JUDGMENT OF THE COURT (Second Chamber)

16 September 2004 *

In Case C-465/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 4 December 2001,

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

applicant,

v

Republic of Austria, represented by H. Dossi, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

Having decided, after hearing the Advocate General, to proceed to judgment without a hearing or an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities has brought an action for a declaration that

(a) by denying workers who are nationals of other Member States of the European Union or the European Economic Area ('the EEA') the right to stand for election

to workers' chambers, the Republic of Austria has failed to fulfil its obligations under Article 39 EC and Article 8 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68'), and under Article 28 of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3 and p. 572; 'the EEA Agreement');

(b) by denying workers from certain non-member States the right to stand for election to works councils and general assemblies of workers' chambers, the Republic of Austria has failed to fulfil its obligations under agreements concluded by the Community with those States prohibiting discrimination, as regards conditions of work, against workers from those States who are legally employed in a Member State.

The legal background

Relevant provisions of Community law

2 Article 39 EC provides:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...

4. The provisions of this article shall not apply to employment in the public service.'

3 The first recital in the preamble to Regulation No 1612/68 states:

'... [F]reedom of movement for workers should be secured within the Community by the end of the transitional period at the latest; ... the attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health'.

4 Articles 7 and 8 of Regulation No 1612/68 form part of Title II, headed 'Employment and equality of treatment', which appears in the first part of that regulation, concerning '[e]mployment and workers' families'.

5 Article 7 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as

regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

6 Article 8 of Regulation No 1612/68 states:

'A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.

The provisions of this article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.'

7 Article 28 of the EEA Agreement provides:

'1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

...

4. The provisions of this article shall not apply to employment in the public service.

...'

8 The Community has concluded a number of agreements with non-member States — including, in particular, the Agreement establishing an Association between the European Economic Community and Turkey, European agreements establishing an

association with central and East European countries, and also cooperation and, later, association agreements with the Maghreb countries — under which workers who are nationals of the non-member States concerned and are legally employed on the territory of a Member State are covered by the prohibition of all discrimination based on nationality as regards conditions of work and remuneration.

National legislation

9 In Austria, Paragraph 1 of the Arbeiterkammergesetz (Law on Workers' Chambers, BGBl. 1991/626, in the version published in BGBl. I, 1998/166; 'the AKG') provides that the purpose of chambers of workers and employees and of the Federal Chamber of Workers and Employees ('workers' chambers') is to represent and promote the social, economic and cultural interests of workers of both sexes.

10 Those chambers, which are bodies governed by public law to which all workers, in principle, belong, through payment of a membership contribution, also perform a consultative function in the legislative field.

11 The institutions of a workers' chamber include, in particular, the general assembly (Paragraph 46 of the AKG). It is elected — for a term of five years (Paragraph 18(1) of the AKG) — by the workers entitled to vote, by equal, direct and secret ballot in accordance with the principles of proportional representation (Paragraph 19 of the AKG). Under Paragraph 20(1) of the AKG, all workers who belong to the chamber on the date of the election are entitled to vote.

12 As regards the conditions for eligibility for election, Paragraph 21 of the AKG provides:

'All workers belonging to a workers' chamber who on the relevant date

1. have completed their 19th year, and

2. have, for a total of at least two years during the previous five years, been in a work or employment relationship in Austria giving rise to membership of the chamber, and

3. apart from the age requirement, are not excluded from eligibility for election to the Nationalrat [Parliament],

are eligible for election to the workers' chamber.'

13 According to Paragraph 26(4) of the Bundesverfassungsgesetz (Federal Constitutional Law):

'All men and women possessing Austrian nationality on the relevant date who have reached the age of 19 before 1 January of the year of the election shall be eligible for election.'

14 Works councils, which are compulsory in Austrian undertakings above a particular size, are responsible for defending the interests of workers in the undertaking concerned and, in particular, for ensuring compliance with legal provisions adopted for their benefit.

15 Paragraph 53(1) of the Arbeitsverfassungsgesetz (Law on Organisation of Work, BGBl. 1974/22, in the version published in BGBl. 1993/460), which determines the conditions of eligibility for election to a works council states:

'All employees who

1. (a) have Austrian nationality, or

   (b) are nationals of a State which is party to the EEA Agreement, and

2. have reached the age of 19 at the date of notification of the election, and

3. have been employed in the establishment or the undertaking to which the establishment belongs for at least six months, and

4. apart from the requirement of Austrian nationality, are not excluded from participating in elections to the Nationalrat [Parliament] ...

are eligible for election.'

The pre-litigation procedure

16 Taking the view that the Austrian rules are incompatible with the requirements of Community law in so far as, first, only Austrian nationals are permitted to stand for election to workers' chambers and, second, workers who are legally employed in a Member State and whose country of origin has concluded an agreement with the Community under which such workers enjoy equal treatment as regards conditions of work are excluded from election to workers' chambers and works councils, the Commission called on the Republic of Austria, by letter of 9 July 1999, to submit its observations on the matter within two months.

17 On 6 September 1999, the Austrian Government acknowledged that its legislation was incompatible with its obligations under Community law in respect of workers who are nationals of other Member States of the Community and the EEA, while also pointing out that the national provisions in question had been rendered ineffective by the direct effect of Community law. Nevertheless, it was in the process of making the necessary amendments to extend to all those workers, irrespective of their nationality, the right to stand for election to workers' chambers. However, the Austrian Government disputed the Commission's claim in respect of workers who enjoy equal treatment as regards conditions of work under an agreement between the Community and a non-member State as long as they are legally employed in a Member State.

18 On 29 December 2000, no amendment having been made to the Austrian provisions, the Commission sent a reasoned opinion to the Republic of Austria calling upon it to adopt, within two months of its notification, the measures necessary to comply with obligations under Article 39 EC, Article 8 of Regulation No 1612/68 and Article 28 of the EEA Agreement, and with the provisions of the abovementioned bilateral agreements concluded by the Community.

19 As the Austrian Government's reply to that reasoned opinion, contained in two letters of 27 February and 12 April 2001, did not include any new information, the Commission decided to bring the present action.

The action

20 In support of its action, the Commission raises two complaints. The first concerns the failure to grant workers who are nationals of other Member States of the Union or the EEA the right to stand for election to workers' chambers. The second complaint concerns the exclusion of workers from non-member States, legally employed in Austria and covered by an agreement between the Community and their State which prohibits discrimination as regards conditions of work, from eligibility for election to the general assembly of workers' chambers and to works councils.

21 The merits of those two complaints should be considered separately.

The first complaint

Arguments of the parties

22 According to the Commission, the requirement, under the Austrian legislation, of Austrian nationality as a precondition for election to workers' chambers is clearly incompatible with Article 39 EC and the first paragraph of Article 8 of Regulation No 1612/68, as interpreted by the Court, and with Article 28 of the EEA Agreement which contains similar provisions.

23 It is clear from Case C-213/90 *ASTI* [1991] ECR I-3507 (*'ASTI I'*) and Case C-118/92 *Commission* v *Luxembourg* [1994] ECR I-1891 (*'ASTI II'*) that a national rule denying workers who are nationals of other Member States the right to stand for election to bodies such as occupational guilds to which the workers concerned must belong and pay a membership contribution and which are responsible for defending and representing workers' interests as well as to perform a consultative function in the legislative field is contrary to the general prohibition of discrimination based on nationality, laid down in Article 39 EC and the first paragraph of Article 8 of Regulation No 1612/68. That must also be the case with respect to Article 28 of the EEA Agreement, the relevant provisions of which are identical to those of Article 39 EC.

24 The Austrian Government requests that the Court reject the complaint, arguing that workers' chambers are bodies governed by public law that participate in a significant way in the exercise of public-law powers, which justifies the exclusion of all foreign workers from eligibility for election to such bodies.

Findings of the Court

25 In order to consider the merits of the complaint, it should first be recalled that in the context of freedom of movement for workers within the European Union, Article 39 (2) EC, which constitutes merely a particular expression of the general prohibition of discrimination on grounds of nationality laid down in the first paragraph of Article 12 EC, prohibits all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

26 That principle is reiterated in several specific provisions of Regulation No 1612/68, including, in particular, Articles 7 and 8 thereof.

27 More specifically, the first paragraph of Article 8 of that regulation provides that workers who are nationals of a Member State and who are employed in the territory of another Member State are to enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, and to have the right of eligibility for workers' representative bodies in the undertaking.

28 The Court has already held, in *ASTI I* and *ASTI II*, that that provision applies to the right to vote and the right to stand in elections held by bodies such as occupational guilds to which workers are required to belong, to which they must pay contributions and which are responsible for defending and representing their interests.

29 As to the EEA Agreement, Article 28(2) of that agreement is drafted in terms essentially identical to those of Article 39(2) EC.

30 Against that background, it follows from Article 39(2) EC, the first paragraph of Article 8 of Regulation No 1612/68 and Article 28(2) of the EEA Agreement, that workers who are nationals of a Member State or a State belonging to the European Free Trade Association ('EFTA') and who are employed in another Member State must be treated in the same way as nationals of the host Member State as regards, in particular, conditions of work and employment, and, more specifically, the exercise of trade-union rights, including the right to stand for election to bodies responsible for the representation and defence of workers' interests, such as workers' chambers in Austria.

31 It is common ground, and not disputed by the Austrian Government, that under the national provisions to which this action relates Austrian nationality is a condition for eligibility for election to those workers' chambers.

32 Such a condition, which is met only by Austrian workers, therefore constitutes direct discrimination against foreign workers.

33 It follows that the Republic of Austria's legislation, which denies workers who are nationals of another Member State of the European Union or an EFTA State the right to stand for election to workers' chambers solely on the ground that the workers concerned do not hold Austrian nationality is contrary to the general prohibition of all discrimination based on nationality underlying the provisions of Community law referred to above.

34 That conclusion is in no way called into question by the Austrian Government's argument that workers' chambers in Austria are bodies governed by public law which participate in the exercise of public-law powers.

35 It is clear from *ASTI I* and *ASTI II* that a national rule which denies workers who are nationals of other Member States the right to vote and/or the right to stand in elections held by bodies such as occupational guilds to which those workers are required to belong, to which they must pay contributions, and which are responsible for defending and representing workers' interests is contrary to the general principle of non-discrimination on the grounds of nationality, despite the fact that under national law such guilds take the form of bodies governed by public law and perform a consultative function in the legislative field.

36 The Austrian Government has not provided any information from which it could be concluded that workers' chambers in Austria differ in kind from the occupational guilds in Luxembourg at issue in the cases that gave rise to those judgments.

37 Moreover, specifically as regards workers' chambers in Austria, the Court has already held that the nationality requirement to which the Austrian legislation submits eligibility for election to those chambers is incompatible with the prohibition — laid down in Article 10(1) of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80'), adopted by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, which was signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1; 'The EEC-Turkey Association Agreement') — of all discrimination based on nationality as regards conditions of work (Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301).

38 Article 10 of Decision No 1/80 is drafted in terms essentially identical to those of Article 39(2) EC and Article 28(2) of the EEA Agreement.

39 Furthermore, it is, in any event, settled case-law that the non-application of the rules laid down in Article 39 EC to activities which entail participation in the exercise of powers conferred by public law is an exception to a fundamental freedom which must therefore be interpreted in such a way as to limit its scope to that which is strictly necessary in order to safeguard the interests which Member States are allowed to protect. It follows that that exception cannot permit a Member State to submit generally any participation in a public-law institution, such as the workers'

chambers in Austria, to a nationality requirement; it merely permits the exclusion of foreign workers, where appropriate, from certain specific activities of the institution in question which, in themselves, actually entail direct participation in the exercise of powers conferred by public law (see, inter alia, *ASTI I*, paragraph 19, and *Wählergruppe Gemeinsam*, paragraph 92).

40 The Court thus concluded, in paragraph 93 of *Wählergruppe Gemeinsam*, in which it made reference to paragraph 20 of *ASTI I*, that the exclusion of foreign workers enjoying equal treatment as regards remuneration and other conditions of work, from eligibility for election to bodies that represent and defend the interests of workers, such as workers' chambers in Austria, can be justified neither by the legal nature of the body in question, as defined under national law, nor by the fact that certain of its functions could involve participation in the exercise of powers conferred by public law.

41 In the light of the foregoing considerations, the Commission's first complaint is well founded.

The second complaint

Arguments of the parties

42 So far as concerns the exclusion from eligibility for election to works councils and workers' chambers of workers who are nationals of non-member States with which the Community has concluded agreements under which they enjoy equal treatment as regards conditions of work, the Commission takes the view that there is no reason

to interpret the term 'conditions of work' in that context more restrictively than in relation to the EC Treaty. Accordingly, even though workers from the non-member States concerned do not enjoy freedom of movement as guaranteed under the Treaty, those among them who are legally employed in a Member State should not find themselves in a less favourable legal situation than Community workers. That is the precise purpose of the prohibition of discrimination based on nationality laid down in the agreements to which this action relates.

43 The Austrian Government contends that the term 'conditions of work' as used in the agreements referred to by the Commission does not include the right of workers from the non-member States concerned to participate in elections to legal bodies representing employees' interests such as workers' chambers and works councils. The scope of that term is narrower than the scope of the same term used in Article 39 EC because, first, Article 39 EC has been clarified by Regulation No 1612/68, the first paragraph of Article 8 of which expressly refers to trade-union and related rights whereas precisely such a clarification is lacking in relation to the international agreements in question and, second, those agreements pursue less ambitious objectives than the EC Treaty in so far as they do not provide for freedom of movement for workers. In those circumstances, the Commission's second complaint is unfounded.

Findings of the Court

44 It is already clear from the Court's case-law that the first indent of Article 37(1) of the European Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1) establishes, in favour of workers of Polish

nationality, once they are legally employed within the territory of a Member State, a right to equal treatment as regards conditions of employment of the same extent as that conferred on Member State nationals in similar terms by Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC) (see Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 41).

45 Similarly, in the context of the Association Agreement between the European Economic Community and Turkey, the Court has held that Article 10(1) of Decision No 1/80, whose wording is almost identical to Article 39(2) EC, imposes on each Member State, as regards the conditions of work for Turkish workers duly registered as belonging to its labour force, obligations analogous to those applying to nationals of other Member States (*Wählergruppe Gemeinsam*, paragraph 77).

46 The Court has already observed, in paragraph 37 of this judgment, that *Wählergruppe Gemeinsam* concerned the very nationality requirement to which the Austrian legislation submits eligibility for election to workers' chambers in Austria.

47 As the Commission has correctly pointed out, there is no reason to give a different interpretation from that applied in relation to the Treaty — which, moreover, has already been applied by analogy in relation to the agreements concluded with Poland and Turkey (see paragraphs 44 to 46 of this judgment) — of the prohibition, set out in the provisions of other agreements concluded between the Community and non-member States, of all discrimination based on nationality as regards conditions of work.

48 In view of the findings the Court has just made in relation to the first complaint, relating to the European Union and the EEA, and for the same reasons, it must be

held that the above prohibition precludes the application to nationals of another State, covered by an agreement which contains such a provision, who are legally employed in a Member State, of a rule such as that in force in Austria which denies such workers the right to stand for election to bodies representing and defending the interests of workers, such as workers' chambers and works councils, on the sole ground that the workers concerned are foreign nationals.

49 The principle of non-discrimination on grounds of nationality set out in the agreements in question requires that all workers, be they domestic nationals or nationals of one of the non-member States concerned, enjoy identical conditions of work and employment and, in particular, be allowed to participate, in the same way, in elections organised by bodies that defend and represent employees' interests. A difference in treatment according to nationality is contrary to that general principle.

50 The arguments put forward by the Austrian Government in support of the converse conclusion cannot be accepted.

51 First, for reasons set out more fully in paragraphs 81 to 86 of *Wählergruppe Gemeinsam*, the fact that the meaning of 'conditions of work' as used in Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC) has been clarified by Regulation No 1612/68, particularly the first paragraph of Article 8 thereof which refers specifically to trade-union and related rights, while such clarification is missing in relation to the bilateral agreements in question in no way means that the scope of the term used in those agreements is narrower than that of the term used in Article 39(2) EC and, hence, that it does not include the right of workers from the

non-member States concerned to participate, on the same terms as domestic nationals, in elections to bodies that represent and defend employees' interests.

52 Second, it is clear not only from the wording of the prohibition of discrimination with regard to conditions of work, which features in various agreements between the Community and non-member States and which is drafted in terms essentially identical to those of Article 39(2) EC, but also from a comparison of the context and the purpose of those agreements and of the EC Treaty that there is no reason to assign to that prohibition a scope other than that given by the Court to Article 48(2) of the EC Treaty (now, after amendment Article 39(2) EC) in *ASTI I* and *ASTI II* (see, by analogy, *Wählergruppe Gemeinsam*, paragraphs 88 and 89).

53 Moreover, the above interpretation is the only one consistent with the aim and broad logic of the agreements concerned, since granting workers who are nationals of the non-member States party to such agreements and who are legally employed in the territory of a Member State entitlement to the same conditions of work as those enjoyed by workers who are nationals of the Member States is an important step towards creating an appropriate framework for the gradual integration of those migrant workers in the host Member State (see, by analogy, *Pokrzeptowicz-Meyer*, paragraph 42, and *Wählergruppe Gemeinsam*, paragraph 79).

54 In the light of those observations, the Commission's second complaint must also be upheld.

55 The Commission's entire action must therefore be considered well founded.

56 Accordingly, it must be held that

— by denying workers who are nationals of other Member States of the European Union or the European Economic Area the right to stand for election to workers' chambers, the Republic of Austria has failed to fulfil its obligations under Article 39 EC, Article 8 of Regulation No 1612/68, and Article 28 of the EEA Agreement;

— by denying workers who are nationals of a non-member State with which the Community has concluded an agreement prohibiting discrimination, as regards conditions of work, against any such workers legally employed in a Member State, the right to stand for election to works councils and the general assemblies of workers' and employees' chambers, the Republic of Austria has failed to fulfil its obligations under those agreements.

Costs

57 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 costs and the Republic of Austria has been unsuccessful, it must be ordered to pay the costs.

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

1. Declares that:

(a) by denying workers who are nationals of other Member States of the European Union or the European Economic Area the right to stand for election to workers' and employees' chambers, the Republic of Austria has failed to fulfil its obligations under Article 39 EC, Article 8 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992, and Article 28 of the Agreement on the European Economic Area;

(b) by denying workers who are nationals of a non-member State with which the Community has concluded an agreement prohibiting discrimination, as regards conditions of work, against any such workers legally employed in a Member State, the right to stand for election to works councils and the general assemblies of workers' and employees' chambers, the Republic of Austria has failed to fulfil its obligations under those agreements;

2. Orders the Republic of Austria to pay the costs.

Signatures.