JUDGMENT OF THE COURT (Second Chamber)

14 July 2005 *

In Case C-386/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 September 2003,

Commission of the European Communities, represented by M. Huttunen and M. Niejahr, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and A. Tiemann, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), C. Gulmann, R. Schintgen and J. Klučka, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 February 2005,

after considering the observations submitted on behalf of the parties,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration from the Court that, by adopting measures contrary to Articles 16 and 18 of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36), in Paragraphs 8(2) and 9(3) of the Regulation on airport groundhandling services (Verordnung über Bodenabfertigungsdienste auf Flugplätzen) of 10 December 1997 (BGBl. 1997 I, p. 2885, 'the BADV'), the Federal Republic of Germany has failed to fulfil its obligations under that directive.

Legal framework

Community legislation

2 Directive 96/67 provides for a system of gradual opening-up of the market for groundhandling services in Community airports.

3 Articles 16 and 18 of that directive contain provisions on access to airport installations and on social and environmental protection respectively. Those articles are worded as follows:

'Article 16

Access to installations

1. Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations to the extent necessary for them to carry out their activities. If the managing body of the airport or, where appropriate, the public authority or any other body which controls it places conditions upon such access, those conditions must be relevant, objective, transparent and non-discriminatory.

2. The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.

3. Where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria.

...

Article 18

Social and environmental protection

Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment.'

4 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event

of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) codifies Council Directive 77/187/EEC of 14 February 1977 (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

National legislation

5 In Germany, Directive 96/67 was transposed mainly by the Law on Airport Groundhandling Services (Gesetz über Bodenabfertigungsdienste auf Flughäfen) of 11 November 1997 (BGBl. 1997 I, p. 2694), and by the BADV. Paragraphs 8 and 9 of the BADV provide as follows:

'Paragraph 8

(1) Suppliers of groundhandling services and self-handling users shall fulfil the "requirements for the provision of groundhandling services" ... . In the cases referred to in Paragraph 3(2) to (5), those requirements shall form part of the invitation to tender and the selection procedure in accordance with Paragraph 7.

(2) The airport operator may require a supplier of groundhandling services or a self-handling user to take over workers according to the groundhandling services transferred to that supplier or user. Such workers shall be chosen on the basis of relevant criteria, in particular according to the function that they perform. The third sentence of Paragraph 9(3) shall apply. Article 613a of the Civil Code is not affected.

(3) In addition to subparagraphs 1 and 2, the aviation authority may make the provision of groundhandling services subject to compliance with specifications or technical conditions. The Airport Users' Committee shall be consulted before those are determined.

(4) The requirements, criteria, specifications and technical conditions laid down under subparagraphs 1 to 3 must be established and applied in a relevant, objective, transparent and non-discriminatory manner. They must be notified in advance by the airport operator.

Paragraph 9

(1) The airport operator and the supplier of groundhandling services or self-handling user are required to enter into a contract concerning the use of the requisite and available part of the airport and its infrastructures as well as the fees to be paid under this regulation to the airport operator, and the conditions to be fulfilled by suppliers of groundhandling services or self-handling users under Paragraph 8.

(2) The airport operator shall ensure that access to airport installations by suppliers of groundhandling services and self-handling users authorised on the basis of this regulation is not wrongfully impeded so far as access is necessary for carrying on their activities. If the airport operator imposes conditions on such access, they must be relevant, objective, transparent and non-discriminatory.

(3) The airport operator is entitled to charge suppliers of groundhandling services and self-handling users a fee for the access to and availability and use of its installations. The amount of such remuneration shall be determined after a hearing of the users' committee in accordance with relevant, objective, transparent and non-discriminatory criteria and may in particular contribute, in the sense of a commercial fee, to the self-financing of the airport. In setting the fee, the airport operator may take into account to a reasonable extent the costs necessarily incurred by him as a result of the transfer of groundhandling services to suppliers of groundhandling services or self-handling users, in particular as a result of not taking over workers.'

6 Paragraph 613a of the German Civil Code (Bürgerliches Gesetzbuch), referred to in Paragraph 8(2) of the BADV, provides:

'(1) When a business or part of a business is transferred to another owner as a result of a legal transaction, that owner shall take over the rights and obligations arising from the employment relationship existing on the date of the transfer. Where those rights and obligations are governed by the provisions of a collective agreement or company agreement, they shall be incorporated in the employment relationship between the new owner and the worker, and may not be altered in a manner unfavourable to the worker within a year of the date of the transfer. The second sentence shall not apply if the rights and obligations under the new owner are governed by the provisions of a different collective agreement or company agreement. The rights and obligations may be altered before the expiry of the period specified in the second sentence if the collective agreement or company agreement ceases to apply or if the terms of another collective agreement, which the new owner and the worker agree is applicable, are not binding on both parties.

(2) The former employer shall be jointly and severally liable with the new owner in respect of the obligations referred to in paragraph 1, in so far as such obligations

arose before the date of the transfer and fall to be met within a year of that date. However, where such obligations fall to be met after the date of the transfer, the former employer shall be liable only in respect of the period before the date of the transfer.

...'

Pre-litigation procedure

7 Having examined the German legislation, the Commission concluded that it had not transposed Articles 16 and 18 of Directive 96/67 correctly into national law. It therefore sent the Federal Republic of Germany a letter of formal notice on 28 February 2000, inviting that Member State to submit its observations.

8 In its reply of 16 May 2000 the Federal Republic of Germany denied that it had failed to fulfil its obligations.

9 The Commission was not persuaded by the explanations provided and, by letter of 21 March 2002, it sent that Member State a reasoned opinion, calling on it to adopt within two months of the date of notification of that opinion the measures necessary to comply with its obligations under that directive.

10 Finding the reply to that reasoned opinion unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

11 The Commission observes that the measures taken in the framework of the powers enjoyed by Member States under Article 18 of Directive 96/67 cannot run counter to the gradual realisation of free access to the groundhandling market as set out in Articles 6 and 7 of that directive. Consequently, national measures adopted with the aim of regulating employment conditions in that field must not discriminate between suppliers of groundhandling services and self-handling users or distort competition between them.

12 The Commission submits that the German legislation in question does not meet those requirements, since it draws a distinction between the managing body of the airport on the one hand and the other suppliers of groundhandling services and self-handling users on the other, thus impeding access to the market for the latter and distorting competition between those different categories of operators. The managing body is able to pass on to new entrants to the market all or, at least, part of the costs connected with the employees whom it can no longer employ because of the loss of market shares inherent in the opening-up of the market.

13 The Commission submits that the general protection measures adopted by the Member States for transposing Directive 2001/23 also apply to the groundhandling sector. Consequently, where the opening-up of the groundhandling market such as that provided for by Directive 96/67 leads to the transfer of a business within the meaning of Article 1(1) of Directive 2001/23, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the operation in question are therefore transferred to the transferee.

14 The Commission states that the measures referred to in Paragraphs 8(2) and 9(3) of the BADV have a discriminatory effect in cases which are not covered by Directive 2001/23, as between the managing body of the airport on the one hand and the other suppliers of groundhandling services and self-handling users on the other, as regards social costs, where groundhandling services are transferred.

15 The Commission also observes that the possibility of passing on certain social costs, provided for in Paragraph 9(3) of the BADV, cannot be justified on the basis of Article 16(3) of Directive 96/67. It is true that that latter provision authorises the managing body of the airport to collect a fee from other suppliers of groundhandling services and self-handling users in return for access to the airport installations. None the less, the amount of that fee should be set according to relevant, objective, transparent and non-discriminatory criteria.

16 The Commission claims that the term 'airport installations' which appears in Article 16(3) of Directive 96/67 must be understood in the context of the infrastructure of the airport and that the amount of the fee charged may be relevant and objective only if it is based on the costs borne by the managing body of the airport in order to guarantee access to the infrastructure in question for the other suppliers of groundhandling services and self-handling users. Consequently, the costs to be met by the managing body where workers are not taken over are not among the costs which may be taken into account to determine the fee referred to in Article 16(3) of Directive 96/67.

17 The German Government observes that, by introducing a system based on negotiation between the managing body of the airport and a new operator, Paragraph 8(2) of the BADV creates a system aiming to safeguard contracts of

employment when the business is transferred, in so far as that is possible. According to that system, a new operator wishing to provide groundhandling services on his own behalf or on behalf of a third party is required to consult with the managing body in order to ensure the protection of workers' rights. Only if that body required that its workers who had become surplus to requirements be taken over and the new operator refused to do so would that body be entitled to share the resulting social costs between all suppliers of the groundhandling services market in question.

18 The German Government submits that the combined provisions of Paragraphs 8(2) and 9(3) of the BADV and the consequent possibility of apportioning fairly, between the suppliers of groundhandling services, the social costs incurred by making workers redundant constitute social protection measures which do not go beyond the framework set by Article 18 of Directive 96/67.

19 The German Government states that, to the extent that in the framework of the liberalisation of groundhandling services, the transfer of activities, employees and other parts of the managing body of the airport to another operator is accompanied by a transfer of the undertaking, the provisions of Directive 2001/23 prevail in any event. Furthermore, in situations which do not fall within the scope of that directive, Paragraphs 8(2) and 9(3) of the BADV comply with the principle of proportionality, since they aim to establish a fair balance between the protection of workers and the objective of liberalising the services in question.

20 The German Government states that Paragraph 8(2) of the BADV requires the new operator and the managing body of the airport only to consult each other with regard to taking on workers. Those measures only lay down an alternative in providing that the managing body may share out proportionately among the

economic operators the social costs arising from liberalisation and the refusal to take on workers, on the basis of relevant, objective, transparent and non-discriminatory criteria.

21 Finally, in the opinion of the German Government, Article 16(3) of Directive 96/67 is not inconsistent with the national legislation in question, because that provision governs the right of the managing body of the airport to require a fee in consideration of access to the airport installations. Paragraph 9(3) of the BADV is not limited to access to the airport installations, but should constitute an incentive to new operators to negotiate with the managing body concerning the conditions for taking over the activity in question in the interests of the workers.

22 In that respect, the German Government submits that the German legislation in question does not transpose Article 16(3) of Directive 96/67, but is based on Article 18 of that directive.

Findings of the Court

The subject-matter of the action

23 First of all, it should be observed that the subject-matter of this action relates to the compatibility of the German legislation in question with Articles 16 and 18 of Directive 96/67 only in situations which are not provided for by Directive 2001/23. As is apparent from the arguments submitted to the Court, the parties agree, on the

one hand, that Directive 2001/23 applies to transfer operations in the groundhandling sector, and, on the other hand, that the rights and obligations arising from Directive 2001/23 are fully implemented each time an opening-up of the market in this area leads to a transfer within the meaning of Article 1(1) of that directive.

24 As regards the national legislation in question, the parties also agree that its scope is broader than that of Directive 2001/23 and that it concerns any situation where a business sector is abandoned by the managing body of the airport for the benefit of a new economic operator. Consequently, it must be determined whether Paragraphs 8 (2) and 9(3) of the BADV comply with Articles 16 and 18 of Directive 96/67.

The complaint based on the obligation to take on workers

25 The Commission's complaint relates to Paragraph 8(2) of the BADV, under which the managing body of the airport may require a supplier of groundhandling services or a self-handling user to take over workers according to the groundhandling services which have been transferred to it.

26 In that respect, it must be observed that, even if the German Government's argument that Paragraph 8(2) does not contain an absolute obligation to take over workers in all cases where the groundhandling market is opened up to new suppliers or self-handling users were to be correct, it is still the case that, by virtue of its very existence, that provision enables managing bodies of airports in Germany to exercise a certain amount of pressure on undertakings or users wishing to enter such a market by providing them with an incentive to take over workers engaged in groundhandling services.

27 Such a provision is therefore liable to make it more burdensome for new suppliers of groundhandling services to enter the sector concerned and to place them at a disadvantage in relation to undertakings which are already established.

28 As for the question of whether such legislation may be justified under Article 18 of Directive 96/67, it should be noted that the Court has held that, whilst Member States retain the power to ensure an adequate level of social protection for the staff of undertakings providing groundhandling services, it is also true that that power does not confer an unlimited jurisdiction and must be exercised in a manner that does not prejudice the effectiveness of that directive and the objectives it pursues (see Case C-460/02 *Commission* v *Italy* [2004] ECR I-11547, paragraphs 31 and 32).

29 As regards the national legislation in question, it should be observed that, on account of its financial implications, there is a risk that it would impair the rational use of airport infrastructures and the reduction of the costs of the services charged to users, thus jeopardising the opening-up of the groundhandling markets and the useful effect of Directive 96/67 (see *Commission* v *Italy*, paragraphs 33 and 34).

30 Consequently, Paragraph 8(2) of the BADV cannot be regarded as compatible with the powers conferred on Member States under Article 18 of Directive 96/67.

31 It follows from those considerations that the complaint based on the obligation to take over workers is well founded.

The complaint based on the right to require a fee for the access to and availability and use of airport installations

32 The complaint of the Commission relates to Paragraph 9(3) of the BADV, the purpose of which is to determine the rules relating to the fees that the managing body of an airport may require from suppliers of groundhandling services and self-handling users for the access to and availability and use of its installations.

33 That provision is the legal basis which enables the managing body to impose a number of charges on the abovementioned economic operators.

34 As regards whether the option of charging a fee complies with Directive 96/67, it should be borne in mind that the Court has held that the reference to installations clearly relates to the infrastructure and the equipment made available by the airport (see Case C-363/01 *Flughafen Hannover-Langenhagen* [2003] ECR I-11893, paragraph 40).

35 The Court has also stated that, not only would the possibility for the managing body of an airport to charge an access fee in addition to the fee for use of the airport installations not facilitate access to the market concerned, it would also run directly counter to the objective of reducing the operating costs of airline companies and, in certain cases, would even lead to an increase in those costs (see *Flughafen Hannover-Langenhagen*, paragraph 44).

36 It follows from those considerations that the amount of the fee in question must constitute consideration which corresponds exactly to the use of the airport installations and must be calculated according to the criteria laid down in Article 16 (3) of Directive 96/67, taking account of the interest of the body concerned in making a profit (see *Flughafen Hannover-Langenhagen*, paragraph 62).

37 However, in this case, the national legislation in question provides that a part of the fee may be intended to offset the costs of not taking over workers when a groundhandling market is opened up.

38 As the Advocate General rightly states at point 69 of his Opinion, that provision shows that the fee provided for in German law goes further than the framework for which it was designed by the Community legislature, which sees the fee exclusively as a payment for the use of airport installations by suppliers of groundhandling services or self-handling users.

39 The costs arising from not taking over workers are in no way connected with the costs incurred by the managing body of the airport in making its installations available, and cannot therefore be regarded as being among the criteria referred to in Article 16(3) of Directive 96/67.

40 Furthermore, as regards the German Government's argument that Paragraph 9(3) of the BADV does not aim to transpose Article 16(3) of Directive 96/67 but complies, when considered in its entirety, with Article 18 thereof, it is sufficient to note that that paragraph of the BADV provides for a fee for access to and availability and use

of airport installations, whereas Article 16(3) of Directive 96/67 relates specifically to collecting fees for access to those installations. In those circumstances, the German Government's argument must be rejected.

41 As regards that argument of the German Government, it should be added, for the sake of completeness, that, as the Advocate General rightly states in points 50 and 51 of his Opinion, a charge that the managing body of the airport may impose on new economic operators for not taking on workers when a groundhandling market is transferred constitutes a financial advantage for that body, and is intended to protect interests which are not among those set out in Article 18 of Directive 96/67.

42 The complaint alleging infringement of Article 16 of Directive 96/67 is therefore also well founded.

43 It follows from all the foregoing that the action of the Commission must be considered to be well founded in its entirety.

44 Consequently, it must be held that, by adopting measures contrary to Articles 16 and 18 of Directive 96/67 in Paragraphs 8(2) and 9(3) of the BADV, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

Costs

45 Article 69(2) of the Rules of Procedure provides that 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 Federal Republic of Germany must be ordered to pay the costs.

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

1. **Declares that, by adopting measures contrary to Articles 16 and 18 of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, in Paragraphs 8(2) and 9 (3) of the Regulation on airport groundhandling services (Verordnung über Bodenabfertigungsdienste auf Flugplätzen) of 10 December 1997, the Federal Republic of Germany has failed to fulfil its obligations under that directive;**

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

[Signatures]