JUDGMENT OF THE COURT (First Chamber)

21 September 2006 *

In Case C-168/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 April 2004,

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

applicant,

v

Republic of Austria, represented by E. Riedl, G. Hesse and C. Pesendorfer, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, K. Lenaerts, M. Ilešič and E. Levits (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by disproportionately restricting the posting of employees who are nationals of a non-Member State in the framework of a provision of services by means of Paragraph 18 of the Austrian Law on the employment of foreign workers (Ausländerbeschäftigungsgesetz) of 20 March 1975 (BGBl. I, 218/1975) as amended in the version published in BGBl. I, 120/1999 ('AuslBG') and

by Paragraph 10(1)(3) of the Law on aliens (Fremdengesetz) of 14 July 1997 (BGBl. I, 75/1997) as amended in the version published in BGBl. I, 34/2000 ('FrG'), the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

Legal context

2 The AuslBG establishes in Paragraph 18(1) the obligation to obtain an authorisation before nationals of a non-Member State can be employed in Austria by an employer which does not have its registered office within that Member State. Paragraph 18(12) to (16) of the AuslBG provides for a special procedure as regards the posting by an undertaking with its registered office in a Member State of nationals of a non-Member State for the purpose of providing services in Austria. The authorisation is replaced by an EU Posting Confirmation, granted subject to the fulfilment of certain conditions.

3 Paragraph 18(12) of the AuslBG provides:

'The employment of alien nationals who are not covered by Paragraph 1(2)(m) and who are posted on federal territory by an alien employer with its registered office in another Member State of the European Union for the purpose of providing services on a temporary basis must be declared to the regional office of the Employment Service before that provision commences. The competent regional office of the Employment Service must issue an acknowledgment of that declaration ('EU Posting Confirmation') within six weeks. ...'

4 The conditions for the issue of the EU Posting Confirmation are set by Paragraph 18(13). The confirmation will be issued:

— if the worker posted, a national of a non-Member State, has been lawfully and habitually employed for at least one year, or has concluded a contract of indefinite duration, with the undertaking employing him in the Member State of origin, and

— if the wage and employment conditions and social security provisions applicable under Austrian law are met for the duration of the posting.

5 As provided for in the FrG, nationals of a non-Member State who are posted in Austria for the purpose of providing a service there by an undertaking with its registered office in another Member State of the Union must hold a visa and residence permit in order to enter and reside in Austria.

6 In accordance with Paragraph 8(1) of the FrG:

'Entry and residence permits can be granted to alien nationals at their request if they hold a valid travel document and no ground for refusal applies (Paragraphs 10 to 12). Visas can be granted for a limited duration only, residence permits can be granted for an indefinite or a limited duration. The duration of the validity of visas and residence permits for a limited duration shall not exceed that of the travel document. ...'

7 Paragraph 10(1)(3) of the FrG provides that the grant of an entry or residence permit must be refused where that permit is to be granted following entry to Austria without a visa. It follows from that provision that, where a national of a non-Member State has entered Austria illegally, his position may not be regularised in situ by the issue of an entry or residence permit.

8 Lastly, the Law on employment contracts (Arbeitsvertragsrechts-Anpassungsgesetz) of 1993 (BGBl. 459/1993, 'AVRAG'), which transposes into Austrian law Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), imposes a general obligation to declare on employers with registered offices in a Member State of the Union. Thus, under Paragraph 7b(3) of the AVRAG, employers must declare workers posted in Austria in order to carry out there work of a specified duration to the central coordinating office for the control of illegal employment at least one week before that work is due to commence.

9 In this connection, the employer must provide certain information about itself and about the national client, the workers posted, the activity in question and the remuneration. Paragraph 7b(9) provides for fines in the event of a breach of that obligation to declare.

Pre-litigation procedure

10 After having received a complaint concerning the incompatibility of the Austrian rules on the posting of nationals of non-Member States with the freedom to provide services guaranteed by Article 49 EC, the Commission sent the Republic of Austria a letter of formal notice on 14 July 1997. It argued in that letter that the posting authorisation and residence permit required at that time by the Austrian legislation

constituted an obstacle to intra-Community trade. The Commission's complaints concerned in particular the substantive conditions for the posting authorisation and the automatic nature of the refusal to grant a residence permit where a foreign worker had entered Austria without a visa.

11 In response, the Austrian Government stated, by a letter of 12 December 1997, that the provisions of national law on the posting of foreign workers had been amended with effect from 1 January 1998. A new procedure to declare the posting, know as the 'EU Posting Confirmation', had been introduced in the authorisation procedure's stead in order to establish whether certain prior conditions for the posting had been met.

12 On 2 July 1998, the Commission sent the Republic of Austria a further letter of formal notice stating that it considered the new procedure to be a complex authorisation procedure, similar to those defined as restrictions of Article 49 EC by the Court's case-law, rather than a mere declaration.

13 By a letter dated 2 September 1998, the Austrian Government stated that the EU Posting Confirmation procedure was simply a declaratory procedure and that it met the relevant requirements laid down by the Court's case-law. In addition, as regards the provision on the automatic refusal to grant a residence permit, it stated that the freedom to provide services did not affect the faculty of Member States to decide upon the entry to their territory and residence there of nationals of non-Member States.

14 Since it was unconvinced by those explanations, the Commission sent a reasoned opinion to the Republic of Austria on 5 April 2002 calling on that Member State to take the measures necessary to comply with that opinion within two months of

receiving notification of it. It submitted that the administrative burden involved in the posting procedure under Austrian legislation and the impossibility of regularising the position of a posted worker who had entered Austrian territory without an entry or residence permit were dissuasive for undertakings established in another Member State, so that those provisions were an obstacle to the freedom to provide services.

15 In its reply of 7 June 2002, the Austrian Government stated that the provisions relating to the EU Posting Confirmation were justified by the need to protect the workers posted against unlawful treatment, while the clause on automatic refusal was based on prerogatives granted to the Member States under the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed on 19 June 1990 at Schengen (Luxembourg).

16 Taking the view that the Republic of Austria had not complied with the reasoned opinion, the Commission brought the present action.

The action

Arguments of the parties

17 The Commission submits that the procedure for the issue of the EU Posting Confirmation and the possibility of a posted worker who enters Austria without an entry or residence permit being refused a residence permit constitute obstacles to the freedom to provide services prohibited under Article 49 EC which cannot be justified by the objectives relied upon by the Republic of Austria.

18 The Austrian Government does not deny that the provisions of Paragraph 18 of the AuslBG and Paragraph 10 of the FrG are restrictions on the freedom to provide services. Referring to the Court's case-law, inter alia 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 and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, it submits that the restrictions at issue are none the less justified by overriding requirements relating to the general interest, namely, as regards the provisions of Paragraph 18 of the AuslBG, the protection of workers and, as regards Paragraph 10 of the FrG, the safeguarding of public policy and public security. In that respect, it submits, the provisions are proportionate to the objectives pursued.

The procedure for the issue of the EU Posting Confirmation

19 In the first place, the Commission claims that the EU Posting Confirmation constitutes a genuine administrative authorisation rather than being the end product of a purely declaratory procedure. It is not issued until the competent national authorities have verified the conditions laid down in Paragraph 18(13) of the AuslBG, but is a prerequisite to providing any service in Austria inasmuch as it is required in order to obtain the posted workers' residence permits, and starting to provide the service before that confirmation is obtained will result in those residence permits being refused automatically.

20 The Commission submits in addition that even if the EU Posting Confirmation is found to be merely declaratory, the existence of a dual procedure, namely that for the visa and that for the posting confirmation, itself constitutes a disproportionate restriction of the freedom to provide services, as is apparent from Case C-43/93 *Vander Elst* [1994] ECR I-3803.

21 The obligation on all service providers established in another Member State who wish to post workers who are nationals of a non-Member State to Austria to obtain an EU Posting Confirmation, in addition to the visa procedure provided for by the FrG and the AVRAG declaration procedure, is incompatible with the principle of proportionality. In that regard, the objectives relied on by the Austrian Government could be achieved by less restrictive measures.

22 The Austrian Government contends, for its part, that the procedure for the grant of the EU Posting Confirmation is not as burdensome as the Commission describes it to be.

23 On the one hand, the EU Posting Confirmation is a declaratory procedure. That contention is supported by the small size of the fine in the event of a failure to comply with that formality. The procedure is also flexible, Paragraph 18(16) of the AuslBG allowing any of the persons concerned by the posting to initiate it.

24 On the other hand, calling it a dual procedure is inaccurate inasmuch as the procedure relating to the EU Posting Confirmation has a separate objective from that relating to the residence permit, different checks being carried out by the competent authorities in each case.

25 In the second place, the Commission challenges the substantive conditions required for the grant of the EU Posting Confirmation.

26 The requirement to ensure that the national wage and employment conditions are observed in the context of a cross-border provision of services, set out in Paragraph 18(13)(2) of the AuslBG, is already provided for by Directive 96/71, transposed into

Austrian law by the AVRAG. Since the provisions of the directive allow for the possibility of carrying out subsequent checks of compliance with those conditions, the Austrian authorities have a less restrictive means of ensuring that those conditions are observed.

27 As regards the requirement of at least one year's prior employment or a contract of an indefinite duration set out in Paragraph 18(13)(1) of the AuslBG, the Commission submits that the expression 'lawfully and habitually', used in the *Vander Elst* judgment, cannot justify a temporal or legal restriction such as that at issue. That expression is closely linked to the context of the question for a preliminary ruling referred to the Court in that case.

28 The economic grounds relied on by the Austrian Government cannot justify such a restriction on the freedom to provide services, since the Court in its judgments in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417 and in *Finalarte* expressly excluded considerations linked to the employment market from those which a Member State could rely on. As regards the ground linked to the protection of the workers, the condition of the duration of prior employment has a negative impact on workers who are nationals of non-Member States inasmuch as such a provision is likely to hinder their recruitment. Furthermore, that condition is wholly disproportionate where the provision of services is sporadic.

29 The Austrian Government submits that the AVRAG provisions are not by themselves sufficient in order to allow the posting of workers who are nationals of non-Member States, which justifies the application of the further requirements laid down in the EU Posting Confirmation procedure.

30 Moreover, the legislation at issue merely implements the Court's case-law in *Vander Elst*, which states that a posted worker who is a national of a non-Member State must be 'lawfully and habitually' employed in the Member State of origin in order

for authorisation for the posting to be granted. In that context, he must prove a specific connection to his employer through an employment relationship of at least one year or a contract for an indefinite duration. That requirement enables the posted worker to be protected from any unlawful treatment.

The automatic refusal of entry and residence permits

31 The Commission submits that, within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision. In so far as the posted workers do not in any way seek to access the labour market of the State in which they are posted, the ground for automatic refusal laid down in Paragraph 10(1)(3) of the FrG is disproportionate in relation to the objective of safeguarding public policy and public security.

32 In fact, the visa granted to nationals of non-Member States whose right of residence stems from Community law is purely formal in character and should be recognised automatically. Thus, its automatic refusal in the event of a 'technically illegal' entry into the country considerably restricts the freedom to provide services and renders it illusory in respect of some sectors. The Austrian authorities have less restrictive yet equally effective means available to them in this respect for ascertaining whether a national of a non-Member State poses a threat to public policy or public security.

33 The Austrian Government points out that workers in possession of a residence permit issued by a State party to the Schengen Agreement and who are posted in Austria for a period of less than three months are thus not affected by the ground for automatic refusal of an entry and residence permit.

34 That Government points out that the European Posting Confirmation procedure must be distinguished from that concerning the entry and residence permit: the latter does not concern the freedom to provide services but the law on aliens. In those circumstances, the legality of the entry into the country does not depend exclusively on the legality of the posting, but also on other factors linked to the control of aliens.

35 In addition, it is of the view that the State from which the posting is made should be in a position to be able to ascertain whether someone poses a threat to public policy or public security or whether he is prohibited from residing in Austria. It maintains that it is not expedient to enact a measure prohibiting residence in respect of a person requesting a residence permit where that person is already in Austrian territory.

Findings of the Court

36 At the outset, it must be recalled that it is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers 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 service provider established in another Member State, where he lawfully provides similar services (see, in particular, *Portugaia Construções*, paragraph 16 and the case-law cited).

37 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 concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider 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*, paragraph 19).

38 Since the posting of workers who are nationals of non-Member States for the purposes of providing cross-border services has not, hitherto, been harmonised at Community level, it is in the light of the principles recalled in the two preceding paragraphs of this judgment that it is necessary to examine the compatibility with Article 49 EC of the Austrian legislation on the posting of workers.

The first complaint: the requirement to obtain the EU Posting Confirmation as laid down in Paragraph 18(12) to (16) of the AuslBG

39 It is indisputable that the conditions to be satisfied under Paragraph 18(12) to (16) of the AuslBG by a service provider intending to post in Austria workers who are nationals of non-Member States, by reason of the administrative burdens that they represent, and in particular the six-week period required in order for the EU Posting Confirmation to be issued, impede the planned posting and, consequently, the provision of services by that undertaking (see, to that effect, Case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, paragraph 23 and the case-law cited).

40 It has already been held, with respect to the posting of workers who are nationals of non-Member States by a service provider established in the Community, that national provisions which make the provision of services within national territory by an undertaking established in another Member State subject to the issue of an

administrative authorisation constitute a restriction on the freedom to provide services within the meaning of Article 49 EC (see *Vander Elst*, paragraph 15, and *Commission* v *Luxembourg*, paragraph 24).

41 In that regard, and contrary to what the Austrian Government maintains, the EU Posting Confirmation procedure is an authorisation procedure. Since that confirmation must be issued before the posting can be carried out and is made only after verification by the competent national authorities of compliance with the requirements laid down in Paragraph 18(13) of the AuslBG, it cannot be maintained that it is merely a declaratory procedure.

42 Such a procedure is, in addition, all the more likely to render difficult, if not impossible, the provision of services using posted workers from a non-Member State in that it entails a period of up to six weeks to process the application for that confirmation.

43 The Court has recognised that the Member States have the power to verify compliance with the national and Community provisions in respect of the provision of services. Likewise, it has accepted the justification for the measures necessary to verify compliance with requirements which are themselves justified by grounds of public interest (see *Arblade and Others*, paragraph 38). However, the Court has also held that those measures must comply with the limits imposed by Community law and must not render the freedom to provide services illusory (see *Rush Portuguesa*, paragraph 17).

44 That being so, it is appropriate to consider whether the restrictions on the freedom to provide services arising from Paragraph 18(12) to (16) of the AuslBG 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 (*Commission* v *Luxembourg*, paragraph 26, and Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 37).

45 In the present case, reasons pertaining to workers' protection, on the one hand, and stability in the labour market, on the other, are relied on in support of the requirements laid down in Paragraph 18(12) to (16) of the AuslBG.

46 In the first place, the Austrian Government argues that it is necessary to ensure that the conditions for a posting under the freedom to provide services are met. In this respect, it must ensure that the undertaking carrying out the posting does not make unlawful use of the right granted to it by the EC Treaty to the detriment of the posted workers. In particular, the conditions of issue laid down in Paragraph 18(13) of the AuslBG seek, according to that Government, to reduce the risk of workforces from a non-Member State being exploited and, specifically, of the latter being employed for the sole purpose of the posting.

47 The overriding requirements 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). In addition, 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, and it also does not prohibit Member States from enforcing those rules by appropriate means (see Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14) when it is found 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 (see *Commission* v *Luxembourg*, paragraph 29 and the case-law cited).

48 However, the EU Posting Confirmation as provided for in Paragraph 18(12) to (16) of the AuslBG cannot be considered to be an appropriate means of attaining the alleged objective.

49 Firstly, by requiring that Austrian wage and employment conditions be routinely observed, such a procedure does not take account of the measures for the protection of workers by which the undertaking intending to carry out the posting 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 any agreement between the European Community and the non-Member State concerned, the application of which is likely to eliminate any significant risk of workers being exploited or of competition between undertakings being distorted (see, to that effect, *Vander Elst*, paragraph 25, and *Commission* v *Luxembourg*, paragraph 35).

50 Secondly, as regards making the issue of the EU Posting Confirmation subject to the requirement that there must be an employment contract of at least one year or of indefinite duration, such a measure goes beyond what is required for the objective of social protection as a necessary condition for providing services through the posting of workers who are nationals of non-Member States (*Commission* v *Luxembourg*, paragraphs 32 and 33, and *Commission* v *Germany*, paragraph 58).

51 In addition, the Austrian Government cannot rely on the formula used by the Court in paragraph 26 of the judgment in *Vander Elst* to argue that such a requirement enables verification to be made that a posted worker who is a national of a non-Member State has lawful and habitual employment in his employer's Member State of establishment. It must be observed that the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider (*Commission* v *Germany*, paragraph 55).

52 A measure which would be just as effective whilst being less restrictive than the measure at issue is the obligation imposed, under the AVRAG, on a service provider to report, before the posting, to the local authorities the presence of one or more workers to be posted, the anticipated duration of their presence and the provision or provisions of services justifying the posting. It enables those authorities to monitor compliance with Austrian social welfare and wages legislation during the posting

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.

53 It must therefore be held that the EU Posting Confirmation procedure exceeds what is necessary to pursue the objective of the protection of workers.

54 In the second place, the Austrian Government states that the EU Confirmation Procedure is intended to prevent the national labour market from being disrupted by a flood of workers who are nationals of non-Member States.

55 It should be borne in mind in this regard that workers employed by an undertaking established in a Member State and who are posted to another Member State for the purpose 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 *Commission* v *Luxembourg*, paragraph 38).

56 It is true that a Member State may check whether an undertaking established in another Member State and which posts in its territory workers who are nationals of a non-Member State 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 them or making them available to others (see *Rush Portuguesa*, paragraph 17, and *Commission* v *Luxembourg*, paragraph 39). However, the EU Posting Confirmation procedure cannot be regarded as an appropriate means to attain the objective relied on by the Austrian Government.

57 The information provided in accordance with the procedure for prior declaration laid down in the AVRAG and referred to at paragraph 52 of this judgment and the information submitted under the procedure for the grant of the residence permit allow the Austrian authorities to ensure 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 and give those authorities, in a manner less restrictive than, but just as effective as, the requirements at issue, 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 provider is established.

58 It follows from this that the EU Posting Confirmation procedure cannot be justified by the objective of preventing disruption of the national labour market and, consequently, must be considered to be disproportionate for the purpose of attaining the objectives pursued by the Republic of Austria.

The second complaint: the automatic nature of the refusal of the entry and residence permit as provided for in Paragraph 10(1)(3) of the FrG

59 As a preliminary point, it is important to note that the area of entry into a Member State and residence there of nationals of non-Member States in connection with a posting by a service provider established in another Member State is not harmonised at Community level.

60 However, the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals (*Seco and Desquenne & Giral*, paragraph 12).

61 In the present case, by making it impossible to regularise the situation of a worker from a non-Member State, lawfully posted by an undertaking established in another

Member State and who has entered Austria without a visa where such a requirement exists under Austrian legislation, Paragraph 10(1)(3) of the FrG imposes a restriction on that undertaking's freedom to provide services. That provision exposes the worker in question to the risk of being excluded from the national territory, which is liable to jeopardise the planned posting.

62 As the Advocate General observed in point 105 of his Opinion, a service provider wishing to avoid the problems linked to the impossibility of making such a situation lawful must therefore ensure, before it even begins the posting, that each worker concerned by that posting is in possession of a permit to enter Austria, which is likely to dissuade an undertaking established in another Member State from providing a service in Austria using workers posted from a non-Member State.

63 The Austrian Government, however, justifies such a restriction on grounds linked to the protection of public policy and public security.

64 In this respect, it is settled case-law that such a justification may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 46, and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 30).

65 Admittedly, there is no doubt that it is an offence for a national of a non-Member State, to whom visa requirements apply, to enter a Member State without a visa. However, as the Advocate General noted in point 110 of his Opinion, the automatic prohibition on granting an entry or residence permit to a worker on a posting from a non-Member State who has entered national territory without the required visa constitutes a sanction which is all the more disproportionate to the gravity of the

offence inasmuch as it disregards the fact that the posted worker, who does not possess a visa, is in a lawful position in the Member State from which he has been posted as well as under the Austrian rules on postings and therefore does not pose a threat to public policy or public security per se.

66 Furthermore, the Austrian Government's arguments based on the limited number of nationals of non-Member States to which the requirement of automatic refusal is likely to apply and the fact that it is impractical to enact a prohibition on the residence of a national of a non-Member State present in Austria, are not well founded. From the information provided in the declaration prior to the posting, referred to in paragraphs 52 and 57 of this judgment, it is fully possible for the competent national authorities to take, in each case, the necessary measures should it become apparent that the worker to be posted poses a threat to public policy or public security before that worker arrives in Austria.

67 Consequently, the automatic nature of the refusal to issue an entry and residence permit in the event of the entry without a visa of a lawfully posted worker from a non-Member State to Austria must be considered to be disproportionate in relation to the objective which it is intended to attain.

68 It follows from those considerations that, on the one hand, by making the posting of workers who are nationals of non-Member States by an undertaking established in another Member State subject to obtaining the 'EU Posting Confirmation' provided for in Paragraph 18(12) to (16) of the AuslBG, the issue of which requires, first, that the workers concerned must have been employed for at least one year by that undertaking or must have concluded an employment contract of indefinite duration with it and, secondly, evidence that the Austrian employment and wage conditions are complied with, and, on the other hand, by laying down in Paragraph 10(1)(3) of the FrG a ground for the automatic refusal of an entry and residence permit, without exception, which does not allow the situation of workers from a non-Member State, lawfully posted by an undertaking established in another Member State, to be regularised when those workers have entered the national territory without a visa, the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

Costs

69 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 Austrian Republic has been unsuccessful, the Austrian Republic must be ordered to pay the costs.

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

1. **Declares that, by making the posting of workers who are nationals of non-Member States by an undertaking established in another Member State subject to obtaining the 'EU Posting Confirmation' provided for in Paragraph 18(12) to (16) of the Austrian Law on the employment of foreign workers (Ausländerbeschäftigungsgesetz), the issue of which requires, first, that the workers concerned must have been employed for at least one year by that undertaking or must have concluded an employment contract of indefinite duration with it and, secondly, evidence that the Austrian employment and wage conditions are complied with, and by laying down in Paragraph 10(1)(3) of the Law on aliens (Fremdengesetz) a ground for the automatic refusal of an entry and residence permit, without exception, which does not allow the situation of workers from a non-Member State, lawfully posted by an undertaking established in another Member State, to be regularised when those workers have entered the national territory without a visa, the Republic of Austria has failed to fulfil its obligations under Article 49 EC;**

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

[Signatures]