OPINION OF ADVOCATE GENERAL LÉGER delivered on 5 October 2006 [1]

1. As part of the liberalisation of activities relating to recruitment, private-sector recruitment agencies are playing a growing role in the operation of the labour markets of the Member States of the European Union. [2] That role is also acknowledged at international level. [3]

2. By the present reference for a preliminary ruling, the Court is asked to interpret various provisions of Community law in the light of a scheme for promoting employment that has been in force in Germany since 2002.

3. Under that scheme, the Bundesagentur für Arbeit (Federal Employment Agency, 'the Bundesagentur') issues recruitment vouchers to persons seeking employment, which releases them, at least to some extent, from their obligation to pay fees to private-sector recruitment agencies whose services they have used in order to find employment.

I — Legal framework

A — *Community law*

4. In addition to Articles 18 EC, 39 EC, 49 EC, 50 EC, and Article 87 EC in conjunction with Articles 81 EC, 85 EC and 86 EC, the present questions referred for a preliminary ruling concern Articles 3 and 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. [4] I shall cite here only those two provisions of secondary Community law.

1 — Original language: French.

2 — See document prepared by the French Senate's Legal Studies Service dated January 2004 concerning organisation of the benefits scheme and recruitment of unemployed persons in seven Member States (comparative law study), available on the internet (http://www.senat.fr/lc/lc130/lcl300.html).

3 — See Convention No 181 and Recommendation No 188 of the International Labour Organization of 19 June 1997 on private-sector recruitment agencies, available on the internet (http://www.ilo.org/ilolex/english/convdisp1.htm and http://www.ilo.org/ilolex/english/recdisp1.htm).

4 — (OJ, English Special Edition 1968 (II), p. 475).

5. Article 3 of Regulation No 1612/68 provides:

'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 of that regulation reads 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.

...'

B — *National law*

7. Paragraph 296 of Book III of the Social Security Code — Promotion of Employment (Sozialgesetzbuch — Arbeitsförderung), [5] entitled 'Recruitment contract between an agency and a person seeking employment' provides, in subparagraph 1, that the contract whereby an agency undertakes to procure a job for a person seeking employment must be made in writing and that it must in particular indicate what fee will be paid to that agency.

5 — BGBl. 1997 I, p. 594, 'SGB III'.

8. According to Paragraph 296(2) of SGB III, a person seeking employment is required to pay the fee due to the agency only where he obtains a contract of employment through the services of the latter.

9. Paragraph 296(4) states, moreover, that once an agency has been given a recruitment voucher that fee is not required to be paid until payment has been made by the Bundesagentur in accordance with Paragraph 421(g) of SGB III. [6]

10. The first sentence of Paragraph 421(g) of SGB III, which is entitled 'Recruitment voucher', provides that persons who are entitled to claim unemployment benefit or unemployment assistance who have not been found a job after three months of unemployment, or persons who are engaged in employment which is provided as part of a job creation scheme or a structural measure of adjustment shall be entitled to a recruitment voucher. [7] The second sentence of Paragraph 421(g)(1) of SGB III provides that by issuing the recruitment voucher the Bundesagentur undertakes to pay the fee due to the agent instructed by the employee and which has placed him in employment, subject to compulsory social security contributions, for a minimum of 15 hours' work a week.

11. Paragraph 421(g)(2) of SGB III provides that a recruitment voucher is to be issued to the value of EUR 1 500, EUR 2 000 or EUR 2 500, according to how long the person seeking employment has been unemployed. A payment of EUR 1 000 is to be made towards the agency's fee when the employment relationship begins and the balance is to be paid following a period of six months' employment; the sums due are to be paid direct to the agency.

12. Paragraph 1 of Book IV of the Social Security Code — Common Social Security Provisions (Sozialgesetzbuch — Gemeinsame Vorschriften für die Sozialversicherung) ('SGB IV') provides:

'... 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 ...'

6 — The German Government gives the meaning of that provision in paragraph 11 of its written observations, explaining that under it the recruitment voucher gives entitlement to only part of the payment and the person seeking employment remains liable for payment of the fee under the recruitment contract. It also states that, under that provision, submission of a recruitment voucher automatically initiates the period within which the fee payable by the person seeking employment to the agency must be paid.

7 — It should be explained that the recruitment voucher scheme was introduced into German law in 2002 on a trial basis. It is intended that the scheme concerned, which applies until 31 December 2006, should be assessed in order to decide whether it should be extended.

13. Moreover, Paragraph 3 of SGB IV provides:

'The provisions relating to compulsory insurance and the 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 the application of this statutory code;

...'

14. Lastly, Paragraph 30 of Book I of the Social Security Code — General Provisions (Sozialgesetzbuch — Allgemeiner Teil) ('SGB I') reads as follows:

'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.

...'

II — Facts and procedure in the main proceedings

15. ITC Innovative Technology Center GmbH ('ITC') carries on business in the recruitment sector. On 27 August 2003, ITC signed a recruitment contract with Mr Darius Halacz. That contract made it the responsibility of ITC to assist Mr Halacz to find a job that was subject to compulsory social security contributions and to provide all the services necessary for the purposes of that recruitment.

16. Mr Halacz had submitted the recruitment voucher to ITC which the Bundesagentur had issued to him. That voucher, which was valid until 15 October 2003 and was for EUR 1 500, 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 when they found him employment. Payment of EUR 1 000 would be made upon commencement of the employment relationship and the remainder would be paid if that relationship lasted for at least six months.

17. In accordance with the relevant provisions of SGB III, the recruitment voucher stated that the fee would be paid on condition that the employment was subject

to compulsory social security contributions, that it covered a minimum of 15 hours' work a week, that the period of employment agreed upon was a minimum of three months, that a recruitment contract had been concluded in writing with the agency, and that under that contract the latter had a claim to payment in respect of the recruitment.

18. 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.

19. By letter of 15 September 2003, ITC asked the Bundesagentur for payment of the first amount due, that is to say EUR 1 000, in accordance with the recruitment voucher. [8]

20. The Bundesagentur rejected that application by decision dated 2 October 2003, on the ground that Mr Halacz had not been placed in employment that was subject to compulsory social security contributions in Germany.

21. On 16 October 2003 ITC appealed against that decision. The Bundesagentur rejected that appeal by decision of 27 October 2003 on the ground that the concept of 'compulsory social insurance' was governed by Paragraphs 1 to 3 of SGB IV; those provisions also applied to SGB III. The provisions concerning compulsory social security contributions covered all persons who were employed within the scope of application of the SGB, that is to say, Germany.

22. On 14 November 2003, ITC brought an action before the Sozialgericht Berlin (Social Court, Berlin) (Germany) seeking, first, the annulment of the decision of the Bundesagentur of 2 October 2003, as upheld by the decision of 27 October 2003, and, second, an order that that body should pay ITC the sum of EUR 1 000, representing the fee for the recruitment that had been put in place.

III — The reference for a preliminary ruling

23. According to the Sozialgericht Berlin, it would be necessary to grant the application

8 — The order for reference shows that the employment relationship between Mr Halacz and his employer was ended in November 2003. As that relationship lasted less than six months, the fee which ITC can claim from the Bundesagentur is in any event limited to EUR 1 000.

before it if the second sentence of Paragraph 421(g)(1) of SGB III were held to be contrary to Community law in so far as it meant that payment by the Bundesagentur of the recruitment fee to the agency that an employee had instructed was conditional upon the job that was found being subject to compulsory social insurance contributions in Germany.

24. It explains in that regard that under German law alone, namely Paragraphs 1 and 3 of SGB IV and Paragraph 30 of SGB I, in conjunction with the second sentence of Paragraph 421(g)(1) of SGB III, 'employment subject to compulsory social security contributions' for the purposes of the last-named paragraph means solely a job of that type which is carried on within the scope of application of the SGB, that is to say Germany.

25. The referring court considers that if the national law were to be interpreted in that way it would infringe rights guaranteed by Community law, in particular because the interpretation of national law which would result from such a reading of those paragraphs of the SGB would mean that an employee who was recruited outside Germany would not be released from his obligation to pay the agency he had instructed, although that would have been the case if he had been recruited in Germany. Moreover, as a result of this interpretation, agencies established in Germany would be indirectly prevented from expanding their recruitment activities abroad whilst foreign agencies would be indirectly prevented from recruiting unemployed Germans abroad.

26. The referring court states, however, that it considers that it would be possible to interpret the second sentence of Paragraph 421(g)(1) of SGB III in conformity with Community law in so far as employment of this type undertaken in another Member State of the Union would then be considered to be 'employment subject to compulsory social security contributions'.

27. Being uncertain as to the interpretation of a number of provisions of Community law, the Sozialgericht Berlin decided to stay the proceedings and to refer the following questions to the Court of Justice 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

covered by 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 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 the 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?'

IV — Analysis

A — *Questions 1 and 3*

28. Questions 1 and 3 may be considered together, since they both seek a ruling from

the Court on whether Community law must be interpreted as meaning that it precludes legislation of a Member State such as that at issue in the main proceedings, whereby payment by a national employment agency to a private-sector recruitment agency of the fee payable by a person seeking employment in respect of recruitment is conditional upon the job that is found by that private-sector agency being subject to compulsory social security contributions in that Member State.

29. By those two questions, the referring court is seeking an interpretation of a number of provisions of Community law, namely, Articles 18 EC, 39 EC, 49 EC, 50 EC, and Article 87 EC read in conjunction with Articles 81 EC, 85 EC and 86 EC, together with Articles 3 and 7 of Regulation No 1612/68. It is necessary to determine which provisions require interpretation in order to enable that court to resolve the dispute in the main proceedings.

30. To that end, I shall begin by excluding immediately from the scope of my analysis Article 87 EC, which the referring court suggests should be read in conjunction with Articles 81 EC, 85 EC and 86 EC. It does not seem to me that the national recruitment voucher scheme can be classified as State aid within the meaning of Article 87 EC.

31. I would point out in that regard that it is settled case-law that classification as State aid requires that all the conditions laid down in Article 87(1) EC be met, [9] that is to say, the measure concerned must confer an advantage on certain undertakings, that advantage must be granted by a Member State or through State resources and should distort or threaten to distort competition in intra-Community trade.

32. The national recruitment voucher scheme does not constitute an advantage for certain undertakings, for the following reasons.

33. According to the case-law of the Court, the concept of aid may cover not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also action which, in various forms, mitigates the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect. [10]

9 — See, inter alia, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74, and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 84.

10 — See, inter alia, Case C-126/01 *Gemo* [2003] ECR I-13769, paragraph 28 and the case-law cited, and *Belgium and Forum 187* v *Commission*, paragraph 86.

34. In the light of that definition, I do not consider that the national recruitment voucher scheme can be considered to be either a subsidy or a mitigation of the charges which are normally included in the budgets of private-sector recruitment agencies. The scheme merely provides for an assignment of the liability to pay the fee due to the private-sector recruitment agency from the employer to the Bundesagentur. By paying that fee directly to that agency, the Bundesagentur is simply paying the consideration for a service rendered, namely the recruitment of a person seeking employment.

35. In addition, according to settled case-law, Article 87(1) EC requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity which is a defining characteristic of the concept of State aid as set out by that article. [11]

36. I share the view of the German Government that the scheme provided for in Article 421(g) of SGB III is not selective. A person seeking employment may give the recruitment voucher issued to him to any agency of his choice, so that payment by the Bundesagentur of the recruitment fee is not in principle limited to certain private-sector recruitment agencies that are restrictively selected.

37. As the condition that an advantage must be conferred on for certain undertakings is therefore not met, there is no need to interpret Article 87 EC, or the other provisions of the EC Treaty which the referring court proposes should be read in conjunction with that article. [12]

38. However, the Treaty provisions concerning both freedom of movement for workers and freedom to provide services appear at first sight to be relevant for resolution of the dispute in the main proceedings.

11 — See, inter alia, Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40 and the case-law cited, and *Belgium and Forum 187* v *Commission*, paragraph 119.

12 — As stated in the sixth recital in the preamble to Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ 2002 L 337, p. 3), 'a number of employment policy measures do not constitute State aid within the meaning of [Article 87(1) EC] because they constitute aid to individuals that does not favour certain undertakings or the production of certain goods ...'.

1. Freedom of movement for workers

(a) Reliance by a private-sector recruitment agency on the Community rules on freedom of movement for workers

39. Article 39(1) EC provides that 'freedom of movement for workers shall be secured within the Community'. Article 39(3)(a) EC specifies that freedom of movement includes the right 'to accept offers of employment actually made'.

40. As the Court has held, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. [13]

41. The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship. [14]

42. In addition, according to the Court, nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC. [15]

43. In the light of that case-law it must be concluded that Mr Halacz falls within the *ratione personae* scope of Article 39 EC, on account both of his status as a person seeking employment who has received a recruitment voucher from the Bundesagentur and of his status as an employee with a contract of employment which was performed between September and November 2003.

44. Without disputing this, the German Government argues however that a private-sector recruitment agency cannot, in a national dispute between itself and the Bundesagentur, rely on rights arising under Article 39 EC since such an agency does not fall within the scope *ratione personae* of that

13 — See, for example, Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, paragraph 18 and the case-law cited.

14 — See, inter alia, Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 27.

15 — Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 21.

article. In support of that view, it cites Case C-55/90, *'Job Centre II'*, [16] in which the Court did not consider Article 48 of the EC Treaty (now, after amendment, Article 39 EC), because the applicant in the main proceedings in that case could not, as a recruitment agency, rely on freedom of movement for workers.

45. I do not share the German Government's view.

46. It is appropriate first of all to remember the context in which the Court considered, in *Job Centre II*, that it was not necessary to interpret the Treaty provisions concerning freedom of movement for workers.

47. In that case, the Corte d'appello di Milano (Italy) was in essence seeking a ruling from the Court on whether the Treaty provisions concerning freedom of movement for workers, freedom to provide services and competition precluded national legislation under which any activity as an agency and negotiator between supply and demand in employment relationships was prohibited unless carried on by public-sector recruitment agencies.

48. In the main proceedings, Job Centre coop. arl, a cooperative society with limited liability in the course of being incorporated, with its registered office in Milan (Italy), was claiming the right to act as an agency between supply and demand on the employment market and to provide temporary staff on the Italian and Community employment markets.

49. Starting from that premiss, the Court held that 'in so far as the questions refer to provisions concerning freedom of movement for workers, it need merely be pointed out that it does not follow from the fact that workers are among the founding members of [the company] that Article 48 is applicable, since once [the company] has been set up and is in operation it will be an independent legal person'. In the view of the Court, 'the provisions concerning freedom of movement for workers ha[d] no relevance for the dispute in the main proceedings'. [17]

50. In his Opinion in that case, Advocate General Elmer noted that no information had been provided to justify the view that 'Job Centre, on its own or by way of transfer or representation, might be able to lay claim

16 — [1997] ECR I-7119.

17 — The Court did, however, agree to interpret Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) in so far as the questions referring to those articles raised the problem of the extent of the exclusive right granted to public-sector recruitment offices, and hence of the prohibition, giving rise to penal and administrative sanctions, of any activity as an agency between supply and demand on the employment market by private-sector companies.

to the rights which employees could acquire should there have been a case of employment procurement'. [18]

51. The background to the present reference for a preliminary ruling differs in several respects from that in *Job Centre II.*

52. First, ITC is not claiming in the main proceedings the right to engage in its activity of employee recruitment. There is no rule of German law preventing it from carrying on its business as an agency between supply and demand on the employment market.

53. Second, it is appropriate to stress that one of the features of a recruitment voucher is that it forms part of a triangular relationship between the Bundesagentur, the person seeking employment and the private-sector recruitment agency.

54. Thus, the Bundesagentur issues a recruitment voucher to a person seeking employment who meets the conditions set out in Paragraph 421(g)(1) of SGB III. By issuing the recruitment voucher, the Bundesagentur undertakes to pay, within certain limits, the fee of the private-sector recruitment agency instructed by the person seeking employment which has succeeded, under a recruitment contract, in finding the latter employment.

55. Since as a result of the recruitment activity a contract of employment has been concluded between the person seeking employment and an employer, the private-sector recruitment agency is entitled to obtain payment of its fee. If a recruitment voucher has been given to that agency by the person seeking employment the Bundesagentur must pay that fee.

56. At that stage in the procedure, the private-sector recruitment agency therefore lays down, as against the Bundesagentur, to the entitlement to payment conferred on it by the recruitment voucher initially issued to the person seeking employment. This procedure, as designed by the German legislature, means that it is not for the person seeking employment to claim payment of the agency's fee directly from the Bundesagentur. It is the private-sector recruitment agency which must apply to the Bundesagentur for the amount which is due to it.

57. In the event of refusal by the Bundesagentur to pay the amount stated in the recruitment voucher, it is therefore the

18 — Point 18.

private-sector recruitment agency which is best placed to assert, where appropriate, the rights arising under Community law.

58. Third, I consider that since a recruitment contract confers on a private-sector recruitment agency the role of an intermediary, such an agency represents the person seeking employment and must therefore have the legal capacity to exercise any rights that may be granted to the latter under Community law.

59. The judgment in *Clean Car Autoservice* [19] appears to me to lend weight to the idea that a private-sector recruitment agency should be able to invoke rights which exist for the benefit of workers under Community law.

60. In that case, the Court was requested in particular to decide whether the rule of equal treatment in the context of freedom of movement for workers may also be relied upon by an employer in order to engage, in the Member State in which he is established, workers who are nationals of another Member State.

61. In his Opinion in that case, Advocate General Fennelly proposed that the Court should answer that question in the affirmative. He expressed the view that the judgments of the Court which define the concept of 'worker' 'do not address, nor do they exclude, either expressly or by implication, the extension of the benefit of Community-law provisions on freedom of movement of workers to persons other than workers who, none the less, have a material connection with a person who has that status'. In his opinion, 'nor can any such inference be drawn from the texts of the relevant Treaty and legislative provisions'. [20] He added, moreover, that 'it must also be borne in mind that, while freedom of movement of workers may be conceived of, in part, in terms of workers' personal rights, and is strengthened by their efforts to secure such rights, inter alia before national courts, it ultimately serves an objective of general interest, provided for in Article 3(c) of the Treaty: the establishment of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons'. [21]

62. It would appear that the Court was persuaded by the various arguments put forward by Advocate General Fennelly.

19 — Case C-350/96 [1998] ECR I-2521.

20 — Point 19.

21 — Point 21.

63. It found in particular that 'Article [39](1) [EC] states, in general terms, that freedom of movement for workers is to be secured within the Community' and that such freedom of movement 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 in a Member State in order to be employed there under the same conditions as nationals of that State and to remain there after such employment'. [22]

64. In the view of the Court, 'whilst those rights are undoubtedly enjoyed by those directly referred to — namely, workers — *there is nothing in the wording of Article [39 EC] to indicate that they may not be relied upon by others*, in particular employers'. [23]

65. I am of the opinion that the Court should take the same view with regard to a private-sector recruitment agency that has concluded a recruitment contract with a person seeking employment. In other words, I consider that the Court should allow such an agency to invoke the rights conferred on workers by Article 39 EC.

66. Since the referring court is also seeking an interpretation from the Court of Article 18 EC, it should be noted at this stage that the Court has held that that article, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to freedom of movement for workers. Since, as I have stated, the facts with which the main proceedings are concerned fall within the scope of the latter provision, it is not necessary for the Court to rule on the interpretation of Article 18 EC. [24]

67. Moreover, as regards Articles 3 and 7 of Regulation No 1612/68, it should first be noted that they merely clarify and give effect to the rights already conferred by Article 39 EC. [25] Next, as regards Article 3 of that regulation, it should be noted that the situations described in it do not correspond to the situation in the main proceedings. As for Article 7 of that regulation, the equal treatment rule which it lays down, both as regards conditions of employment and work and as regards the social and tax advantages which workers should receive in the host State, has no relevance to the resolution of the dispute in the main proceedings, which concerns a measure adopted by the State of origin which is intended to facilitate access

22 — *Clean Car Autoservice*, paragraph 18.

23 — Ibid. paragraph 19 (emphasis added).

24 — Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26.

25 — Regarding Article 3, see, for example, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 6. Regarding Article 7, see, in particular, Case C-205/04 *Commission* v *Spain*, not published in the ECR, paragraph 3.

to employment. Consequently, in the present case, it is Article 39 EC which is the only legislation that is relevant with regard to freedom of movement for workers.

68. It is therefore important to ascertain at this point whether there exists in the present case an obstacle to the free movement of workers which is prohibited by Article 39 EC.

(b) The existence of an obstacle to the free movement of workers

69. In its order for reference, [26] the Sozialgericht Berlin explains that issuing a recruitment voucher has the effect of making the Bundesagentur jointly liaise with the worker who has been recruited as regards the latter's obligation to pay the fee. This does not mean that the worker is released from the obligation owed by him with the private-sector recruitment agency, since he remains bound to pay if the Bundesagentur does not settle his debt in full. The national court also states that it is possible, should the employment relationship end before a period of six months has elapsed, that the Bundesagentur will only pay EUR 1 000, leaving the remainder of the fee to be paid by the person seeking employment.

70. The national court also notes that although a person seeking employment is entirely released from his obligation to pay the recruitment fee where the job that is found for him is located in Germany and he occupies the post for six months, thereby receiving a benefit of between EUR 1 500 and EUR 2 500, a person who exercises his right of freedom of movement loses that benefit entirely.

71. With regard to the existence of an obstacle to freedom of movement for workers, the Commission of the European Communities argues that the Treaty provisions concerning that freedom prohibit Member States from imposing obstacles on the exercise by their nationals of employment in another Member State. [27] In the Commission's view, such an obstacle exists directly where, as in the present case, the possibility of taking up employment in another Member State is adversely affected. It adds that a person seeking employment who must pay a private-sector agency the recruitment fee himself if he is recruited in another Member State and cannot apply to the Bundesagentur for payment of that fee may be discouraged from exercising his right of freedom of movement and accepting employment in another Member State. [28]

26 — Page 9 of the French translation.

27 — The Commission cites in that connection Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 95 et seq.

28 — Paragraph 14 of the Commission's written observations.

72. On that point, ITC contends, in particular, that it is conceivable that a person seeking employment who is offered work in a Member State other than Germany would be forced to decline the offer because he is unable to pay the private-sector recruitment agency which has found him that job. [29]

73. I am of the view that the German recruitment voucher scheme, as currently structured, is indeed liable to restrict the freedom of movement for workers.

74. It must first be stated that the Court has held on numerous occasions that the Treaty provisions relating to 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. [30]

75. According to the Court, national provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right of freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. [31]

76. Having regard to both the written observations lodged by ITC and the Commission and to the information provided at the hearing, it is common ground that, where, as in the main proceedings, the Bundesagentur refuses to pay all or some of the amount provided for in the recruitment voucher which has been issued to a person seeking employment it is ultimately for the latter to pay the fee which remains owing to the private-sector recruitment agency whose services he has used. [32]

77. I would draw attention to the fact that, under German law, it is a precondition of payment by the Bundesagentur of the fee due to a private-sector agency for the recruitment of a person seeking employment that the job that is found is subject to compulsory social security contributions in Germany. Therefore, if the job is located in another Member State, the person seeking employment is not released from his obligation to

29 — Page 3 of the French translation of the written observations lodged by ITC.

30 — Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25 and the case-law cited.

31 — *Kranemann*, paragraph 26, and the case-law cited.

32 — It seems that, in the particular case of Mr Halacz, certain provisions of the recruitment contract preclude his being required to pay the recruitment fee owing to ITC. However, as ITC's representative explained at the hearing, it cannot be excluded that, under German civil law, depending on the outcome in the main proceedings, an action may be brought in the German courts seeking payment of that fee by Mr Halacz.

pay the fee. Such a rule is, in my opinion, likely to deter him from accepting a job in another Member State. It therefore constitutes, for the purposes of Article 39(3)(a) EC, a barrier to the freedom of a person seeking employment 'to accept offers of employment actually made'.

78. It is necessary now to consider whether that obstacle to the freedom of movement for workers can be justified.

(c) Justification for the obstacle to freedom of movement for workers

79. In its order for reference, [33] the Sozialgericht Berlin considers, with regard to the objectives pursued by the German legislation, first, that the fact the German social security system can only operate properly thanks to the contributions paid in that country and, second, the fact that aid given to recruitment in Germany is intended to protect the German labour market against the loss of specialist workers, and thereby maintain its performance. According to that court, the adverse effect of the German legislation on freedom of movement for workers cannot be regarded as proportionate to those two objectives.

33 — Pages 13 and 14 of the French translation.

80. It contends in that regard that, having regard to the high level of unemployment in Germany, no causal link can be established between the loss of contributions in that Member State and the recruitment of a person seeking employment in another Member State. In particular, from a statistical point of view and against that background of mass unemployment, it is probably impossible to prove that a job vacancy in Germany is unfilled because a person seeking employment has been able to find a job in another Member State.

81. The court making the reference considers that the same applies to theissue of a negative trend in the structure of the German labour market resulting from the loss of skilled labour. In view of the high level of unemployment in Germany no such danger can be detected at the present time, especially since the recruitment voucher scheme is only temporary.

82. The Commission shares the view expressed by the referring court. It too doubts the existence of a causal link between the loss of social security contributions in Germany and the recruitment of a person seeking employment in another Member State. In the Commission's opinion, the equilibrium of the German social security system is not under threat. There could be only a minimum loss of social security contributions. Moreover, savings would be made as regards social security benefits since, as the person recruited would no

longer be registered as a person seeking employment, the Member State of origin would no longer need to pay him unemployment benefit.

83. As regards preventing the loss of skilled labour, the Commission first argues that the objective thus stated of preventing the emigration of workers does not constitute an overriding reason in the public interest capable of justifying an obstacle to freedom of movement for workers.

84. Although it must be accepted such an objective may represent an overriding reason in the public interest, the Commission considers that, having regard to the high level of unemployment, that fear would appear justified only in a very few sectors. It should also be borne in mind that a recruitment voucher is issued only when a person seeking employment has been unable to find a placement after three months. Only persons seeking employment who are not in demand on the labour market because their skills are not required therefore receive a recruitment voucher. A national provision which consistently precludes recruitment in another Member State would go beyond what is necessary and would therefore be disproportionate in relation to the objective of preventing the loss of skilled workers.

85. The German Government maintains for its part that even after the insertion by the Treaty of Amsterdam of a title on employment into the Treaty establishing the European Community, and even though promotion of employment is an issue of common interest for the Member States, such promotion remains within the competence of the latter and each of them may therefore pursue its own policy on employment. [34]

86. It also states that the recruitment voucher introduced by Article 421(g) of SGB III is a new instrument of that employment policy, which is in force for a trial period ending on 31 December 2006. With the opening up of the recruitment market to private-sector agencies, that instrument is being used as an experiment with a view to improving efficiency in the recruitment of persons seeking employment and the reduction of unemployment in Germany. It is therefore a matter of overriding public interest.

87. According to the German Government, the Member States have scope for trying out new instruments as part of their employment policies. That implies that an instrument of this type will be restricted to the territory of each country. In its view, there is an objective justification for restricting to each national

34 — These arguments appear in the written comments which the German Government devotes to the freedom to provide services. It is clear, however, from the discussion which took place at the hearing that the same arguments also apply with regard to freedom of movement for workers.

labour market measures to promote employment that would have effects on the labour market of another Member State.

88. Lastly, in so far as Article 421(g) of SGB III relieves a person seeking employment of recruitment costs, which are funded by the German social security system, it is only recruitment which contributes to the funding of that system that should be encouraged. The German Government maintains in that regard that the recruitment voucher scheme is intended to increase the effectiveness of recruitment and at the same time to reduce the length of time persons seeking employment are unemployed. In view of the large number of job vacancies in Germany and the need to increase the number of people paying contributions, this scheme helps to ensuring the long-term equilibrium of the German social security system.

89. I would point out first of all that, contrary to what the German Government seeks to establish, I do not consider that the argument that the recruitment voucher is a new instrument of employment policy in the Federal Republic of Germany can of itself justify the existence of an obstacle to freedom of movement for workers.

90. Even though Member States retain the power to draw up their own employment policies and the Community is required only to play a coordination and guidance role, within the framework laid down in Articles 125 EC to 130 EC, those States are none the less required to exercise that power in accordance with Community law and in particular the Community rules ensuring freedom of movement for workers.

91. A number of provisions of Community law, such as Articles 2 EC and 2 EU, demonstrate moreover that the establishment of an area without internal borders is intended as a means of achieving a high level of employment and social protection within the Community. In addition, according to Article 126(2) EC, promoting employment is to be regarded by Member States as a 'matter of common concern'.

92. I also note that the need to ensure mobility of labour within the Community has been affirmed for a considerable time by the Community legislature. Thus, the third recital in the preamble to Regulation No 1612/68 reads:

'... freedom of movement constitutes a fundamental right of workers and their families; ... mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social

advancement, while helping to satisfy the requirements of the economies of the Member States; ... the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed.'

93. Such mobility is encouraged all the more in 2006, which the Commission has designated the 'European Year for Workers' Mobility'. In the context of the Social Policy Agenda for 2006-2010, the Commission wishes to create a 'genuine European labour market', which means it will be necessary, in particular, 'to remove the remaining direct and indirect barriers'. [35]

94. This leads me to consider that a new instrument introduced by a Member State as part of its employment policy cannot be allowed to hinder the mobility of workers solely on the grounds that it belongs in an area which still falls to a large extent within the competence of the Member States.

95. Looking now at the justifications relating, first, to the need to ensure the long-term equilibrium of the German social security system and, second, to preventing the loss of skilled labour, it should be pointed out that it is settled case-law that a measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. It is necessary, however, in such a case that 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. [36]

96. It is also settled case-law that aims of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty. [37] However, the Court accepted in *Kohll* [38] that it is possible for the risk of seriously undermining the financial balance of a social security system to constitute such an overriding reason in the public interest.

35 — Communication from the Commission of 9 February 2005 on the Social Agenda (COM(2005) 33 final, p. 8). Individual instruments introduced at Community level, such as the EURES (European employment services) network, contribute to the 'integration of the European labour markets' (see recital 5 to Commission Decision 2003/8/EC of 23 December 2002 implementing Council Regulation (EEC) No 1612/68 as regards the clearance of vacancies and applications for employment (OJ 2003 L 5, p. 16)). In that regard, the EURES network is responsible for developing exchanges of information and cooperation between the employment services of the Member States.

36 — See, inter alia, *Kranemann*, paragraph 33 and the case-law cited.

37 — Ibid., paragraph 34 and the case-law cited.

38 — Case C-158/96 [1998] ECR I-1931, paragraph 41. See also Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 47, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 72.

97. On this point, I think, as do the referring court and the Commission, that no such risk has been shown to exist in the present case.

98. I am not convinced that the recruitment of a person seeking employment in another Member State is likely automatically to lead to a loss of social security payments in Germany. First, in view of the high level of unemployment in that Member State, a job vacancy is likely to be quickly filled by another person seeking employment registered in that same Member State. Second, the mobility of workers is not a one way matter. The departure of one person seeking employment is therefore likely to be offset by the arrival of another person ready to accept an offer of employment actually made in Germany.

99. The existence of a causal link between the loss of social security contributions in Germany and the recruitment of a person seeking employment in another Member State is therefore, in my view, not established.

100. In addition, as the Commission points out, the recruitment of a person seeking employment in another Member State means that he need no longer receive unemployment benefits in Germany. The consequence of this is a saving for the German benefits system.

101. As regards the justification of preventing the loss of skilled labour, it is necessary first to decide whether this can be regarded as one of the overriding reasons in the public interest which a Member State may rely on.

102. I consider that a Member State should, in principle, be able to rely on that justification. It seems to me that it should be accepted that a Member State may have a legitimate interest in maintaining a certain equilibrium in the structure of its labour market.

103. This means however, in my view, that this justification is acceptable only if it relates to a measure concerning a particular sector of that labour market which is experiencing certain structural difficulties such as an inadequate number of skilled workers.

104. Such a justification cannot therefore be accepted in relation to a general measure like the German recruitment voucher scheme, the application of which is not limited to a

particular sector of employment. In such a situation, since that scheme is generally restricted to persons seeking employment who are placed in Germany, it goes beyond what is necessary in order to achieve the objective of preventing the loss of skilled labour and is therefore disproportionate.

105. Lastly, in response to the remarks made on this subject by the German Government at the hearing, it does not seem to me to be relevant to invoke here what the Court ruled in connection with benefits linked to job seeking, namely that 'it may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State'. [39]

106. The present case does not call into question the need for such a link in order to issue a recruitment voucher to a person seeking employment such as Mr Halacz. It is not disputed here that in order to be entitled to a recruitment voucher Mr Halacz must meet the conditions laid down in the first sentence of Paragraph 421(g)(1) of SGB III, which show a connection between the person seeking employment and the national labour market. [40]

107. In my view, the requirement of a genuine link between the person seeking employment and the national labour market cannot, in the light of that case-law from the Court, be relied upon by the State of origin in a situation such as that in the main proceedings where a person seeking employment who does not find work in that State wishes to accept an offer of employment actually made in another Member State.

108. It is clear from all these considerations, in my view, that Article 39 EC should be interpreted as meaning that it precludes legislation of a Member State such as that at issue in the main proceedings, which provides that payment by a national employment agency to a private-sector recruitment agency of the fee payable by a person seeking employment in respect of a recruitment is

39 — *Collins*, paragraph 69. See also to this effect, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 38, and *Ioannidis*, paragraph 30. As Advocate General Ruiz-Jarabo Colomer explains in his Opinion in *Collins*, such a condition 'may be justified in order to avoid what has come to be known as "benefit tourism", where persons move from State to State with the purpose of taking advantage of non-contributory benefits, and in order to prevent abuses' (point 75).

40 — Under that paragraph, persons who are entitled to claim unemployment benefit or unemployment assistance who have not been found a job after three months of unemployment, or persons who are engaged in employment which is promoted as part of a job creation scheme or a structural measure of adjustment, are entitled to receive a recruitment voucher.

conditional upon the employment that is found by that private-sector agency being subject to compulsory social security contributions in that Member State.

109. At this point in my analysis, it is my opinion that the Court should confine itself to considering the present reference for a preliminary ruling in the light of the freedom of movement for workers. It is this fundamental freedom which in my view lies at the root of the dispute in the main proceedings.

110. As we have seen, the German recruitment voucher scheme is of direct benefit to persons seeking employment. Since, according to the case-law of the Court, the Treaty rules relating to freedom of movement for workers confer rights on those persons, it is both necessary and sufficient to consider such a scheme in the light of that freedom.

111. It is true that the special nature of the recruitment activity means that those seeking employment embody two different aspects. As a party to a recruitment contract concluded with a private-sector recruitment agency they are also recipients of services.

112. However, from the point of view of considering whether the German recruitment voucher scheme is compatible with Community law, that status seems to me to be secondary in relation to that of a 'worker' within the meaning of Article 39 EC.

113. For that reason I suggest that the Court should hold that there is no need to interpret Article 49 EC.

114. Should the Court not share that view, I will offer it in the alternative an analysis of the present reference for a preliminary ruling from the viewpoint of the freedom to provide services.

2. Freedom to provide services

(a) Applicability of the Community rules on freedom to provide services

115. With regard to the applicability of Article 49 EC in the context of the main proceedings, the Commission considers that the activity of recruitment constitutes a service within the meaning of Article 50 EC and that the situation in question has a cross-border element. It is true that the

service was provided by a company whose registered office is in Germany to a person seeking employment who resided in that Member State. However, the service itself has a cross-border element in that the recruitment to a job located in the Netherlands would not have been possible without the contacts which the service provider had with that Member State.

116. The German Government, for its part, expresses some hesitancy as regards the possibility of detecting a cross-border element in the fact that the employer with which the person seeking employment has been recruited is established in another Member State. In its view, such a cross-border element exists if a person seeking employment uses the services of a private-sector recruitment agency established in another Member State.

117. With regard to these arguments, it should be pointed out first of all that the Court has already held that the activity of recruitment constitutes the provision of services within the meaning of Articles 49 EC and 50 EC. [41]

118. Next, unlike the German Government, I am of the view that the situation at issue in the main proceedings does indeed involve a sufficient cross-border extraneous element.

119. I would point out in that regard that the Court of Justice has held that Article 49 EC applies even where the provider and the recipient of the services are established in the same Member State, on condition that the services are being provided in another Member State. [42]

120. In the case in the main proceedings, the cross-border dimension is made clear by the fact that the job searching, which forms an integral part of the activity of recruitment, was done by the private-sector agency in another Member State. It is, moreover, to be expected that, as part of the performance of a recruitment contract the service provider will have contacts with potential employers based in other Member States, in order to increase the chances of a successful recruitment.

121. Thus, the fact that a recruitment contract was concluded between a persons seeking employment and a private-sector recruitment agency each of which located in the same Member State does not in my view preclude the applicability of Article 49 EC since the job searching, which is the main

41 — Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraph 7.

42 — See, inter alia, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 18.

purpose of the recruitment activity, was undertaken in another Member State. [43]

(b) The existence of a barrier to freedom to provide services

122. According to the referring court, [44] a restriction on freedom to provide services within the meaning of the first paragraph of Article 49 EC seems possible since, if the proper interpretation of Paragraph 421(g) of SGB III is that based on national law alone, agencies established in Germany are indirectly prevented from expanding their recruitment activities into another Member State and foreign agencies are indirectly prevented from placing unemployed Germans in another Member State. That court notes that, due to their proximity to employers established in other Member States, it is foreign agencies which should be in the best position to place unemployed Germans in other Member States. Such agencies would therefore probably be at a greater disadvantage in carrying on their activity if Paragraph 421(g) of SGB III were to be interpreted as meaning that a person seeking employment is not released from his obligation to pay a fee when he is placed in a job located in another Member State.

123. However, for the German Government, the question whether a barrier to freedom for foreign employment agencies to provide services exists is hypothetical having regard to the facts in the main proceedings.

124. That Government considers in any event that the scheme adopted under Paragraph 421(g) of SGB III does not include a restriction on the freedom to provide services. It precludes any direct or indirect discrimination between private employment agencies established in Germany and those established in another Member State. The latter may offer their services in Germany under the same conditions as German agencies. Moreover, in the event of a recruitment abroad, Paragraph 421(g) of SGB III would not put an agency established outside Germany in a less favourable position than an agency established in that Member State. Ultimately, that paragraph merely governs who pays the private-sector agency's fee in the event of a successful recruitment, regardless of where the seat of that agency is located.

125. The German Government also submits that in the present case the service provider is not prevented by the State in which it is

43 — Conversely, the Court has held that 'a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty [now, after amendment, Articles 12 EC and 49 EC] regarding the procurement of nationals of that Member State for posts in undertakings in the same State' (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 40).

44 — Paragraph 3.2.2 of the order for reference.

established from pursuing its activities in another Member State. Access to the recruitment market in another Member State is therefore not hindered by Paragraph 421(g) of SGB III.

126. The Commission, for its part, observes that a person seeking employment, who may be regarded as the recipient of the recruitment service, can seek payment of the private-sector recruitment agency's fee from the Federal Republic of Germany only if an employment relationship is found for him in that Member State. However, if the service involves a cross-border element and the recipient of the service is placed in a job located in another Member State, the costs payable in respect of that placement are not covered by the Federal Republic of Germany. Consequently, the recipient of the service is at a disadvantage in the case of a recruitment abroad, so there is a restriction on freedom to provide services which, as in *Vestergaard*, is based exclusively on the place where the service is performed.

127. I should like to point out, first of all, that the question whether there is an obstacle under German law to the freedom to provide services of private-sector recruitment agencies established outside Germany is, having regard to the facts in the main proceedings and as the Germany Government makes clear, hypothetical. The Court should therefore not in my view interpret Article 49 EC from that point of view.

128. Second, it is appropriate to ask whether a barrier to freedom to provide services exists in the case of a private-sector recruitment agency established in Germany.

129. It is settled in that regard that such an agency is not prevented under German law from pursuing its recruitment activity in another Member State. Might it, however, be deterred from so doing because, if it finds the other party to the contract a job in another Member State, the recruitment fee will have to be paid by the person seeking employment and not by the Bundesagentur?

130. As the German Government has rightly said, Article 421(g) of SGB III essentially governs the question *who* pays the private-sector agency's fee in the case of a successful recruitment. If the recruitment is in a job located in Germany the recruitment voucher allows the private-sector agency to be paid, at least in part, by the Bundesagentur. Conversely, if the recruitment is in a job located in another Member State the person seeking employment remains liable to pay the private-sector recruitment agency's fee in full. In either case, however, that agency is entitled to obtain payment of the fee stipulated in the recruitment contract. The German recruitment voucher scheme does not therefore of itself have the effect of

putting at a financial disadvantage private-sector recruitment agencies established in Germany who provide their services in other Member States. This scheme does not in my view constitute a barrier to the freedom of such agencies to provide services.

131. Third, it is necessary to determine whether an obstacle to freedom to provide services exists from the point of view of the person seeking employment, who is the recipient of the services.

132. I, like the Commission, consider that from this point of view there is indeed an obstacle to freedom to provide services.

133. In so far as the recipient of the service must pay the private-sector recruitment agency's fee himself when the service, that is to say, the recruitment activity, is provided in another Member State, whereas the Bundesagentur would pay all or some of that fee in the case of recruitment in Germany, the German recruitment voucher scheme involves a difference in treatment based on the place where the service is provided. Such difference in treatment is prohibited by Article 49 EC, as the Court held in *Vestergaard*. [45]

(c) Justification for the obstacle to freedom to provide services

134. Since the grounds relied on in the present proceedings to justify the obstacle to freedom to provide services are the same as those which I considered above from the viewpoint of freedom of movement for workers, I refer in that regard to point 79 et seq. of this Opinion.

135. The obstacle to freedom to provide services as I have described it does not therefore appear to me to be properly justified.

136. I infer from this that Article 49 EC must also be interpreted as meaning that it precludes legislation of a Member State such as that at issue in the main proceedings, which provides that payment by a national employment service to a private-sector recruitment agency of the fee payable by a

45 — Paragraph 22. See also, regarding this type of restriction on the freedom to provide services, Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraphs 15 and 16.

person seeking employment in respect of his recruitment is conditional on the job that is found by that private-sector agency being subject to compulsory social security contributions in the territory of that Member State.

B — *Question 2(a) and Question 4(a)*

137. By these questions, which I shall consider together, the court making the reference is essentially asking the Court whether it is possible and necessary to interpret the second sentence of Paragraph 421(g)(1) of SGB III in conformity with Community law.

138. As I mentioned above, the referring court itself considers that it is possible to interpret the national provision at issue in conformity with Community law, in so far as 'employment subject to compulsory social security contributions' within the meaning of that provision may also be considered to cover employment of that type located in another Member State of the Community. Clearly, the general nature of that term is, in my view, such that it means it can be interpreted in conformity with Community law.

139. The principle that national courts are required to interpret their domestic law in such a way as to permit the effective application of Community rules was initially laid down with regard to the application of directives. [46]

140. Since it is a requirement 'inherent in the system of the Treaty', [47] and in so far as it is an expression of the duty of cooperation in good faith provided for in Article 10 EC, this 'duty to interpret national law in conformity with Community rules' is designed to apply to all provisions of Community law and therefore naturally with regard to the provisions of primary law. [48]

141. The court making the reference is therefore required, so far as possible, to interpret the second sentence of Paragraph 421(g)(1) of SGB III in conformity with Community law. [49]

46 — The Court has thus ruled that it is incumbent on national courts to interpret their national laws, so far as possible, 'in the light of the wording and the purpose of the directive' concerned (Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26). See more recently, to that effect, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 108.

47 — *Adeneler and Others*, paragraph 109.

48 — See, by way of illustration, Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11; Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 34; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39.

49 — I would also point out that the Court of Justice has held that where interpretation in conformity with Community rules is not possible 'the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any [national] provision in the measure application of which would, in the circumstances of the case, lead to a result contrary to Community law' (*Engelbrecht*, paragraph 40).

142. In the light of the answer I therefore propose the Court should give to Question 2(a) and Question 4(a), there is no need to consider Question 2(b) or Question 4(b).

V — Conclusion

143. In the light of all these considerations, I propose that the Court should answer the questions referred by the Sozialgericht Berlin as follows:

(1) Article 39 EC should be interpreted as meaning that it precludes legislation of a Member State, such as that at issue in the main proceedings, which provides that payment by a national employment agency to a private-sector recruitment agency of the fee payable by a person seeking employment in respect of a placement is conditional upon the employment that is found by that private-sector agency being subject to compulsory social security contributions in that Member State.

(2) The referring court is required, so far as possible, to interpret the second sentence of Paragraph 421(g)(1) of Book III of the Social Security Code — promotion of Employment (Sozialgesetzbuch — Arbeitsförderung) in conformity with Community law.