# JUDGMENT OF THE COURT (First Chamber)

21 October 2004 *

In Case C-445/03,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 21 October 2003,

**Commission of the European Communities,** represented by M. Patakia, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Grand Duchy of Luxembourg,** represented by S. Schreiner, acting as Agent, assisted by A. Rukavina, lawyer,

defendant,

* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), K. Schiemann, E. Juhász and M. Ilešič, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2004,

gives the following

## Judgment

1 By its application, the Commission of the European Communities is seeking a declaration by the Court that:

— by imposing the requirement of an individual work permit or a collective work permit on a service provider established in another Member State when that provider wishes to deploy its workers who are nationals of non-member

countries and who lawfully reside and work in that other Member State, when the issuance of that individual or collective permit is subject to considerations relating to the employment market and to the existence of a contract of indefinite duration and previous employment with the same service provider for a period of at least six months, and

— by requiring that service provider to provide a minimum bank guarantee of LUF 60 000 (EUR 1 487),

the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC.

## The national legal framework

2 The first and fourth paragraphs of Article 1 of the Grand Ducal Regulation of 12 May 1972, establishing the measures applicable to the employment of foreign workers within the territory of the Grand Duchy of Luxembourg, (*Mémorial* A 1972, p. 945), as amended by the Grand Ducal Regulation of 17 June 1994 (*Mémorial* A 1994, p. 1034) ('the Grand Ducal Regulation of 12 May 1972'), provides:

'Without prejudice to the provisions relating to entry into and residence in the Grand Duchy of Luxembourg, no alien may work in a manual or non-manual capacity in Luxembourg without being authorised to do so pursuant to the present regulation.

...

The provisions of the present regulation shall not apply to workers who are nationals of a Member State of the European Union or of a State party to the Agreement on the European Economic Area.'

3 Pursuant to Article 2 of the Grand Ducal Regulation of 12 May 1972, the authorisation referred to in Article 1 of that regulation is to be established by the issuance to the worker, by the Minister for Labour or by his representative, of a work permit falling within one of the four categories listed in that article.

4 The first, second, fifth and sixth paragraphs of Article 4 of the Grand Ducal Regulation of 12 May 1972 provide:

'No employer may employ a foreign worker who does not hold a valid work permit and who has not made a prior declaration to the National Labour Office concerning the post to be filled.

That declaration, to be completed in duplicate and duly countersigned by the worker, shall constitute an application for obtaining or renewing a work permit, in the case of a worker who does not yet hold a work permit or whose work permit has expired or whose work permit is valid only for a given employer or line of work.

...

A receipt of the declaration submitted pursuant to the second paragraph of the present article shall be issued by the National Labour Office to the worker concerned. That receipt shall constitute a temporary work permit. A copy shall be sent to the employer.

In the event of a work permit being refused, the temporary work permit shall automatically expire.'

5 Article 8 of the Grand Ducal Regulation of 12 May 1972 reads as follows:

'The work permit shall be issued, refused or withdrawn by the Minister for Labour or his representative acting pursuant to the opinion of the [special advisory committee] provided for in Article 7a of the present regulation and the opinion of the labour administration. The two opinions shall take account inter alia of the situation, evolution and organisation of the labour market.'

6 Article 9(1) of the Grand Ducal Regulation of 12 May 1972 provides:

'A collective work permit may be issued in exceptional cases for foreign workers deployed temporarily in the Grand Duchy of Luxembourg on behalf of either a foreign undertaking or a Luxembourg undertaking, at the request of the undertaking under whose authority the workers are employed.

A collective work permit within the meaning of the preceding subparagraph may be issued only for those workers who are in a relationship through a contract of employment of indefinite duration with their undertaking of origin which is effecting the deployment, on condition that that contract began at least six months prior to the employment in the territory of the Grand Duchy of Luxembourg for which the collective work permit is requested.'

7 The first and second paragraphs of Article 9a of that regulation provide:

'Individual work permits and collective work permits shall be issued only once the employer has provided proof of a bank guarantee with a duly accredited financial institution covering possible repatriation costs for the workers for whom a work permit is requested.

The amount of the bank guarantee shall be fixed by the special advisory committee established by Article 7a of the present regulation and may not be lower than LUF 60 000 per worker.'

**Pre-litigation procedure**

8 As it took the view that the requirements of Articles 1, 4, 8, 9 and 9a of the Grand Ducal Regulation of 12 May 1972 are contrary to Article 49 EC, the Commission initiated the procedure in respect of failure to fulfil Treaty obligations.

9 After giving the Grand Duchy of Luxembourg formal notice to submit its observations, the Commission issued a reasoned opinion on 21 March 2002 in which it called on that Member State to adopt the measures necessary to comply with the reasoned opinion within two months from the date of notification. Since the Grand Duchy of Luxembourg did not reply to that opinion, the Commission brought the present action.

## The action

*Arguments of the parties*

10 The Commission maintains, first, that, by subjecting temporary deployment of workers within Luxembourg to the conditions applicable to workers' access to the local labour market, the Grand Ducal Regulation of 12 May 1972 entails discrimination which is prejudicial to undertakings providing services. It adds that in any event that regulation contains restrictions which are contrary to Article 49 EC.

11 Second, regarding the various conditions provided for by the Grand Ducal Regulation of 12 May 1972, the Commission states that the requirement of a prior work permit renders the freedom to provide services illusory and that whether or not such a permit is obtained depends on the discretion of the local administration. It maintains that it is possible to ensure, through less restrictive measures, compliance with Luxembourg social welfare rules in the event of deployment of workers for the purpose of providing services.

12 As regards the requirement of an employment contract of indefinite duration entered into at least six months prior to the deployment, the Commission argues that that requirement is contrary to the principle of proportionality. It maintains

that, once the occupational obligations for hiring a national of a non-member country laid down by the legislation of the Member State where the service provider is established have been fulfilled, that national must be deemed to be holding lawful, regular employment. It adds that the requirement at issue here does not take account of the particularities of certain sectors of activity which frequently use employment contracts of limited duration or of situations in which services are provided on an ad hoc and very short-term basis.

13 Regarding the requirement of a bank guarantee, the Commission maintains that this constitutes an additional economic burden for employers established outside Luxembourg who are already required to pay dues and sometimes supply a bank guarantee in the Member State where they are established in order to obtain work permits there. The Commission adds that other, less restrictive measures would serve to ensure that the worker returns to the Member State where the employer is established once the services have been provided.

14 The Luxembourg Government replies, first, that the Grand Ducal Regulation of 12 May 1972 must be assessed having regard to the national social-welfare legislation, which imposes strict rules concerning minimum wages, safety in the workplace and duration of employment contracts. It submits that the only effective way to ensure compliance with that legislation, with regard also to the situation in which foreign undertakings supply services using workers who are nationals of non-member countries, is through monitoring based on administrative permits. It states that the requirements at issue here, on the one hand, serve an objective of general interest, namely the social-welfare protection of workers, by seeking to eliminate the risk of exploitation of such workers, particularly where they are nationals of non-member countries and, on the other hand, apply without distinction to foreign service providers and undertakings established in Luxembourg in order to avoid reverse discrimination against the latter.

15 Second, it submits that the Commission's complaints about the various requirements imposed by the Grand Ducal Regulation of 12 May 1972 are unfounded.

16 Regarding the requirement of a prior permit, the Luxembourg Government maintains that the references in Articles 8 and 9 of the Grand Ducal Regulation of 12 May 1972 to the labour market situation and exceptional cases respectively are merely specific applications of the principle of priority of employment for Community nationals enshrined in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968 (II), p. 475). It adds that the judicial review of decisions refusing permits precludes any discretionary power on the part of the Luxembourg authorities.

17 The Luxembourg Government also disagrees that the collective permit measure serves to render the provision of services illusory, stating that it is for the provider to lodge its application before the contract is definitively awarded and that that application is dealt with under a simplified procedure.

18 Regarding the requirement of an employment contract of indefinite duration existing for at least six months before the deployment, the Luxembourg Government maintains that that requirement is intended to ensure that the worker has a stable link with the Member State of origin and a close and lawful link to the undertaking deploying him, in order to avoid the risk of abusive exploitation of workers from non-member countries and distortion of competition through social dumping practices. It adds that, if there are no long-term prospects for work with his undertaking of origin, a deployed worker, once in the Luxembourg labour market for a certain time, might be tempted to remain there. It also disagrees that the disputed requirement is disproportionate, stating that, in view of considerable national disparities in this area, protection of employed workers is not necessarily guaranteed in the Member State of origin of the deployed worker.

19 With regard to the bank guarantee requirement, the Luxembourg Government states that this consists of obtaining a letter of guarantee from a banking institution and costs merely EUR 25, approximately for each six-month period.

*Findings of the Court*

20 It is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State, where he lawfully provides similar services (see, inter alia, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16, and the case-law cited).

21 However, where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35, and *Portugaia Construções*, cited above, paragraph 19).

22 It is appropriate to consider the compatibility of the requirements at issue here with Article 49 EC in the light of those principles.

23 It is indisputable that the conditions to be satisfied under the Grand Ducal Regulation of 12 May 1972 by a service-providing undertaking intending to deploy in Luxembourg workers who are nationals of non-member countries are liable, by

reason of the administrative and financial burdens that they represent, to impede the planned deployment and, consequently, the provision of services by that undertaking (see, to that effect, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 30).

24 It has already been held with respect to the deployment of workers who are nationals of non-member countries by a service-providing undertaking established in the Community that national legislation which makes the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative permit constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC (see Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15).

25 The matter of deployment of workers who are nationals of non-member countries in the provision of cross-border services has not been harmonised at Community level, as the Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services (OJ 1999 C 67, p. 12), tabled by the Commission on 12 February 1999, has not yet become law. In addition, the Grand Ducal Regulation of 12 May 1972 applies without distinction to undertakings established outside or within the territory of the Grand Duchy, as evidenced in particular by Article 9(1) thereof.

26 That being so, it is appropriate to consider whether the restrictions on the freedom to provide services arising from the Grand Ducal Regulation of 12 May 1972 appear to be justified by a public-interest objective and, if so, whether they are necessary in order to pursue, effectively and by appropriate means such an objective (see *Finalarte*, cited above, paragraph 37).

27 In the present case, reasons of social welfare, on the one hand, and stability in the labour market, on the other, are relied on in support of the requirements laid down in the Grand Ducal Regulation of 12 May 1972.

28 The Luxembourg Government relies, first, on the need to ensure compliance with the national legislation in the area of, inter alia, minimum wages, safety in the workplace and duration of employment contracts, in order to guarantee the social welfare of workers deployed in its territory as well as equal conditions of competition, from a social standpoint, between undertakings established in Luxembourg and those established outside the country. In particular, the requirement, in the case of an application for a collective work permit, of employment contracts of indefinite duration in force for at least six months between the workers in question and their undertaking of origin, is, in its view, intended to eliminate the risk of abusive exploitation of workers from non-member countries through the use of precarious and poorly-remunerated contracts and the dangers of distortion of competition through social dumping practices.

29 It is true that the overriding reasons relating to the public interest which have already been recognised by the Court include the protection of workers (see, inter alia, *Finalarte*, paragraph 33, and *Portugaia Construções*, paragraph 20). It is also true that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14), when it emerges that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established (Case C-272/94 *Guiot* [1996] ECR I-1905, paragraphs 16 and 17, and *Arblade*, cited above, paragraph 51).

30 However, a work licensing mechanism such as that established by the Grand Ducal Regulation of 12 May 1972 cannot be regarded as constituting an appropriate means. It involves formalities and periods which are liable to discourage the free provision of services through the medium of workers who are nationals of non-member countries.

31 A measure which would be just as effective whilst being less restrictive than the measure at issue here would be an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment. It would enable those authorities to monitor compliance with Luxembourg social welfare legislation during the deployment while at the same time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin.

32 Moreover, making the granting of a collective work permit subject to the requirement that an employment contract of indefinite duration must have been in existence between the workers and their undertaking of origin for at least six months before their deployment to Luxembourg goes beyond what is required for the objective of social welfare protection as a necessary condition for providing services through the deployment of workers who are nationals of non-member countries.

33 As correctly pointed out by the Commission, that requirement is liable to make considerably more complicated the deployment in Luxembourg of workers who are nationals of non-member countries for the purposes of providing services in sectors where, due to the particular features of the activity in question, frequent use is made of short-term and service-specific contracts. It should be borne in mind in this regard that, according to the information provided by the Luxembourg Government, the national legislation governing employment contracts authorises the use of such contracts for the hiring of Community workers for certain types of tasks.

34 As stated by the Advocate General in point 52 of his Opinion, the requirement in issue also affects the situation of newly-created undertakings which wish to provide services in Luxembourg using workers who are nationals of non-member countries.

35 Moreover, it does not take account of the social measures by which the undertaking intending to deploy is bound in the Member State of origin, particularly as regards working conditions and remuneration, under the law of the Member State in question or a possible agreement in place between the European Community and the non-member country concerned, the application of which is likely to eliminate any significant risk of workers being exploited or of competition between undertakings being distorted (see *Vander Elst*, cited above, paragraph 25).

36 It thus follows that the requirements imposed by the Grand Ducal Regulation of 12 May 1972 are not appropriate means for pursuing the objective of worker protection.

37 Second, as expressly stated by the Luxembourg Government with regard to the requirement referred to in paragraphs 32 to 35 of this judgment, the Grand Ducal Regulation of 12 May 1972 is intended to prevent the national labour market from being disrupted by a flood of workers who are nationals of non-member countries.

38 It should in this regard be borne in mind that, although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason of general interest (see, to that effect, Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 13), workers employed by an undertaking established in a Member State and who are deployed to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work (see *Rush Portuguesa*, paragraph 15; *Vander Elst*, paragraph 21; and *Finalarte*, paragraph 22).

39 It has been held, however, that a Member State must be able to check whether an undertaking established in another Member State and which deploys in its territory workers who are nationals of a non-member country is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service in question, for instance, that of bringing his workers for the purpose of placing workers or making them available (see *Rush Portuguesa*, paragraph 17).

40 However, such checks must observe the limits imposed by Community law and in particular those stemming from the freedom to provide services, which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities (see *Rush Portuguesa*, paragraph 17).

41 As stated in paragraph 30 of this judgment, the need to obtain a work permit is, because of the formalities and procedural delays inherent in the process, likely to make it less attractive to engage in the freedom to provide services in Luxembourg using workers who are nationals of a non-member country.

42 In addition, as pointed out by the Commission, by providing that the assessment of individual work permits must be carried out having regard to the labour market situation and that a collective work permit may be issued only in exceptional cases, the Grand Ducal Regulation of 12 May 1972 has the effect of making the prospective deployment in Luxembourg, for the purposes of providing services, of workers who are nationals of a non-member country subject to the discretion of the local administrative authorities.

43 Contrary to the contentions of the Luxembourg Government, considerations relating to priority of employment for Community nationals are irrelevant with regard to workers intended for deployment for the purpose of providing services and who will therefore have no access to the labour market in the host Member State. As

to the Luxembourg Government's statement that the decisions of those administrative authorities may be challenged through judicial review, it supports the finding that having to obtain the required work permit may cause prejudicial delays for the service provider.

44 With regard to the requirement, in the case of an application for a collective work permit, that an employment contract of indefinite duration must have been in force between the relevant workers and their undertaking of origin for at least six months, it has already been stated in paragraphs 33 and 34 of the present judgment that this is likely to make considerably more complicated the provision of services in Luxembourg by undertakings in a sector in which frequent use is made of short-term and service-specific contracts, or by newly-created undertakings using workers who are nationals of non-member countries.

45 That requirement is also disproportionate to the objective of ensuring that workers on detachment return to the Member State of origin once their work has been completed.

46 An obligation imposed on a service-providing undertaking to provide the local authorities with information showing that the situation of the workers concerned is lawful as regards matters such as residence, work permit and social coverage in the Member State in which that undertaking employs them would give those authorities, in a less restrictive but just as effective a manner as the requirements at issue here, a guarantee that the situation of those workers is lawful and that they are carrying on their main activity in the Member State in which the service-providing undertaking is established. Combined with the information provided by that undertaking concerning the anticipated period of deployment (see paragraph 31 of this judgment), that information would enable the Luxembourg authorities to take, as appropriate, the measures necessary at the end of that period.

47 The obligation to provide, for the purposes of obtaining a work permit, a bank guarantee to cover costs in the event of repatriation of the worker at the end of his deployment is an excessive burden for service-providing undertakings, having regard to the objective pursued. As stated by the Advocate General at point 56 of his Opinion, it is perfectly possible to envisage measures more in keeping with the freedom to provide services than the general obligation to provide a prior guarantee, such as an order to pay costs actually incurred due to repatriation.

48 Accordingly, the Court finds that the requirements imposed by the Grand Ducal Regulation of 12 May 1972 are inappropriate for pursuing the objective of preventing disturbance in the local employment market.

49 In the light of the foregoing, the Court finds that the Commission's complaints in regard to the Grand Ducal Regulation of 12 May 1972 are well founded.

50 Accordingly, the Court finds that, by imposing on service providers established in another Member State who wish to deploy in its territory workers who are nationals of non-member countries a requirement of individual work permits, the issuance of which is subject to considerations relating to the employment market, or a requirement of a collective work permit, which is granted only in exceptional cases and only when the workers concerned have, for at least six months prior to the deployment, been in a relationship with their undertaking of origin through a contract of employment of indefinite duration, and by requiring those service providers to provide a bank guarantee, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC.

## Costs

51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by imposing on service providers established in another Member State who wish to deploy in its territory workers who are nationals of non-member countries a requirement of individual work permits, the issuance of which is subject to considerations relating to the employment market, or a requirement of a collective work permit, which is granted only in exceptional cases and only when the workers concerned have, for at least six months prior to the deployment, been in a relationship with their undertaking of origin through a contract of employment of indefinite duration, and by requiring those service providers to provide a bank guarantee, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC;**

2. **Orders the Grand Duchy of Luxembourg to pay the costs.**

Signatures.