



Press and Information

Court of Justice of the European Union

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Luxembourg, 21 January 2010

Judgment in Case C-546/07  
Commission v Germany

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**Germany has infringed Community law by restricting to its own undertakings alone the possibility of entering into contracts with Polish undertakings in respect of work to be carried out within its territory**

*Such a restriction is discriminatory and cannot be justified*

In order to address serious disturbances on its labour market, Germany may, in accordance with the 2003 Act of Accession<sup>1</sup>, after notifying the Commission, limit, in the context of the provision of services, the movement of workers posted by companies established in Poland. This restriction may be maintained so long as Germany applies national measures or measures resulting from bilateral agreements to the free movement of Polish workers. However, the application of such a restriction may not result in conditions for the temporary movement of workers, in the context of the transnational provision of services between Germany and Poland, which are more restrictive than those in force on the date on which the Treaty of Accession was signed ('standstill' clause).

Under the 1990 German-Polish Agreement<sup>2</sup>, work permits are, in principle, to be issued to Polish workers who are detached for temporary employment on a works contract between a Polish employer and an undertaking 'from the other side' (contractual workers) regardless of the situation and trends of the labour market.

Pursuant to instructions adopted by the German Federal Employment Agency concerning employment of foreign workers from the new Member States of the European Union, works contracts authorising the recruitment of foreign workers may not be entered into where the work is to be carried out in districts in which the average unemployment rate for the previous six months has been at least 30% higher than the unemployment rate for Germany as a whole. The list of the districts to which that prohibition applies is updated every quarter.

The Commission takes the view that, by preventing undertakings from Member States other than Germany which wish to carry out work in Germany from concluding contracts with a Polish contractor, unless the undertakings from those other Member States establish a subsidiary in Germany, the latter Member State has failed to fulfil its obligations in respect of the freedom to provide services. In its action for failure to fulfil obligations, the Commission, supported by Poland, also alleges that Germany has infringed the 'standstill' clause laid down in the 2003 Treaty of Accession by extending the regional restrictions on access to the labour market.

*The restriction on the conclusion of works contracts*

The Court first points out that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider by reason of its nationality or the fact that it is established in a Member State other than that in which the service is to be provided.

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<sup>1</sup> Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

<sup>2</sup> Agreement of 31 January 1990 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the posting of workers from Polish undertakings to carry out works contracts, as amended on 1 March and 30 April 1993 (BGBl. 1993 II, p. 1125).

Consequently, the requirement that an undertaking must set up a permanent establishment or branch in the Member State in which the service is provided runs directly counter to the freedom to provide services as it renders impossible the provision of services, in that Member State, by undertakings established in other Member States.

Next, the Court finds that, by interpreting the term 'undertaking from the other side' in the German-Polish Agreement as referring only to German undertakings, Germany creates direct discrimination, contrary to the EC Treaty, against service providers established in Member States other than Germany which wish to enter into a works contract with a Polish undertaking and thereby benefit, through providing services in Germany, from the quota for Polish workers guaranteed under that agreement.

The Court notes that, since the accession of Poland to the Union, the German-Polish Agreement concerns two Member States, with the result that the provisions of that agreement can apply to relations between those Member States only in compliance with Community law, in particular with the Treaty rules on the free provision of services.

The Court points out that discriminatory rules may be justified on grounds of public policy, public security or public health. Recourse to such justification, however, presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

By arguing in particular that it is necessary to ensure efficient monitoring of the proper application of the German-Polish Agreement, **Germany has failed to adduce any convincing argument capable of justifying restrictions on a fundamental freedom.**

#### *The 'standstill' clause*

The Court finds that **the fact that, after the date of signature of the Treaty of Accession, new districts<sup>3</sup> were added** to the list of those in which works contracts under the German-Polish Agreement are not authorised **does not amount to contravention of the 'standstill' clause.**

More restrictive conditions are not created in the case where the reduction in the number of Polish workers liable to be posted in the context of the provision of services in Germany is simply the consequence of the application, after that date, of a clause, the terms of which have remained identical, to a factual situation which has developed within the labour market. Consequently, the list – updated every quarter – of districts which are subject to the prohibition is, in that context, purely declaratory, since there has not been any deterioration in the legal situation or any unfavourable change in German administrative practice.

The Court observes that this interpretation is confirmed by the purpose of such 'standstill' clauses, which is generally to prohibit the introduction of any new measure by a Member State having the purpose or effect of creating more restrictive conditions than those which applied before the date from which those clauses take effect.

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**NOTE:** An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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<sup>3</sup> These are, inter alia, Bremerhaven, Bochum, Dortmund, Duisburg, Essen, Wuppertal, Dresden, Cologne, Oberhausen and Recklinghausen.

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*The [full text](#) of the judgment is published on the CURIA website on the day of delivery.*

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*Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106*