access to the German market for those construction undertakings in that it makes treatment of their German branches as construction undertakings depend on fulfilment of criteria which those branches have difficulty in fulfilling.

33 As the Commission has rightly pointed out, the interest which construction undertakings established in Member States other than the Federal Republic of Germany will have in setting up a German branch will often lie in the economic necessity to have administrative, technical and sales staff in Germany, in order particularly to arrange advertising or to launch projects. However, the staff responsible for carrying out construction work in performance of contracts may be employed elsewhere, at other branches or at the undertaking's seat.

34 For another thing, that condition is likely to be less onerous for undertakings from the Federal Republic of Germany than for undertakings from other Member States in so far as there is less need for German undertakings to assign administrative, technical and sales staff to their German branches because such tasks can be performed by the staff employed at the undertaking's seat in Germany.

35 As regards the justification for this restriction, the German Government invokes in substance the same arguments as those which it offered in response to the first two complaints, notably overriding reasons concerning prevention of abusive practices on the building industry market and social protection of the workers concerned.

36 However, since those arguments relate to the condition requiring compliance with the German collective agreements and not to the condition referred to in paragraph 30 above, which lies at the root of the restriction, they can be no justification for it.

37 In the absence of any other overriding reasons of public interest justifying this restriction, the Commission's third complaint must also be upheld.

Costs

38 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. Since the Commission has applied for an order that the Federal Republic of Germany pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by providing in its legislation that construction undertakings established in other Member States

(a) may not provide transfrontier services on the German market as part of a consortium unless they have their seat or at least an establishment in Germany employing their own staff and have concluded a company-wide collective agreement for those staff;

(b) may not contract out workers from another country to other construction undertakings unless they have their seat or at least an establishment in Germany employing their own staff and, as members of a German employers' association, are covered by framework and social-welfare collective agreements;

(c) may not establish in Germany a branch recognised as a construction undertaking if its staff is entrusted solely with work on administration, marketing, planning, supervision and/or wages and salaries, but in order to be so recognised, such an establishment must employ on the German labour market workers who spend more than 50% of the firm's total working time on building sites,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC);

2. Orders the Federal Republic of Germany to pay the costs.

Jann Edward La Pergola

Sevón Timmermans

Delivered in open court in Luxembourg on 25 October 2001.

R. Grass P. Jann

Registrar President of the Fifth Chamber