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Judgment of the Court of Justice in Case C-341/02

Commission of the European Communities v. Federal Republic of Germany

**A MEMBER STATE IS NOT OBLIGED, WHEN CHECKING TO ENSURE THAT
THE MINIMUM WAGE IS BEING PAID TO WORKERS POSTED FROM
ANOTHER MEMBER STATE, TO TAKE ALL ALLOWANCES AND
SUPPLEMENTS INTO ACCOUNT**

Quality bonuses and bonuses for dirty, heavy or dangerous work are not elements which must mandatorily be taken into account for purposes of calculating the minimum wage

The realisation of the internal market offers a dynamic framework for the transnational supply of services. An increasing number of companies post workers to carry out work, on a temporary basis, within the territory of a Member State other than that in which they are normally engaged. The process whereby employment relationships may become transnational in nature does, however, raise certain problems as to the law applicable to such relationships.

The posting of workers in the framework of the provision of services is governed by Directive 96/71.¹ This directive seeks to ensure fair competition and to guarantee respect for workers' rights. Member States' legislation must be coordinated in such a way as to provide a core of mandatory rules on minimum protection with which employers who post workers to the Member State in which the service is to be provided must comply in the host country. This core covers, inter alia, the provisions relating to the minimum wage. Thus, if a Member State provides for such a wage, this will also apply to posted workers. The concept of a minimum wage is defined by the national legislation and practices of the Member State to the territory of which the worker is posted.

The Commission brought an action against Germany in 2002 for failure to fulfil obligations in respect of certain features of the German rules governing the posting of workers. More specifically, that action concerns the compatibility, with Directive 96/71, of the method applied by that Member State for the purpose of comparing the minimum wage fixed by

¹ 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).

national German provisions with the remuneration actually paid by an employer established in another Member State.

The Commission criticises Germany for not recognising, as constituent elements of the minimum wage, all of the allowances and supplements paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the bonus granted to workers in that industry. According to the Commission, the failure to take these into account results – by reason of the different methods whereby remuneration is calculated in other Member States – in higher wage costs for employers established in other Member States, who are thus precluded from offering their services in Germany.

Germany rejects that criticism and argues that hours worked outside normal working hours and involving requirements of a particularly high standard in terms of quality of results or which involve particular constraints and dangers have a greater economic value than normal working hours and that bonuses relating thereto must not be taken into account for the purpose of calculating the minimum wage. If those amounts were taken into account for that calculation, the worker would be deprived of the economic countervalue corresponding to those hours of work and the relationship between the remuneration payable by the employer and the service which the worker must provide in return would thus be altered to the detriment of the latter. Germany relies on Directive 96/71, which provides that it is for the Member States to define the minimum rate of pay.

The Court of Justice of the European Communities first of all notes that the parties are in agreement on the fact that, in accordance with the directive, account need not be taken, as component elements of the minimum wage, of payment for overtime, contributions to supplementary occupational retirement schemes, amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting, and flat-rate sums calculated on a basis other than that of the hourly rate. Moreover, it is the gross amount of wages which must be taken into account.

In the course of the proceedings for failure to fulfil obligations, Germany adopted and proposed a number of amendments to its rules, which the Court considers appropriate for removing several of the inconsistencies between German law and the directive. These include, among others, the taking into account of allowances and supplements paid by an employer which, in the calculation of the minimum wage, do not alter the relationship between the service provided by the worker and the consideration which he receives in return, and the taking into account, under certain conditions, of the bonuses in respect of the 13th and 14th salary months. However, as those amendments came about too late, that is to say, after the expiry of the period laid down in the reasoned opinion, to be taken into consideration by the Court, the Court has declared that there was a failure to fulfil obligations in that regard.

Finally, the Court finds that it is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation should be provided to the worker for those additional services without its being taken into account for the purpose of calculating the minimum wage. According to the Court, the directive does not require that such forms of compensation (which, when taken into account in the calculation of the minimum wage, alter the relationship between what is provided and what is received in consideration thereof) be treated as elements of the minimum wage. The Court accordingly dismisses the Commission's action on that point.

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Languages available: DE, EN, FR, GR, IT, NL, PL, PT

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>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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