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Judgment of the Court of Justice in Case C-244/04

Commission of the European Communities v Germany

THE WORK VISA REGIME APPLIED BY GERMANY TO NATIONALS OF NON-MEMBER STATES POSTED BY SERVICE PROVIDERS ESTABLISHED IN OTHER MEMBER STATES IS CONTRARY TO THE FREEDOM TO PROVIDE SERVICES

A simple prior declaration by the undertaking intending to post workers who are nationals of non-member States would be a less restrictive measure than the requirement of at least a year's prior employment by that undertaking. It would enable abuse and circumvention of the freedom to provide services to be prevented.

The posting of employed persons who are nationals of a non-member State is governed in Germany by the Law on Aliens¹. That law provides that foreigners intending to reside for more than three months on German territory and to pursue paid employment there must be in possession of a specific residence visa. Thus, undertakings wishing to provide services in Germany must ensure that their workers from non-member States obtain a visa from the German diplomatic representation in the Member State where the undertaking is established. As regards the detailed rules for the issue of that visa, a circular lays down that the German diplomatic representation is to satisfy itself, in advance, that, among other criteria, the worker has been employed for at least a year by the undertaking which intends to effect the posting.

Since it considered that the practice based on the checking of certain criteria, in advance of the posting, and restriction of posting to workers employed for at least a year by the provider, established in another Member State, amount to obstacles to the freedom to provide services, the Commission brought this action for failure to fulfil obligations against Germany before the Court of Justice of the European Communities.

¹ BGBl. 2002, p. 361.

The prior nature of the check

The Court of Justice finds, first of all, that such a prior check may make it more difficult, or even impossible, to exercise the freedom to provide services through posted workers who are nationals of non-member States.

It considers next whether such a prior check can be justified by a public interest objective and whether that check is necessary to pursue, effectively and by appropriate means, that objective. Germany relied on grounds relating to the prevention of abuse of the freedom to provide services, the protection of workers and legal certainty to justify the practice of a prior check.

The Court holds that the German authorities' practice **exceeds what is necessary** to prevent abuse and circumvention of the freedom to provide services. A requirement that the service provider furnish a **simple prior declaration** certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, would give the national authorities a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established.

As regards **the protection of workers**, the Court points out that a prior declaration would enable the authorities to monitor compliance with German social welfare legislation during the deployment while taking account of the obligations by which that undertaking is already bound under the social welfare legislation applicable in the Member State of origin. It would be a more proportionate means because it is less restrictive than the requirement in question.

Finally, the check in advance cannot be justified by the necessity of ensuring that such **posting is effected lawfully**. It is for undertakings which do not comply with that legislation to bear the responsibility for a posting effected unlawfully.

The requirement of at least a year's prior employment by the undertaking effecting the posting

The Court finds that such a requirement, which is a restriction on the freedom to provide services, is **disproportionate** in the light of the objective of the social welfare protection of workers who are nationals of non-member States and of the objective of seeking to ensure that the workers return to the Member State of origin at the ending of the posting.

As regards the defence based on the **prevention of social dumping**, the Court notes that the Member States may extend their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory. In that regard, a prior declaration supplemented by the relevant information in respect of wages and employment conditions would constitute a measure less restrictive of the freedom to provide services.

Consequently, the Court concludes that Germany has infringed the provisions on the freedom to provide services.

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Languages available: CS, DE, EN, ES, FR, HU, IT, NL, PL, SK

*The full text of the judgment may be found on the Court's internet site
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-244/04>
It can usually be consulted after midday (CET) on the day judgment is delivered.*

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