JUDGMENT OF THE COURT (First Chamber)

22 December 2008 *

In Case C-161/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 March 2007,

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

applicant,

supported by:

Republic of Lithuania, represented by D. Kriaučiūnas, acting as Agent,

intervener,

* Language of the case: German.

v

Republic of Austria, represented by C. Pesendorfer and M. Winkler, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano (Rapporteur), A. Borg Barthet and J.-J. Kasel, Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 June 2008,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by requiring, for the registration of partnerships or companies in the commercial register on application by nationals of the Member States which acceded to the European Union on 1 May 2004, with the exception of the Republic of Cyprus and the Republic of Malta ('the eight new Member States'), a determination by the Arbeitsmarktservice (labour market service; 'the AMS') that they are self-employed or the presentation of a work permit exemption certificate, the Republic of Austria has failed to fulfil its obligations under Article 43 EC.

Legal framework

Community law

2 Article 24 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the

Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('the Act of Accession') is worded as follows:

'The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

3 Those annexes provide, in the first subparagraph of paragraph 2, under the heading 'Freedom of Movement for Persons', that States which were already members of the Union at the time of that accession may continue to apply 'national measures … regulating access to their labour markets by … nationals [of the new Member States]' until the end of the five year period following the date of accession.

National law

4 Pursuant to Paragraph 32a, in conjunction with Paragraph 1(2)(l) and (m), of the Law on the employment of foreign nationals (Ausländerbeschäftigungsgesetz) of 20 March 1975 (BGBl. 218/1975), that law, in the version currently in force (BGBl. I, 99/2006) ('the AuslBG'), applies to nationals of the eight new Member States.

5 Paragraph 2(2) of the AuslBG defines employment as an activity carried out 'within a work relationship' or 'in a quasi-employee relationship'.

6 Paragraph 2(4) of the AuslBG is worded as follows:

'In order to assess whether there is employment in the sense of subparagraph 2, it is necessary to have regard to the genuine economic substance and not to the external appearance of the situation. Employment in the sense of subparagraph 2 exists in particular when:

1. a member of a partnership, with the purpose of achieving the objective of the partnership, or

2. a member of a limited liability company with a holding of less than 25% performs for that partnership or company activities which are typically performed within a work relationship, unless the regional office of the [AMS] determines, on application and within a period of three months, that he in fact personally exercises a significant influence on the management of the partnership or company. The burden of proof is on the applicant. On the expiry of that period, the activity can be undertaken even without the required certificate. If the application is rejected after the expiry of that period, the activity already begun must be terminated immediately or at the latest in the week following notification of the decision.'

7 Paragraph 15 of the AuslBG sets out the conditions governing the issue of a work permit exemption certificate as follows:

‘(1) A foreign national who does not yet have unrestricted access to the labour market (Paragraph 17) may obtain, on application, a work permit exemption certificate:

1. if he has been in authorised employment for at least five of the last eight years in the national territory … and if he is lawfully established …

…’

Pre-litigation procedure

8 Since it considered the method of distinguishing between self-employed persons and employees deriving from Paragraph 2(4) of the AuslBG to be a restriction on the freedom of establishment guaranteed by Article 43 EC, the Commission, on 21 March 2005, sent a letter of formal notice on the matter to the Austrian authorities, which replied by letter of 19 May 2005, disputing any infringement of that article.

9 On 6 July 2006, the Commission sent the Republic of Austria a reasoned opinion, requesting it to adopt the measures necessary to comply with that opinion within a period of two months from its receipt. The Austrian authorities replied on 7 September 2006, restating their position.

10 The Commission therefore decided to bring the present action.

11 By order of the President of the Court of 19 September 2007, the Republic of Lithuania was given leave to intervene in this case in support of the form of order sought by the Commission.

The action

Arguments of the parties

12 The Commission contends that the obligation under the national legislation in question, which requires nationals of the eight new Member States who wish to register a partnership or company in the commercial register to obtain a certificate from the

AMS determining that they are self-employed, or a work permit exemption certificate, constitutes an unjustified restriction on the exercise of the freedom of establishment.

13 The arguments of the Commission concentrate essentially on the complaint concerning the incompatibility with Article 43 EC of the procedure for certification of self-employed status laid down in Paragraph 2(4) of the AuslBG, since few nationals of those Member States would be able to show they had been in authorised employment for five of the last eight years preceding the application for an exemption certificate, which is necessary in order to obtain a work permit exemption certificate pursuant to Paragraph 15 of the AuslBG.

14 The Commission points out, first, that under Paragraph 2(4), a national of one of the eight new Member States is presumed to be acting as an employee when, as a member of a partnership, or of a limited liability company with a holding of less than 25%, he performs 'activities which are typically performed within a work relationship'. By requiring that the person concerned rebut the presumption by providing proof of his self-employed status, that provision not only makes access to a self-employed activity subject to an additional condition compared to those applicable to other economic operators, but also prevents that economic activity from being pursued during the certification procedure. The freedom of establishment of the economic operators concerned from the eight new Member States is therefore impeded.

15 The Commission also contends that the restriction enacted in Paragraph 2(4) of the AuslBG is discriminatory on the ground that the procedure in question applies to nationals of the new Member States on the basis of their nationality.

16 Nor can that restriction be justified, on the basis of Article 46 EC, on grounds of public policy within the meaning of Community case-law, since the Republic of Austria has not proved the existence of a genuine and sufficiently serious threat to a fundamental interest of society.

17 In any case, the obligation to submit to the certification procedure at issue is neither necessary nor proportionate with regard to the objective, relied on by that Member State, of combating potential abuses of the freedom of establishment by preventing attempts to evade restrictions on freedom of movement for workers.

18 In particular, the reversal of the burden of proof which operates under the provision in question in order to obtain from a member of a partnership or company information making it possible to establish that the economic activity is genuinely being carried out in a self-employed capacity is not the only possible means by which to induce the cooperation of every person concerned, contrary to what is asserted by the Republic of Austria. According to the Commission, that result can also be achieved by other less restrictive means, such as obligations to cooperate laid down by legislation, possibly accompanied by sanctions.

19 In addition, the prior authorisation procedure could be replaced by a subsequent check, following registration of the partnership or company. In that way, the self-employed persons concerned could commence their activity and the competent authorities, for their part, order its cessation where a check has revealed an abuse.

20 In its defence, the Republic of Austria's starting point is that the Commission is wrong in basing its action on an infringement of the freedom of establishment guaranteed by Article 43 EC. It considers that the certification procedure provided for in Paragraph 2(4) of the AuslBG falls within the sphere of the freedom of movement for workers and is covered by the option available to the Member States on the basis of Article 24 of the Act of Accession to restrict, during the transitional period, access by the nationals of the new Member States to the labour market.

21 Only employees and 'bogus self-employed persons', that is, members of a partnership or company who find themselves 'atypically' in a situation similar to that of employees, are subject to the prior authorisation procedure. By contrast, self-employed persons such as members of a partnership or company who do not perform work for the partnership or company which is typical of an employment relationship, but limit themselves to management tasks and dealing with their holdings, do not fall, contrary to what is contended by the Commission, within the scope of Paragraph 2(4) of the AuslBG.

22 The Republic of Austria then argues that the objective of that provision is to put an end to a practice of circumvention of the obligation to seek prior authorisation for access to employment by means of the creation of partnerships or companies, in the cases set out in that provision. Contrary to the viewpoint of the Commission, there is no less restrictive means of combating such a practice. In particular, a subsequent check would come too late and would not prevent disruptions to the labour market, as the Court held in Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607. Equally, the rule relating to the burden of proof, criticised by the Commission, constitutes the only appropriate means of ascertaining whether the activity is in fact being carried out by a member of a partnership or a company in a self-employed capacity, since a mere obligation to cooperate is not sufficient to enable compliance with that condition to be checked. The persons concerned would have no interest in cooperating where the law was being circumvented.

23 Finally, that Member State contends that the maximum period of three months is reasonable, since in practice the certification procedure often finishes after only a short wait for the person concerned, in particular when his self-employed status is clearly proved.

Findings of the Court

24 As a preliminary point, it should be noted that the concept of establishment within the meaning of the EC Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and

social interpenetration within the European Community in the sphere of activities of self-employed persons (see Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 18 and the case-law cited).

25 In the light of that concept as so defined, it is necessary first of all to dismiss the Republic of Austria's argument that the national legislation at issue falls exclusively within the sphere of freedom of movement for workers, and more specifically of the transitional derogation provided for in the first subparagraph of paragraph 2 in Annexes V to XIV to the Act of Accession.

26 It is clear from the case file, and in particular from the arguments developed by the Republic of Austria, that that legislation imposes administrative formalities, under certain conditions, on all nationals of the eight new Member States who wish to carry out an economic activity in Austria as a member of a partnership or a limited liability company, in order to distinguish, among those nationals, between those who are genuinely self-employed and those who are in fact employees. It follows that the Commission is justified in disputing the compatibility of Paragraphs 2 and 15 of the AuslBG with Article 43 EC, inasmuch as those national provisions apply inter alia to self-employed persons and lay down rules on the exercise of their freedom of establishment.

27 Next, according to settled case-law, the freedom of establishment conferred by Article 43 EC on Community nationals includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals (see, to that effect, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 19, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 20).

28 In other words, Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 24).

29 In the present case, the national legislation at issue infringes that very prohibition by requiring only nationals of the eight new Member States to prove that they will not be working as employees by presenting the certificate provided for in Paragraph 2(4) of the AuslBG or a work permit exemption certificate as referred to in Paragraph 15(1) of that law.

30 Thus, first, access by those Community nationals to an economic activity as a member of a partnership or of a limited liability company in which they have a holding of less than 25% of the capital is subject to additional conditions and formalities compared to those applied to Austrian nationals. Second, if the certification procedure provided for in Paragraph 2(4) of the AuslBG is applied, the economic activity carried out by the nationals of the eight new Member States is itself suspended for the duration of that procedure, namely for a maximum of three months.

31 The national legislation at issue therefore enshrines a difference in treatment on the ground of nationality which is prohibited, in principle, by Article 43 EC.

32 It must therefore be examined whether that difference in treatment falls within the derogation provided for in Article 46 EC, according to which discriminatory measures can be justified only on grounds of public policy, public security or public health.

33 In that regard, the Republic of Austria, relying on a ground relating to public policy, claims that the measures in question aim essentially to combat possible abuses of the freedom of establishment by preventing any circumvention of the transitional rules applicable to freedom of movement for workers, in order to protect the interest of Austrian society in the proper working of the labour market and in equality of the conditions of competition on that market.

34 That argument cannot be upheld.

35 As the Court has pointed out on numerous occasions, the concept of public policy, first, comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society and, second, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed (see to that effect, in particular, Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 28; Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 49; and Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 50).

36 It is also clear from the case-law that the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, and by precise evidence enabling its arguments to be substantiated (see, by analogy, *Commission* v *Luxembourg*, paragraph 51 and the case-law cited).

37 In the present case, however, the Republic of Austria has merely invoked in a general manner the danger of circumvention by supposed 'bogus self-employed persons' of the transitional rules governing the freedom of movement for workers coming from the eight new Member States, without putting forward any precise evidence capable of

establishing that the potential infringement of those rules constitutes a genuine and sufficiently serious threat to a fundamental interest of society.

38 Furthermore, even supposing that that danger of circumvention of the rules is liable to cause such interference with public policy, it must be held that the defendant Member State has not established to the requisite legal standard either that the objective concerning the proper working of the labour market which is pursued by the legislation in question makes it necessary to put in place a general system of prior authorisation, applying to all economic operators concerned from the eight new Member States, or that that objective cannot be achieved by measures less restrictive of the freedom of establishment.

39 In fact, as the Commission and the Republic of Lithuania suggest, measures less restrictive than those introduced by the national legislation at issue, for example the putting in place of regular administrative checks possibly coupled with obligations concerning the communication of information on the part of the economic operators potentially affected, could achieve a similar result by enabling it to be ascertained whether certain economic activities are actually carried out on a self-employed basis, or in the context of an employment relationship.

40 Such a system appears all the more conceivable since, as the Republic of Austria confirmed at the hearing, the national provisions in question are addressed essentially to the construction sector and therefore concern the creation of partnerships or companies carrying out activities of a certain duration. Contrary to what is contended

by that Member State, a check carried out subsequently, after registration of a partnership or company, would therefore not necessarily be too late, but would both enable the self-employed persons concerned to start carrying out their activity and allow the competent authorities to order its cessation where a check has revealed an abuse.

41 Consequently, the restriction on the freedom of establishment which results from the national legislation at issue is not justified.

42 In those circumstances, it must be held that by requiring, for the registration of partnerships or companies in the commercial register on application by persons who are nationals of the eight new Member States and are members of a partnership or have minority holdings in a limited liability company, a determination by the AMS that they are self-employed or the presentation of a work permit exemption certificate, the Republic of Austria has failed to fulfil its obligations under Article 43 EC.

Costs

43 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, the latter must be ordered to pay the costs.

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

1. **Declares that, by requiring for the registration of partnerships or companies in the commercial register on application by persons who are nationals of the Member States which acceded to the European Union on 1 May 2004 — with the exception of the Republic of Cyprus and the Republic of Malta — and are members of a partnership or have minority holdings in a limited liability company, a determination by the Arbeitsmarktservice that they are self-employed or the presentation of a work permit exemption certificate, the Republic of Austria has failed to fulfil its obligations under Article 43 EC;**

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

[Signatures]