JUDGMENT OF THE COURT (Second Chamber)

17 January 2008 *

In Case C-152/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 April 2005,

Commission of the European Communities, represented by R. Lyal and K. Gross, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk (Rapporteur), P. Kūris, J.-C. Bonichot and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

1 By its application the Commission of the European Communities requests the Court to declare that, by excluding in the first sentence of Paragraph 2(1) of the Law on subsidies for owner-occupied dwellings (Eigenheimzulagengesetz), in the version published in BGBl. 1997 I, p. 734, as amended by the ancillary budget law of 2004 (Haushaltsbegleitgesetz 2004, BGBl. 2003 I, p. 3076, 'the EigZulG'), real property in another Member State from eligibility for the subsidy for owner-occupied dwellings granted to persons liable to unlimited taxation on income, whether or not those

persons are able to obtain a comparable subsidy in that other Member State, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC.

The German legislation

2 Paragraph 1 of the Law relating to income tax (Einkommensteuergesetz), in the version published in the BGBl. 2002 I, p. 4210 ('the EStG'), provides:

'(1) Natural persons having their domicile or habitual residence in Germany shall be liable to unlimited taxation of income …

(2) The following shall also be liable to unlimited taxation of income: German nationals who

1. have neither their domicile nor their habitual residence in Germany and who

2. are linked by a contract of employment to a German legal person governed by public law and who therefore receive a salary from German public funds and the members of their households, possessing German nationality or not in receipt of income or only of income taxable in Germany alone. This shall apply exclusively

to natural persons who, in the country in which they have their domicile or habitual residence, are liable to income tax only to an extent equivalent to limited liability to tax.

(3) At their request, natural persons having neither their domicile nor habitual residence in Germany may also be liable to unlimited taxation of income insofar as they receive income arising in Germany … This option applies only if at least 90% of their income during a calendar year is subject to German income tax or if their income not subject to German income tax is no more than EUR 6 136 a calendar year; this amount will be reviewed downward if that should be necessary and appropriate having regard to the situation in the State of residence. …'

3 Paragraph 1 of the EigZulG provides that persons liable to unlimited taxation of income for the purpose of the EStG are entitled to that property subsidy.

4 By virtue of the first sentence of Paragraph 2(1) of the EigZulG, that subsidy is granted for the construction or purchase of a dwelling in an owner-occupied house in Germany or of an owner-occupied dwelling in Germany.

5 According to Paragraph 4 of that law, the right to the subsidy may be acquired only in calendar years in which the beneficiary uses the dwelling for his own occupation. Occupation of the dwelling free of charge by a member of the beneficiary's family also enables the grant of the subsidy.

Pre-litigation procedure

6 By letter of formal notice of 4 April 2000, the Commission informed the Federal Republic of Germany of its doubts as to the compatibility of the first sentence of Paragraph 2(1) of the EigZulG with Articles 18 EC, 39 EC and 43 EC. The Federal Republic of Germany answered that letter of formal notice by letter of 30 May 2000.

7 On 16 December 2003 the Commission sent to the Federal Republic of Germany a reasoned opinion inviting it to take the measures necessary to comply therewith within a period of two months of its receipt. Not being satisfied with the German authorities' reply to that opinion, contained in a letter of 17 February 2004, the Commission decided to bring the present action.

The action

Admissibility

8 The Federal Republic of Germany argues that the action is in part inadmissible on the ground that the Commission in its letter before action, by the use of the words 'German taxpayer', referred only to persons of German nationality liable to income tax. It was not, therefore, open to the Commission to widen the scope of the action to include the situation of workers of different nationality.

9 In this regard, it is to be borne in mind that although it is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the formal notice, the reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in each, where the subject-matter of the proceedings has not been extended or altered (see, to that effect, Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraphs 36 and 37).

10 In addition, the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the EC Treaty. On the other hand, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 26).

11 In this instance, contrary to the claims of the Federal Republic of Germany, it is not apparent from the letter of formal notice that the Commission intended to limit the subject-matter of the dispute to the situation of German nationals.

12 As a matter of fact, first, in the third paragraph of that letter the Commission makes particular reference to Paragraph 1(3) of the EStG which, for the purposes of liability to income tax, refers to natural persons having neither domicile nor habitual residence in Germany and who receive income in that State, irrespective of their nation-

ality. Second, in the fifth paragraph of that letter the Commission states that, in its view, exclusion of persons making use of cross-border mobility from eligibility for the property subsidy is, under Articles 18 EC, 39 EC and 43 EC, incompatible with the principle of freedom of movement of persons.

13 The subject-matter of the dispute not having been altered or extended and the letter of formal notice having enabled the Federal Republic of Germany to be informed of the factors needed for the preparation of its defence, the objection to admissibility raised by that Member State must be rejected and the action introduced by the Commission declared admissible.

Substance

14 A preliminary point to be noted here is that by letter of 4 January 2006 the Federal Republic of Germany informed the Court of the adoption on 22 December 2005 of the Law abolishing the subsidy for owner-occupied dwellings (Gesetz zur Abschaffung der Eigenheimzulage, BGBl. 2005 I, p. 76).

15 In this regard it is sufficient to observe that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-161/02 *Commission* v *France* [2003] ECR I-6567, paragraph 6, and judgment of 18 July 2007 in Case C-26/07 *Commission* v *Greece*, not published in the ECR, paragraph 6). Since it is established that the law abolishing the subsidy was adopted after the expiry of that period, it is not to be taken into consideration in these proceedings.

16 It is settled case-law that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 10; and Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 12).

17 It is therefore necessary to consider whether, as the Commission maintains, the EigZulG, in particular the first sentence of Paragraph 2(1) thereof, constitutes a restriction of the freedom of movement and freedom of establishment enshrined in Articles 18 EC, 39 EC and 43 EC.

18 Article 18 EC, which sets out in general terms the right of every citizen of the European Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC with regard to freedom of movement for workers and in Article 43 EC with regard to freedom of establishment (*Commission* v *Portugal*, paragraph 13; *Commission* v *Sweden*, paragraph 15; and Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraph 35).

19 The first question for consideration is therefore whether a provision of national law, such as the first sentence of Paragraph 2(1) of the EigZulG, that makes the grant of the subsidy for owner-occupied dwellings, to which persons liable to unlimited taxation of income in Germany are entitled by virtue of Paragraph 1 of that law, subject to the condition that the dwellings built or purchased by those persons for their own occupation should be situated in Germany, is contrary to Articles 39 EC and 43 EC.

20 In this connection it is to be borne in mind that any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers or freedom of establishment and who has been employed in a Member State other than that of residence falls within the ambit of Article 39 EC or of Article 43 EC, as the case may be (Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31; Case C-470/04 *N* [2006] ECR I-7409, paragraph 28; and Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17).

21 What is more, the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the European Community, and they preclude measures which might place those nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 34; *Commission* v *Portugal*, paragraph 15; *Commission* v *Sweden*, paragraph 17; and Case C-318/05 *Commission* v *Germany*, paragraph 114).

22 Provisions preventing or deterring a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned (*Commission* v *Denmark*, paragraph 35; *Commission* v *Portugal*, paragraph 16; *Commission* v *Sweden*, paragraph 18; and Case C-318/05 *Commission* v *Germany*, paragraph 115).

23 In this case, the first sentence of Paragraph 2(1) of the EigZulG places at a disadvantage persons liable in Germany to unlimited taxation of income who build or purchase a dwelling for their own occupation in the territory of another Member

State. That provision does not allow such persons to receive the property subsidy, whereas persons are entitled to it who are in the same situation with regard to income tax and who, when building or purchasing a dwelling, decide to maintain or establish domicile in Germany.

24 In those circumstances, as Advocate General Bot observes in point 64 of his Opinion, that provision has a deterrent effect on persons liable to unlimited taxation on income in Germany who have the right to freedom of movement under Articles 39 EC and 43 EC and who wish to build or purchase a dwelling for their own occupation in another Member State.

25 It follows that, by reserving entitlement to the subsidy for owner-occupied dwellings to persons liable in Germany to unlimited taxation of income on condition that the dwelling built or purchased for their own occupation is situated in German territory, the first sentence of Paragraph 2(1) of the EigZulG is capable of impeding freedom of movement for workers and freedom of establishment, as guaranteed by Articles 39 EC and 43 EC.

26 According to well-established case-law, however, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, are appropriate to ensuring the attainment of that objective and do not go beyond what is necessary to attain the objective pursued (*Commission* v *Portugal*, paragraph 24, and *Commission* v *Sweden*, paragraph 25).

27 In this case, the Federal Republic of Germany contends that the condition laid down in the first sentence of Paragraph 2(1) of the EigZulG is justified by the aim of encouraging the building of dwellings in its territory in order to ensure an adequate supply

of housing. However, on any view that condition goes beyond what is necessary to attain the objective pursued.

28 In point of fact, the objective of satisfying demand for housing is just as easily attained if the person liable in Germany to unlimited taxation of income chooses to establish his residence in another Member State rather than in Germany (*Commission* v *Portugal*, paragraph 35).

29 It follows from the foregoing that the first sentence of Paragraph 2(1) of the EigZulG constitutes a restriction prohibited by Articles 39 EC and 43 EC and that the Commission's claim alleging that the Member State concerned had failed to fulfil its obligations under the Treaty is well founded.

30 Second, with regard to persons liable in Germany to unlimited taxation of income who are not economically active, the same conclusion applies, for the same reasons, to the complaint relating to Article 18 EC.

31 It must therefore be declared that, by excluding in the first sentence of Paragraph 2(1) of the EigZulG dwellings in another Member State from eligibility for the subsidy for owner-occupied dwellings granted to persons liable to unlimited taxation on income, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC.

Costs

32 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 Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by excluding in the first sentence of Paragraph 2(1) of the Law on subsidies for owner-occupied dwellings (Eigenheimzulagengesetz), in the version published in 1997, as amended by the ancillary budget law of 2004 (Haushaltsbegleitgesetz 2004) dwellings in another Member State from eligibility for the subsidy for owner-occupied dwellings granted to persons liable to unlimited taxation on income, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC;**

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

[Signatures]