JUDGMENT OF THE COURT (Third Chamber)

11 January 2007 *

In Case C-208/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Sozialgericht Berlin (Germany), made by decision of 11 April 2005, received at the Court on 12 May 2005, in the proceedings

ITC Innovative Technology Center GmbH

v

Bundesagentur für Arbeit,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2006,

after considering the observations submitted on behalf of:

— ITC Innovative Technology Center GmbH, by L.A. Wenderoth, Rechtsanwalt,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 EC, 39 EC, 49 EC and 87 EC, the lastmentioned article being read in conjunction with Articles 81 EC, 85 EC and 86 EC, together with Articles 3 and 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

2 That reference was made in proceedings between ITC Innovative Technology Center GmbH ('ITC'), a private-sector recruitment agency established in Germany and the Bundesagentur für Arbeit (Federal Employment Agency) ('the Bundesagentur') concerning the refusal by the latter to pay ITC in respect of a staff recruitment voucher on the ground that the job found by ITC for the person seeking employment was not covered by compulsory social security contributions in Germany.

Legal framework

Community legislation

3 Article 1(1) of Regulation No 1612/68 provides:

'Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.'

4 Article 2 of that regulation states:

'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.'

5 Article 3 of Regulation No 1612/68 states:

'1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

— where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

— where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

...'

6 Article 7(1) and (2) of that regulation is worded as follows:

'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.'

National legislation

7 The Social Law Code (Sozialgesetzbuch) ('SGB') provides at Paragraph 421(g) of Book III ('SGB III') as follows:

'(1) Employees who are entitled to claim unemployment benefit or unemployment assistance and who have not been found a job after three months of unemployment or who are engaged in employment which is promoted as part of a job creation scheme or structural measure of adjustment under the Sixth Section of the Sixth Chapter shall be entitled to a recruitment voucher. By issuing the recruitment voucher, the Bundesagentur undertakes to pay, in accordance with the provisions set out below, the fee due to an agent instructed by the employee, which has placed the employee in employment subject to compulsory social security contributions for a minimum of 15 hours' work a week. Recruitment vouchers shall be valid for successive periods of three months.

...'

8 Paragraph 1 of Book IV of the SGB ('SGB IV') states:

'(1) ... The provisions of this Book, with the exception of the First and Second Titles of the Fourth Section and the Fifth Section, shall also apply to job promotion.

...'

9 Paragraph 3 of SGB IV provides:

'The provisions on the insurance obligation and insurance entitlement shall apply:

(1) to the extent that they require employment or a self-employed activity, to all persons who are employed or actively self-employed within the area of application of this statutory code;

...'

10 Paragraph 30 of Book I of the SGB states:

'(1) The provisions of this statutory code shall apply to all persons who have their domicile or habitual place of residence within its area of application.

(2) Provisions of supranational and international law shall not be affected.

...'

The main proceedings and the questions referred for a preliminary ruling

11 On 27 August 2003, ITC concluded a recruitment contract with Mr Halacz, who was seeking work. That contract made it the responsibility of ITC to assist Mr Halacz in finding a job subject to compulsory social security contributions and to provide all the services necessary for the purposes of that recruitment.

12 Mr Halacz had submitted the recruitment voucher to ITC which the Bundesagentur had issued to him. The voucher stated that the person seeking employment could instruct one or more recruitment agencies of his choice and that the amount stated on the voucher would be paid to the private-sector recruitment agency which had found him employment. The relevant provisions of SGB III state that payment is to be conditional, in particular, on the employment being subject to compulsory social security contributions, covering a minimum of 15 hours' work a week, and the period of employment agreed upon being a minimum of three months.

13 On 3 September 2003, with ITC's help, Mr Halacz concluded a contract of employment for a fixed term with a company established in the Netherlands, for the period from 4 September 2003 to 4 March 2004. That employer confirmed that the employment relationship in question was subject to compulsory social security contributions and that it covered a minimum of 15 hours' work a week.

14 By letter of 15 September 2003, ITC asked the Bundesagentur for an initial payment of EUR 1 000 under the recruitment voucher, which it submitted at the same time. The Bundesagentur rejected that application by administrative decision of 2 October 2003, on the ground that Mr Halacz had not been placed in employment subject to compulsory social security contributions in Germany.

15 The objection lodged by ITC on 16 October 2003 was rejected by the Bundesagentur by administrative decision of 27 October 2003 on the ground that the concept of compulsory social security contributions was governed by Paragraphs 1, 2 and 3 of SGB IV; those provisions also applied to SGB III. The provisions governing compulsory social security contributions thus covered all persons who were employed within the scope of application of the SGB, that is to say, in Germany.

16 On 14 November 2003, ITC brought an action before the Sozialgericht Berlin (Social Court, Berlin) seeking the annulment of the decision of the Bundesagentur of 2 October 2003, as upheld by the decision issued on 27 October 2003 in response to its objection.

17 While stating that it is possible to interpret the second sentence of Paragraph 421(g)(1) of SGB III in conformity with Community law, that court is of the view that, were the provision to be interpreted under German law alone, it would be held to apply only to employment within the territorial scope of application of the SGB.

18 In those circumstances, the Sozialgericht Berlin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) To what extent are rules of Community law protecting freedom of movement for persons, particularly Articles 18 EC and 39 EC and Articles 3 and 7 of Regulation (EEC) No 1612/68, infringed by an interpretation of the second sentence of Paragraph 421(g)(1) of [SGB III] to the effect that employment subject to compulsory social security contributions means only employment that comes within the scope of application of the [SGB]?

(2) (a) To what extent is it possible and necessary to interpret that provision in conformity with European law so as to avoid the type of infringement described in Question 1?

(b) If an interpretation in conformity with Community law should not be possible or necessary, to what extent does the second sentence of Paragraph 421(g)(1) of SGB III infringe the rules of Community law protecting freedom of movement for workers?

(3) To what extent are rules of Community law protecting freedom to provide services and competition, particularly Articles 49 EC, 50 EC and 87 EC, in conjunction with Articles 81 EC, 85 EC and 86 EC, or other rules of Community law, infringed by an interpretation of the second sentence of Paragraph 421(g)(1) of SGB III to the effect that employment subject to compulsory social security contributions means only employment that comes within the scope of application of the [SGB]?

(4) (a) To what extent is it possible and necessary to interpret that provision in conformity with European law so as to avoid the type of infringement described in Question 3?

(b) If an interpretation in conformity with Community law should not be possible or necessary, to what extent does the second sentence of Paragraph 421(g)(1) of SGB III infringe Community law inasmuch as the freedom of movement for workers is not protected?'

The questions referred for a preliminary ruling

Question 1 and Question 2(b), on freedom of movement for workers

19 By these questions, the national court essentially asks whether Article 39 EC, together with Articles 3 and 7 of Regulation No 1612/68, prohibit national legislation, such as the second sentence of Paragraph 421(g)(1) of SGB III, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is to be conditional on the job found by the agency being subject to compulsory social security contributions in that State.

20 It is necessary, in the first place, to reply to the argument put forward by the German Government that a private-sector recruitment agency, such as ITC, cannot rely either on Article 39 EC or on Regulation No 1612/68, on the ground that, since it acts as an intermediary and not as an employed person, it does not fall within the scope of application *ratione personae* of those provisions. It refers in that regard to Case C-55/96 *Job Centre* (*'Job Centre II'*) [1997] ECR I-7119, paragraph 13).

21 Article 39(1) EC states generally that freedom of movement for workers is to be secured within the European Community. Article 39(2) and (3) provides that such freedom of movement is to 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, and is to entail the right, subject to limitations justified on grounds of public policy, public security or

public health, to accept offers of employment actually made, to move freely within the territory of Member States for that purpose, to stay there for the purpose of employment under the same conditions as nationals of that State and to remain there after such employment.

22 However, while it is established that the rights to freedom of movement laid down under Article 39 EC benefit workers, including those seeking employment (see, to that effect, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 12 and 13), there is nothing in the wording of that article to indicate that those rights may not be relied upon by others (see Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, paragraph 19).

23 As the Court has already held, in order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers (*Clean Car Autoservice*, paragraph 20).

24 The task of a private-sector recruitment agency, such as ITC, is to act as a mediator and intermediary between those applying for and those offering positions of employment. A recruitment contract concluded with a person seeking employment accordingly confers on such an agency the role of intermediary, inasmuch as it represents the applicant and seeks employment on his behalf.

25 That being the case, it is possible that a private-sector recruitment agency may, in certain circumstances, rely on the rights directly granted to Community workers by Article 39 EC.

26 In order to be truly effective, the right of workers to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State without discrimination must also entail as a corollary the right of intermediaries, such as a private-sector recruitment agency, to assist them in finding employment in accordance with the rules governing the freedom of movement for workers.

27 Such an interpretation of the rules in question is all the more necessary in circumstances such as those at issue in the main proceedings, where a private-sector recruitment agency has concluded a recruitment contract with a person seeking employment on the basis of a recruitment voucher issued to that person, in terms of which the Bundesagentur undertook to pay the costs of the private-sector recruitment agency in the event of its finding employment for the applicant which satisfied certain criteria. In those circumstances, it is for the private-sector recruitment agency, and not for the person seeking employment, to claim payment from the Bundesagentur in respect of the fee due to that agency.

28 There is nothing in the Court's reasoning in *Job Centre II* which precludes such an interpretation of the provisions of the EC Treaty relating to freedom of movement for workers.

29 In the second place, it must be noted, as regards the German Government's argument that ITC cannot rely on the rights laid down under Article 39 EC because that agency is established in only one Member State, that the Treaty rules governing freedom of movement for persons and measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 26, and Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraph 69).

30 However, even though a private-sector recruitment agency established in Germany, such as ITC, seeks to rely on the rules relating to freedom of movement for workers against the German authorities, that does not affect the application of those rules. That agency's complaint is precisely that it was placed at a disadvantage by the system of recruitment vouchers established under the second sentence of Paragraph 421(g)(1) of SGB III, with the result that the person seeking employment for whom it found a job was also, or may also have been, placed at a disadvantage by reason of the fact that that job was in another Member State (see also, to that effect, *Terhoeve*, paragraph 28).

31 In the third place, as regards the question whether national legislation such as the legislation at issue in the main proceedings constitutes a restriction on freedom of movement for workers, it must be pointed out that all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraph 13; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94; *Terhoeve*, paragraph 37; Case C-190/98 *Graf* [2000] ECR I-493, paragraph 21; and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25).

32 In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity (see, inter alia, *Bosman*, paragraph 95, and *Terhoeve*, paragraph 38).

33 National provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to

the nationality of the workers concerned (*Bosman*, paragraph 96; *Terhoeve*, paragraph 39; *Graf*, paragraph 23; Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 74; Case C-232/01 *Van Lent* [2003] ECR I-11525, paragraph 16; and *Kranemann*, paragraph 26).

34 It would be incompatible with the right of freedom of movement were a worker or a person seeking employment, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement (see, to that effect, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30, and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 18).

35 In so far as national legislation provides that a Member State will pay a fee which is owed to a private-sector recruitment agency only where the employment found by that agency is subject to compulsory social security contributions in that State, a person seeking employment for whom that agency has found a job subject to compulsory social security contributions in another Member State is placed in a less favourable situation than if the agency concerned were to have found a job in that Member State, because he would, in the latter case, have been entitled to payment of the fee due to the recruitment agency in respect of his recruitment.

36 Such legislation, which creates an obstacle which is capable of discouraging persons seeking employment, particularly those whose financial resources are limited, and, accordingly, private-sector recruitment agencies, from looking for work in another Member State because the recruitment fee will not be paid by the Member State of the person's origin, is, in principle, prohibited by Article 39 EC. It is accordingly unnecessary to consider whether Articles 3 and 7 of Regulation No 1612/68 have been infringed.

37 A measure which constitutes an obstacle to freedom of movement for workers could be accepted only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, *Kranemann*, paragraph 33).

38 It is therefore necessary to consider whether a measure such as the German system of recruitment vouchers can be justified, in the first place, by the fact that such a system represents a new instrument of the national employment policy which aims to improve workers' recruitment and to reduce unemployment, in the second place, by the fact that its purpose is to protect the national social security system, which can be done only if contributions are paid on a national basis and where contributions would be lost if persons seeking employment were to be recruited in other Member States and, lastly, by the fact that it seeks to protect the national labour market against the loss of qualified workers.

39 With regard to the first of these justifications, it must be pointed out that the Member States are required to choose measures likely to attain the objectives pursued in the field of employment. The Court has recognised that the Member States have a broad margin of discretion in exercising that power. In addition, encouragement of recruitment constitutes a legitimate aim of social policy (see, as regards equal treatment for male and female workers, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 71 and 74, and Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraphs 61 and 62).

40 However, the broad margin of discretion which the Member States enjoy in matters of social policy may not have the effect of undermining the rights granted to

individuals by the Treaty provisions in which their fundamental freedoms are enshrined (see *Terhoeve*, paragraph 44; *Seymour-Smith and Perez*, paragraph 75; and *Steinicke*, paragraph 63).

41 Mere general statements concerning the capacity of the system of recruitment vouchers at issue in the main proceedings to improve workers' recruitment and to reduce unemployment in Germany are not sufficient to establish that the objective of that system justifies restricting the exercise of one of the fundamental freedoms of Community law or to give reasonable support to the conclusion that the means selected are, or could be, appropriate for the purposes of achieving that objective.

42 The same applies to the second justification, based on the protection of the German social security system. The existence of a causal link between the loss of social security contributions in Germany and the recruitment of a person seeking work in another Member State has not been established. Furthermore, having regard to the high level of unemployment in Germany, it is not clear that a vacant position in that Member State will remain unfilled for any longer because a person seeking employment has been recruited in another Member State.

43 While it is true that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest (see, inter alia, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41), such a risk has not been established in the present case. The contributions lost to the German social security system can be reduced. First, while a person seeking employment who is recruited in another Member State is no longer required to pay social security contributions in his Member State of origin, that State is no longer required to pay him unemployment benefit. Secondly, it is of the essence of the freedom of movement for workers laid down by the Treaty that the departure of a worker to another Member State may be counterbalanced by the arrival of a worker from another Member State.

44 Even on the assumption that the organisation of the labour market, including the prevention of the loss of qualified workers, could, in some circumstances and subject to certain conditions being complied with, justify restrictions on the freedom of movement for workers, it must in any event be held that national legislation such as the legislation at issue in the main proceedings goes beyond what appears necessary to achieve the objectives pursued. Such objectives do not justify the systematic refusal of the benefit of recruitment vouchers to persons seeking employment who are recruited in other Member States. Such a measure is tantamount to an outright negation of the freedom of movement for Community workers laid down by Article 39 EC, which aims to guarantee to workers and persons seeking employment the right to gain access to employment of their choice and to exercise that activity in the territory of another Member State (see, as regards freedom of establishment, Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 93).

45 In those circumstances, the answer to Question 1 and Question 2(b) must be that Article 39 EC prohibits national legislation, such as the second sentence of Paragraph 421(g)(1) of SGB III, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by the agency be subject to compulsory social security contributions in that State.

Question 3

46 By this question, the national court essentially asks, first, whether Articles 49 EC and 50 EC prohibit national legislation, such as the second sentence of Paragraph 421(g)(1) of SGB III, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking

employment in respect of that person's recruitment be subject to the condition that the job found by that agency is subject to compulsory social security contributions in that State. Secondly, it asks whether Article 87 EC, read in conjunction with Articles 81 EC, 85 EC and 86 EC, prohibits such legislation.

The Treaty provisions relating to State aid

47 The order for reference shows that the Sozialgericht Berlin essentially wishes to know whether the recruitment vouchers provided for in the second sentence of Paragraph 421(g)(1) of SGB III constitute State aid within the meaning of Article 87(1) EC, in that in releasing a person seeking employment from his obligation to pay a private-sector recruitment agency the fee due to it in respect of the job it has found for him, such a provision may confer an advantage on those recruitment agencies.

48 In that regard, it must be noted that, first, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, *Bosman*, paragraph 59).

49 However, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is

hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20).

50 In the present case, the national court has provided no explanation as to the significance which the classification as a State aid of the system of recruitment vouchers put in place by the legislation at issue might have in relation to the dispute before it.

51 Furthermore, although that court has explained, in general terms, how the system of recruitment vouchers at issue in the main proceedings operates, the absence of specific information as to whether or not an advantage exists and the effect of that system on trade between Member States does not allow it to be determined whether it complies with the Community rules relating to State aid (see, to that effect, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 58 to 62, and order in Case C-190/02 *Viacom* [2002] ECR I-8287, paragraph 21).

52 In the absence of sufficient information, it is not possible to discern the specific problem of interpretation which might be raised in relation to each of the provisions of Community law relating to competition in respect of which the national court seeks an interpretation. The need for precision with regard to the factual and legislative context applies especially in the area of competition, which is characterised by complex factual and legal situations (order in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 5; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22; and order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 19).

53 In those circumstances, there is no need to reply to that part of Question 3.

The freedom to provide services

54 As a preliminary point, it must be noted that the activity of employee recruitment constitutes, in accordance with case-law, the provision of services for the purposes of Articles 49 EC and 50 EC (see Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 7, and Case 279/80 *Webb* [1981] ECR 3305, paragraphs 8 and 9).

55 As regards the question whether national legislation, such as the legislation at issue in the main proceedings, gives rise to a restriction which is prohibited by Article 49 EC, it should be pointed out that, according to settled case-law, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, 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, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see, inter alia, Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21).

56 In pursuance of that rule, the freedom to provide services may, contrary to what the German Government contends, be relied on by an undertaking against the State in which it is established where the services are provided to recipients established in another Member State and, more generally, whenever a provider of services offers services in a Member State other than the one in which he is established (see, inter alia, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 14).

57 By making payment of the recruitment voucher subject to the condition that the person seeking employment be employed in a post which is subject to compulsory social security contributions in the national territory, legislation such as the legislation at issue in the main proceedings gives rise to a restriction on the freedom to provide services based on the place where that service is provided.

58 Such legislation is capable of affecting the recipient of the services, that is to say, in the main proceedings, the person seeking employment, who must himself, where the job found by the private-sector recruitment agency is in another Member State, pay the fee due to the agency.

59 As regards the private-sector recruitment agency, which is the provider of the services, while it is true that it may continue to carry on its recruitment activity in other Member States, the fact that the job it finds for a person seeking employment is in another Member State means that the recruitment fee will no longer be paid by the Bundesagentur but will be the responsibility of the person seeking employment himself. Accordingly, although such a recruitment agency is not prevented from carrying on its activity, the opportunity to extend its activity to other Member States will be restricted, in so far as the use by many employers of the services of such an agency will largely be dependent on the existence of the recruitment voucher system, and it will also be by virtue of that system that the agency will be able to find a job for a person seeking employment in another Member State without incurring the risk that it will not be paid.

60 As regards the question whether there is also a restriction on the freedom of recruitment agencies established outside Germany to provide services, it must be held that, having regard to the facts of the case in the main proceedings, such a question is merely hypothetical, so that it is unnecessary to reply to it in this case.

61 As regards, lastly, the question whether such a restriction may be justified, since the grounds put forward to justify such a restriction on the freedom to provide services are the same as those considered in paragraphs 37 to 44 of this judgment in relation to the freedom of movement for workers, it must be held that national legislation such as the second sentence of Article 421(g)(1) of SGB III goes beyond what is necessary to achieve the objectives pursued.

62 In the light of the foregoing considerations, the answer to Question 3 must be that Articles 49 EC and 50 EC prohibit national legislation, such as the second sentence of Paragraph 421(g)(1) of SGB III, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State.

Question 1, on citizenship of the European Union

63 By this question, the national court essentially asks whether Article 18 EC prohibits a national provision such as the second sentence of Paragraph 421(g)(1) of SGB III.

64 In that regard, it is sufficient to note that Article 18 EC, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Articles 39 EC and 40 EC in relation to the freedom of movement for workers and the freedom to provide services.

65 Inasmuch as the main proceedings fall within the scope of the lastmentioned provisions, it is not necessary to give a ruling on the interpretation of Article 18 EC (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26, and Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 20).

Question 2(a) and Question 4(a)

66 By these questions, the national court essentially asks to what extent it is possible and necessary to interpret a provision of domestic law in conformity with Community law.

67 It should be noted at the outset that the provisions of Articles 39 EC, 49 EC and 50 EC confer on individuals rights which are enforceable by them and which the national courts must protect (see Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26, and Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7).

68 According to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of Community law (see Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39).

69 Where such an application is not possible, the national court must apply Community law in its entirety and protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law (see, to that effect, *Murphy and Others*, paragraph 11; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 26; and *Engelbrecht*, paragraph 40).

70 The answer to Question 2 and Question 4(a) must therefore be that it is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than those of the parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Articles 39 EC, 49 EC and 50 EC prohibit national legislation, such as the second sentence of Paragraph 421(g)(1) of Book III of the German Social

Security Code, which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State.

2. **It is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the EC Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions.**

[Signatures]