Rush Portuguesa Limitada v. Office National d'Immigration (Case C-113/89)

Before the Court of Justice of the European Communities (6th Chamber)

ECJ (6th Chamber)

(Presiding, Kakouris P.C.; Koopmans, Mancini, O'Higgins and DÍez de Velasco JJ.) Mr. Walter Van Gerven, Advocate General.

27 March 1990

Reference from France by the Tribunal Administratif (Administrative Court), Versailles, under Article 117 EEC.

Provisions Considered:
EEC 59, 60
Iber.Acc. 2, 215, 216, 221
Reg. 1612/68

Services. Migrant workers. Aliens.

Freedom to supply services under Articles 59 and 60 EEC includes the right to move freely in the host member-State with all one's staff for the purposes of the supply. The host State may not subject the movement of the staff in question to restrictions such as a requirement to be engaged *in situ* or an obligation to obtain a work permit. [12]

Aliens. Migrant workers. Portugal. Transitional period.

Article 216 of the Act of Iberian Accession introduces a derogation from the principle of freedom of movement laid down in Article 48 EEC and must be interpreted in the light of the purpose of that provision. It applies in the case of access by Portuguese workers to the employment market of other member-States, but not to the movement of Portuguese workers moving temporarily as part of *819 the provisions of services by their employer and returning home at the end of the supply of such services. [13]-[15]

Services. Migrant workers. Aliens. Labour contractors.

Although labour contractors are providing a service, that service consists precisely in the provision of recruits to the labour market of the host State. As such, and as an exception, **Article 216** of the Act of Iberian Accession will operate to preclude the free movement of the workers in question. [16]

Services. Migrant workers. National treatment.

Community law does not preclude a host member-State from applying its labour laws and collective labour agreements to any person employed, even temporarily, in its territory. That applies even where the employer is established abroad and the employee is moving temporarily in order to carry out work which the employer is providing as a service under Articles 59 and 60 EEC. [17]
The Court *interpreted* **Articles 59** and **60** EEC, Articles 2 and 216 of the Act of Iberian Accession and Regulation 1612/68 *in the context of* a Portuguese company specialising in construction works which had subcontracted to build a railway line in France and had taken its own Portuguese workforce to do so contrary to the requirement under French law that the defendant Office had a monopoly in the engagement of foreign workers, *to the effect that* freedom to supply services came into effect for Portugal immediately on accession whereas free movement of workers was postponed by **Article 216** until the end of the transitional period, *that* the supply of services included the use of one's own labour force, *that* **Article 216** aimed at preventing disturbances on the labour market but not at restricting the movement of employees of a foreign-based employer who were not on the labour market at all, *that* employees of labour contractors straddled the boundary since although the employer was providing a service they were on the labour market and consequently covered by **Article 216,** *that* French labour law including collective agreements could properly be applied to the Portuguese employees, and consequently *that* the Portuguese company could bring its Portuguese workers into France to carry out its work without having to obtain French work permits and without having to 'employ' them via the defendant Office.

Representation

A. Desmazières de Séchelles, of the Paris Bar, for the plaintiff.
G. de Bergues, Legal Adviser, assisted by G.A. Delafosse, Director at the Ministry of Employment, for the French Government.
M.L. Duarte, Legal Adviser, and L.I. Fernandes, Director of Legal Affairs, for the Portuguese Government as *amicus curiae*.
E. Lasnet, Legal Adviser to the Commission, for the E.C. Commission as *amicus curiae*. *820

The following cases were referred to in the judgment:

1. Lopes Da Veiga v. Staatssecretaris Van Justitie (9/88), 27 September 1989: [1989] E.C.R. 2989, [1991] 1 C.M.L.R. 217. Gaz:9/88
2. Seco SA v. Etablissement D'Assurance contre la Vieillesse et L'Invalidite (62-63/81), 3 February 1982: [1982] E.C.R. 223. Gaz:62/81

The following further cases were referred to by the Advocate General:
3. Webb (279/80), 17 December 1981: [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719. Gaz:279/80
4. Ministere Public and Chambre Syndicale des Agents Artistiques et Impresarii de Belgique Asbl v. Van Wesemael and Follachio (110-111/78), 18 January 1979: [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87. Gaz:110/78
5. Re Insurance Services: E.C. Commission v. Germany (205/84), 4 December 1986: [1986] E.C.R. 3755, [1987] 2 C.M.L.R. 69. Gaz:205/84
6. Frans-Nederlandse Maatschappij voor Biologische Producten BV (272/80), 17 December 1981: [1981] E.C.R. 3277, [1982] 2 C.M.L.R. 497. Gaz:272/80
7. The State v. Watson and Belmann (118/75), 7 July 1976: [1976] E.C.R. 1185, [1976] 2 C.M.L.R. 552. Gaz:118/79
8. Regina v. Pieck (157/79), 3 July 1980: [1980] E.C.R. 2171, [1980] 3 C.M.L.R. 220. Gaz:157/79
9. Messner (C-265/88), 12 December 1989: not yet reported. Gaz:265/88
10. Casati (203/80), 11 November 1981: [1981] E.C.R. 2595, [1982] 1 C.M.L.R. 365. Gaz:203/80
11. Criel (Donckerwolcke) v. Procureur de la Republique (41/76), 15 December 1976: [1976] E.C.R. 1921, [1977] 2 C.M.L.R. 535. Gaz:41/76
12. Peskeloglou v. Bundesanstalt für Arbeit, Nürnberg (77/82), 23 March 1983: [1983] E.C.R. 1085, [1983] 2 C.M.L.R. 381. Gaz:77/82
13. Kempf v. Staatssecretaris Van Justitie (139/85), 3 June 1986: [1986] E.C.R. 1741, [1987] 1 C.M.L.R. 764. Gaz:139/85
14. Levin v. Staatssecretaris Van Justitie (53/81), 23 March 1982: [1982] E.C.R. 1035, [1982] 2 C.M.L.R. 454. Gaz:53/81
15. Sagulo (8/77), 14 July 1977: [1977] E.C.R. 1495, [1977] 2 C.M.L.R. 585. Gaz:8/77

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Facts

Legal background

According to Article 2 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties ('the Act of Accession'), the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession are to be binding on the new member-States and are to apply in those States under the

conditions laid down in those Treaties and in the Act of Accession.
With respect to the free movement of persons, services and capital, Articles 215 to 232 of the Act of Accession lay down special conditions concerning the accession of Portugal.
Article 215 of the Act of Accession provides that:
'Article 48 EEC shall only apply, in relation to the freedom of movement for workers between Portugal and the other member-States subject to the transitional provisions laid down in Articles 216 to 219 of this Act.'
Article 216(1) provides that:
'Articles 1 to 6 of Regulation 1612/68 on the freedom of movement of workers within the Community shall apply in Portugal with regard to nationals of the other member-States and in the other member-States with regard to Portuguese nationals only as from 1 January 1993.
The Portuguese Republic and the other member-States may maintain in force until 31 December 1992, with regard to nationals of other member-States and to Portuguese nationals respectively, national provisions or those resulting from bilateral arrangements making prior authorisation a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment.
However, the Portuguese Republic and the Grand Duchy of Luxembourg may maintain in force until 31 December 1995 the national provisions referred to in the preceding subparagraph in force on the date of signing of this Act with regard to Luxembourg nationals and Portuguese nationals respectively.'
Apart from Article 221 thereof, the Act of Accession contains no transitional measures or other special conditions concerning the right of establishment and the freedom to provide services. **Article 221** authorises Portugal to maintain restrictions on activities falling within the travel and tourist agencies sector until 31 December 1988 and on activities in the cinema sector until 31 December 1990.

Facts

Rush Portuguesa Limitada ('Rush') a company governed by Portuguese law whose registered office is in Portugal, is a building and public works undertaking. Rush entered into a sub-contract with a French company for works on several TGV Atlantique sites in France. *822 In order to carry out the works, Rush brought its Portuguese workforce from Portugal.
The French Labour Inspectorate carried out checks on two of the sites at which Rush was working under a sub-contract, and noted a number of infringements of the Code du Travail (French Labour Code). The infringements involved 46 workers on the first site and 12 on the second. They were engaged on various tasks; 46 were engaged in the application of concrete and reinforced concrete and 7 were site foremen. The remainder were a manging engineer, a team leader, a general site worker, a crane operator and a mason.
According to the reports made by the Labour Inspector, the workers concerned did not have the work permits prescribed by section L341.6 of the Code du

Travail for foreign nationals employed in France. It also appeared that the Portuguese workers had not been recruited by the Office National d'Immigration, on which section L341.9 of the Code du Travail confers the exclusive right to recruit nationals of third States for work in France.
The reports were forwarded to the Public Prosecutor's Office by the Director of the Office National d'Immigration for the purpose of legal proceedings. He also initiated the procedure provided for in section 341.7 of the Code du Travail--which provides that without prejudice to such legal proceedings as may be commenced against him, any employer who has employed a foreign worker in breach of section L341.6(1) is required to pay a special contribution to the Office National d'Immigration.
By decisions of 28 January and 26 March 1987, the Director of the Office National d'Immigration informed Rush that it was required to pay the above-mentioned special contribution and served enforcement notices on it for the relevant amounts.
On 17 March 1987, Rush wrote to the Office National d'Immigration challenging the validity and basis of the enforcement notice served on it on 28 January 1987. Rush received no reply to that letter.

The proceedings before the national court

Rush asked the Tribunal Administratif, Versailles, to annul the decisions of the Director of the Office National d'Immigration notified to it on 28 January and 26 March 1987, and the implied decision rejecting its objection of 17 March 1987. In support, Rush claimed that Articles 59 to 66 EEC prevented the application of the Code du Travail to its employees. Since 1 January 1986, those provisions had been applicable to relations between Portugal and the previous member-States. According to Rush, the effect of those provisions is that a provider of services may move from one member-State to another with his employees and transitional rules on freedom of movement for workers, such as those contained in *823 **Articles 215** and **216** of the Act of Accession, cannot be applied to him. Rush claims that the sub-contract work carried out by it in France is a service within the meaning of **Articles 59** to **66** EEC.
The Office National d'Immigration contends that the freedom to provide service does not extend to all the employees of the supplier of services and that such employees remain generally subject to the requirement of a work permit until 1 January 1993, the date on which the transitional period ends. In its view, that freedom certainly does not extend to the jobs of the Portuguese workers concerned. They are not specialist jobs and do not call for special relations of trust between worker and company. In that regard, the Office National d'Immigration refers to the Annex to Council Regulation 1612/68 on freedom of movement for workers within the Community, which defines posts requiring specialist qualifications and posts of a confidential nature.

The questions

The Tribunal Administratif, Versailles, considered that the decision to be given depended on the interpretation of the applicable Community law. It therefore stayed the proceedings and, by judgment of 2 March 1989, referred the following three questions to the Court of Justice for a preliminary ruling:

1. Does Community law taken as a whole, and in particular Article 5 and Articles 58 to 66 of the Treaty of Rome and Article 2 of the Act of Accession of Portugal to the European Community, authorise a founding member-State of the Community, such as France, to preclude a Portuguese company whose registered office is in Portugal from providing services in the building and public works sector on the territory of that member-State by going there with its own Portuguese workforce so that the workforce may carry out work there in its name and on its account in connection with those services, on the understanding that the Portuguese workforce is to return, and does in fact, return immediately to Portugal once its task has been carried out and the provision of the services has been completed?

2. May the right of a Portuguese company to provide services throughout the Community be made subject by the founding member-States of the EEC to conditions, in particular relating to the engagement of labour *in situ*, the obtaining of work permits for its own Portuguese staff or the payment of fees to an official immigration body?

3. May the workforce, which has been the subject of the disputed special contributions and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the Labour Inspector recording the breaches committed by Rush Portuguesa, be regarded as 'specialised staff or employees occupying a post of a confidential nature' within the meaning of the provisions of the Annex to Council Regulation 1612/68 of 15 October 1968?

*824 **Opinion of the Advocate General (Mr. Walter Van Gerven)**

1. The Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic (hereinafter referred to as 'the Act of Accession') provides that, in regard to the free movement of workers between Spain and Portugal on the one hand and the other member-States on the other, **Article 48** EEC is only to be applicable to a limited extent. The Act of Accession, however, contains no limitations on the applicability of **Articles 59** *et seq.* EEC with regard to the freedom to provide services. The preliminary questions referred to the Court of Justice by the Tribunal Administratif (Administrative Court), Versailles (hereinafter referred to as 'the national court'), require the Court to clarify the implications of the relevant provisions of the Act of Accession for suppliers of services within the Community (in the case before the national court, from Portugal) who avail themselves of Portuguese or Spanish workers.

Background

2. The Portuguese company, Rush Portuguesa Lda (hereinafter referred to as ' Rush') is active in the building and public works sector and entered into a number of sub-contracts with a French undertaking for the carrying out of works on

several TGV Atlantique sites in France. In order to carry out the works, Rush made use of a number of workers of Portuguese nationality which it brought from Portugal to France. The national court asks the Court of Justice in answering the preliminary questions to proceed on the assumption that such workers would return to Portugal immediately upon completion of the provision of services.
After two inspections had been carried out by the French 'Inspection du Travail,' in September and December 1986, it was established that Rush was employing a total of 58 Portuguese workers who, in breach of section L341.6 of the Code du Travail, did not have work permits. For further details as to the tasks of those workers, I refer to the Report for the Hearing. The aforementioned section of the Code du Travail forms part of Chapter 1 of Title IV of Book III of the Code du Travail relating to 'Foreign workers and the protection of the national labour force.' That provision prohibits the employment of foreigners in France who do not have a work permit where such a work permit is required in accordance with French law or pursuant to international conventions. Rush is also said to have infringed section L341.9 which confers on the Office National d'Immigration (formerly 'Office de Migration Internationale,' hereinafter referred to as the 'ONI') a monopoly on the recruitment and bringing into France of foreign workers.
Further to the reports which were drawn up on the occasion of these inspections, ONI imposed a 'special contribution' on Rush in *825 pursuance of section L341.7 of the Code du Travail. As the representative of the French Government made clear at the hearing, this contribution is in the nature of an administrative fine. It amounts to at least 500 times the guaranteed minimum wage laid down in section L141.8 of the Code du Travail. It also appears from the documents before the Court that the total amount of the fine imposed on Rush amounts to approximately 1.5 million FF. Rush applied to the national court for this fine to be set aside.
3. As regards further clarification of the issues, it should not be forgotten that the question which arises in the main dispute relates only to the legality of the special contribution imposed on Rush. The national court wishes more particularly to know whether a supplier of services may be penalised in that manner for employing Portuguese workers who have no work permit. The present proceedings therefore do *not* concern the question whether Rush's activity is permitted and/or may be made subject by France to prior authorisation. The designation and permissibility under French law of its activity as an employment bureau or even as a contractor (irrespective of the nationality of the persons employed by Rush) and the compatibility of the relevant French legislation with Community law are of no relevance in replying to the preliminary questions.
Nor does the main dispute appear to be concerned with the question whether a member-State may levy a contribution on the grant of a permit. Nevertheless, the last part of the second question may be read in such a way that the national court is seeking to ascertain whether a member-State can make the provision of a service subject to the payment of a specific fee to the immigration service in connection with the grant of permits to the workers employed by the supplier of services. To judge from the observations submitted to the Court, this question is raised in conjunction with the aforementioned monopoly enjoyed by ONI as

regards the recruitment and bringing into France of foreign workers, and moreover relate to the (small) charge imposed under section L341.8 of the Code du Travail, which is to be paid on the renewal of a permit. I shall come back to this question very briefly at the end of my reasoning (see paragraph 22 below).

Relevant provisions of Community law

4. In principle, a Community undertaking providing a service in a member-State ('the host member-State') other than the one in which it is established may not be denied the right, in order to provide this service, to recruit workers from other member-States and to employ them in the host member-State. Article 6(3) of Council Directive 68/360 [FN1] (see also paragraph 5 below, *in fine*) provides that the member-State *826 in which the service is provided is obliged to issue to such workers a residence permit (which may be limited to the expected period of the employment).

FN1 Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of member-States and their families [1968] O.J. Spec. Ed. 485.

5. In the case of undertakings which, in order to provide a service, wish to make use of workers from Spain and Portugal, account must be taken until 1993 of the rules [FN2] contained in the Act of Accession. Article 215 of the Act of Accession imposes a restriction on the freedom, guaranteed by **Article 48** EEC, of movement of workers between Portugal and the ten 'old' member-States. In accordance with this provision, **Article 48** EEC is only to apply subject to the transitional provisions laid down in Articles 216 to 219 of the Act of Accession. **Article 216** of the Act of Accession provides that:
1. Articles 1 to 6 of Regulation 1612/68 on the freedom of movement of workers within the Community shall apply in Portugal with regard to nationals of the other member-States and in the other member-States with regard to Portuguese nationals only as from 1 January 1993.

FN2 Hereafter only Portuguese workers are mentioned. The same remarks are, however, applicable to Spanish workers, regard being had to the identical wording of Articles 55 to 58 of the Act of Accession.

... The other member-States may maintain in force until 31 December 1992, with regard to ... Portuguese nationals ..., national provisions ... making prior to authorisation a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment.
The abovementioned Articles 1 to 6 of Regulation 1612/68 acknowledge, in implementation of **Article 49** EEC, the right of all nationals of a member-State to take up an activity as an employed person in another member-State and to pursue such activity under the same conditions as the nationals of such member-State. In other words, those provisions give effect to the principle of equal treatment enshrined in paragraphs (2) and (3) of Article 48 EEC.

Article 218 of the Act of Accession further provides that, in so far as certain provisions of Directive 68/360 may not be dissociated from those of Regulation 1612/68 whose application is deferred pursuant to **Article 216** of the Act of Accession, the ten 'old' member-States may derogate from those provisions to the extent necessary for the application of the provisions of **Article 216.**
Article 1 of Directive 68/360 requires the member-States to abolish all restrictions on the movement and residence of nationals of the member-States and of members of their families to whom Regulation 1612/68 applies. Article 6(3) of the directive contains, as I have already mentioned, a concrete application thereof as regards workers employed in the service of or for the account of a supplier of services.

The first and second preliminary questions

6. On the basis of the provisions of the Act of Accession mentioned *827 in the preceding paragraph ONI applied to Rush the abovementioned provisions of the Code du Travail and, owing to the infringement thereof, imposed on it the fine provided for in section L341.7. Before the national court, Rush argued that such a penalty was in conflict with the freedom to provide services guaranteed by **Articles 59** to **66** EEC whose application is not restricted or postponed by the Act of Accession. In order to settle this dispute the national court referred to the Court of Justice three preliminary questions which are reproduced in the Report for the Hearing. In what follows I deal only with the first and second questions. As to the third question, which in my opinion is of no relevance in the determination of these proceedings, I shall briefly come back to it in paragraph 23.
In essence, the Court is asked to clarify to what extent the limitations on the free movement of workers flowing from the Act of Accession may be applied to undertakings within the Community which, for the purpose of providing a service, wish to go to one of the old member-States of the Community taking workers of Portuguese nationality. In particular, the national court asks whether an 'old' member-State (i) may prohibit an undertaking within the Community from providing services on its territory with Portuguese employees, or (ii) can make the provision of services subject to conditions, in particular that the undertaking must recruit personnel on the spot, must apply for residence permits for its Portuguese employees, or must pay contributions to the immigration service. The questions raised by the national court literally concern the right of *Portuguese* suppliers of services to take Portuguese workers to an 'old' member-State. It should already be clear that the solution under Community law cannot be different according to whether suppliers of services from Portugal or from another member-State of the Community are involved, given the undiminished application of **Articles 59** to **66** EEC and the fact that the aforementioned provisions of the Act of Accession contain only a restriction on the right of residence of Portuguese workers, whoever their employer is.
7. The reasoning I give below is structured as follows. In the first part I recall the Court's case law in which the scope of the Treaty rules relating to freedom to provide services has been clarified, with special reference to the legal position of suppliers of services who go to the place where the service is to be provided with

personnel who cannot lay claim to freedom of movement for workers (see paragraphs 8 to 11 below). A short discussion of this case law, which is also referred to by the parties to the main proceedings, is useful in order to show the background against which this dispute is taking place. In the second and most important part, I shall examine the effect on this 'common law' of **Articles 216** *et seq.* of the Act of Accession (see paragraphs 12 to 18 below). In the third part, I shall draw conclusions therefrom as regards the power of 'old' member-States to impose an administrative *828 fine (see paragraphs 19 to 21 below). Finally, I shall briefly express my view on the question whether a member-State may charge a fee payable by an employer/supplier of services in respect of the grant of a work or residence permit (see paragraph 22 below).

The 'acquis communautaire' as regards the freedom to provide services

8. It must be stated straightaway that the contested provisions of French law contain no (formal) discrimination with regard to non-French suppliers of services. In fact, the provisions in question impose an administrative fine on all employers who employ foreigners without a residence permit in France. The prohibition is therefore applicable in the same way to French and non-French employers/suppliers of services. The Court has, however, made clear that a national legislative provision which at first sight is non-discriminatory and normally applies to permanent activities by undertakings established in the member-State concerned cannot be fully applied to activities of a temporary nature which are carried on by undertakings established in other member-States. Thus, the Court held in Webb (in which reference was made to the earlier Van Wesemael [FN3] judgment) as follows:
the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the member-State of his establishment. [FN4]

FN3 Joined Cases 110-111/78, van wesemael [1979] E.C.R. 35 [1979] 3 C.M.L.R. 87.

FN4 Case 279/80 Webb [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719, At Para. [17]; See also Van Wesemael and the Subsequent Judgment In Case 205/84, E.C. Commission v. Federal Republic of Germany, [1986] E.C.R. 3755, In Particular, Para. [27] of the Judgment.

In a subsequent judgment it was added that the restriction introduced by the national provision must be objectively necessary in order to protect an interest which is acceptable from a Community point of view. [FN5]

FN5 See E.C. Commission v. Germany At Para. [27].

In Webb the rule was also laid down that the application of national provisions, even if they are inspired by the general good and are at first sight applicable without discrimination, may not cause unnecessary duplication of the rules applicable in the member-State of establishment, in order to prevent disguised discrimination against providers of services from another member-State in relation to national providers of services. [FN6] It is worthy of mention that on the same date the Court also delivered its judgment in the Frans-Nederlandse Maatschappij voor Biologische Producten case, in which it held that the same principle applied to the free movement of goods. Member-States may not unnecessarily require an importer of *829 goods to repeat technical or chemical analyses if such analyses have already been carried out in another member-State. [FN7]

FN6 See para. [20].

FN7 See Case 272/80, [1981] E.C.R. 3277, [1982] 2 C.M.L.R. 497, In Particular Paras. [13]-[15].

9. The principles laid down in Webb were further clarified in the Seco judgment of 1982, [FN8] whose factual background bears certain similarities with that of the present case.

FN8 Joined Cases 62-63/81 seco v. ivi [1982] E.C.R. 223.

The main dispute in Seco concerned the carrying on of temporary activities in Luxembourg by French undertakings, which, for that purpose, engaged workers from non-member States who, during the carrying out of the work in Luxembourg, were required to remain affiliated to the relevant French social security scheme. The case concerned provisions of Luxembourg law which, in the case of temporary activities on Luxembourg territory, required the *employer* of foreign workers to pay the share of the national old-age and invalidity insurance contributions for which he is liable, although the workers in question derived no social benefit from the contributions. [FN9] The question was therefore whether such a provision complied with Community law, regard being had to the fact that the economic advantages which the employer would derive from not adhering to the rules as regards minimum wages in the State in which the service was provided would be negated.

FN9 See para. [3]. It appears from the judgment that the relevant provisions of Luxembourg law were introduced in order to prevent an employer from being encouraged to make use of foreign workers for the purpose of reducing his social charges (see para. [4]).

10. The Court's judgment applied the rule established in Webb that the provisions of the Treaty relating to the freedom to provide services do not merely prohibit open discrimination on the basis of the nationality of the provider of the services,

but also any disguised form of discrimination which, although based on apparently neutral criteria, in fact lead to the same result. [FN10] The Court held that:
Such is the case ... when the obligation to pay the employer's share of social security contributions imposed on persons providing services within the national territory is extended to employers established in another member-State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a case the legislation of a State in which the service is provided proves in economic terms to be more onerous for employers established in another member-State, who in fact have to bear a heavier burden than those established within the national territory. [FN11]

FN10 See para. [8].

FN11 Para. [9].

It was further made clear in the judgment that, although a member-State might completely refuse to allow the *workers* in question to enter their territory or to undertake paid employment there, they could not *830 use those powers in order to impose a discriminatory burden on a *supplier of services* from another member-State. [FN12]

FN12 Paras. [11]-[12].

11. If the Seco case is compared with the situation in the present case, a certain similarity may be seen. In the present proceedings, too, the question arises as to the power which (in this case the 'old') member-States retain as regards the adoption of measures in connection with the performance of salaried employment which constitute a restriction on the provision of services by an undertaking which makes use of personnel which cannot avail themselves of freedom of movement for workers. The criterion laid down in this connection in the Seco case is that the application of a national provision which at first sight applies without distinction, may not give rise to a disguised discrimination of suppliers of services established in another member-State. In Seco, such discrimination did exist because the obligation of employers established in another member-State to pay an employers' contribution for employees in respect of whom contributions had already been paid in the member-State of establishment affected those employers more heavily than their competitors established in the national territory who were only subject to the payment of contributions in one member-State. However, that situation does *not* arise in the present case. Rules of the type of the French provisions in question do not entail any 'unnecessary repetition' of contributions paid or requirements already fulfilled in the member-State of origin. In that sense, foreign providers of services suffer no competitive disadvantage in relation to French suppliers of services.
That distinction does not, however, deprive of its validity the principle mentioned

above which has been laid down in the Court's case law relating to the freedom to provide services. Restrictions on this freedom must find justification in the general interest and must be necessary in order to ensure the protection of the interests which they are intended to safeguard. Furthermore, the member-States may not use their power in matters of immigration and access to paid employment in order to impose a discriminatory burden on suppliers of services established in another member-State. Moreover, in connection with the other freedoms guaranteed by the Treaty, it has been accepted that member-States retain a certain power of regulation and sanction, but that the application of such national provisions may not negate a freedom guaranteed by the Treaty, or unnecessarily restrict it. [FN13]

FN13 In respect of the freedom of movement of persons, reference may be made to Case 118/75 Watson and Belmann: [1976] E.C.R. 1185, [1976] 2 C.M.L.R. 552 *831 , In Particular Paras. [17] to [21]; Case 157/79 Pieck: [1980] E.C.R. 2171, [1980] 3 C.M.L.R. 220, and Case C-265/88 Messner: Not Yet Reported. As regards the free movement of goods, reference can be made to Case 203/80 Casati: [1981] E.C.R. 2595, [1982] 1 C.M.L.R. 365, In Particular Para. [27], and Case 41/76 Donckerwolke: [1976] E.C.R. 1921, [1977] 2 C.M.L.R. 535, In Particular at Paras. [32] to [38].

Against that background of the greatest possible observance of the freedom guaranteed by the Treaty, I shall now examine which provisions, adopted on the basis of the Act of Accession, by the 'old' member-States are permissible in relation to suppliers of services established in another member-State.

Influence of the Act of Accession on the freedom to provide services

12. As mentioned above (at paragraph 5), the Act of Accession empowers the ' old' member-States to apply until 1993 national rules which make immigration and access to paid employment by Portuguese nationals subject to prior authorisation. To that end, they retain the power to refuse to grant to Portuguese *workers* the residence permit provided for in Directive 68/360. It seems to me to go without saying that a system of prior residence permits can work more efficiently if observance thereof is also required of *employers* of Portuguese nationals, whether they be 'national' employers or employers from another member-State. In most cases it will be for the employer to apply for a residence permit and it may also be assumed that most employees of a supplier of services operating in another member-State come to work in that member-State *at the request of their employer.*
What is the rationale of **Articles 216** *et seq.* of the Act of Accession? In the Court's case law they are interpreted as an exception (to be narrowly construed) to the free movement of (Portuguese) workers, which is intended to prevent a disturbance of the labour market in the 'old' member-States as a result of a massive influx of Portuguese nationals seeking work. [FN14] To this end, a transitional period was introduced into the Act of Accession during which the movement of employees is restricted.

FN14 See Case 9/88 Lopes de Veiga: [1989] E.C.R. 2989, [1991] 1 C.M.L.R. 217, In Particular at Para. [10], and Case 77/82 Peskeloglou [1983] E.C.R. 1085, [1985] 2 C.M.L.R. 381, in particular at para. [12] (this case involved the interpretation of an identical provision in the Act of Accession relating to Greece).

It now remains to clarify the manner of the interaction between, on the one hand, the principle of the freedom to provide services which, according to the Court's case law mentioned above, may only be restricted to the extent strictly necessary, and, on the other hand, the measures which may be taken by the 'old' member-States pursuant to the provisions of the Act of Accession which, in accordance with the Court's case law, are to be narrowly construed. Before giving my own opinion on this matter, I shall first consider the positions taken before the Court. On one point there is agreement: an interpretation of the Act of Accession pursuant to which the member-States retain a discretionary power to refuse a residence permit to *all* the Portuguese workers employed by a supplier of services, thereby obliging the latter to work solely with employees from the 'old' member-States, would amount to eliminating the freedom to provide services in respect of the *832 provision of services which presuppose the movement of workers. There is therefore a certain category of Portuguese workers to whom the restrictions contained in the Act of Accession may not be applied. It is when it comes to determining this category that opinions are sharply divided.

13. The most radical viewpoint in favour of the freedom to provide services is to be found in the observations of Rush. Rush submits in particular that the relevant provisions of the Act of Accession contain no single restriction on the recruitment and employment of Portuguese nationals *by a supplier of services.* It comes to this conclusion on the basis of the following reasoning. The presence in France of Rush employees has nothing to do with the application of **Article 48** EEC: they did not look for work in France and have not entered the French labour market, seeing as they have a contract of employment in Portugal and, in the context of that employment, temporarily come to France in order to perform duties in the service of Rush, without, however, laying claim to the right to establish themselves for an indefinite period as workers in France. Moreover, their respective employment relationships remain strongly Portuguese in nature. They are paid and charged to tax in Portugal and remain subject to the Portuguese social security scheme. From all those circumstances Rush concludes that its employees are not to be regarded as 'workers' within the meaning of Regulation 1612/68, with the result that the provisions contained in the Act of Accession with regard to Portuguese workers do not apply to them.

14. This argument cannot be accepted. The Court has consistently stressed that the Community concept of a 'worker' is very broad, and covers any national of a member-State who actually and genuinely performs work in another member-State. [FN15] In that connection it does not matter whether that work is carried out in the service of an undertaking which is active in other member-States or in the service of an undertaking which is established in the member-State where

the work is carried out. In accordance therewith the preamble to Regulation 1612/68 provides that 'the right of all workers in the member-States to pursue the activity of their choice within the Community should be affirmed ... without discrimination [as regards] permanent seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.' The rules laid down in Regulation 1612/68 thus undoubtedly extend to protect workers of a supplier of services such as Rush. As I have said, however, the rules relating to the right of Portuguese workers to accept or carry on salaried employment in the territory of one of the 'old' member-States have been restricted until 1993 by **Article 216** of *833 the Act of Accession (see paragraph 5 above). **Article 216** is therefore based on the same broad definition of 'worker' as **Article 48** EEC.

FN15 See for example Case 139/85 Kempf: [1986] E.C.R. 1741, [1987] 1 C.M.L.R. 764, In Particular at Paras. [8] to [14], Together with the Reference to Case 53/81 Levin: [1982] E.C.R. 1035, [1982] 2 C.M.L.R. 454.

15. The most restrictive interpretation of the freedom to provide services is to be found in the submissions of the French Government. According to this interpretation, only employees of a supplier of services who are in a 'position of trust' in the undertaking are excluded from the application of the Act of Accession because such persons are to be assimilated to the supplier of services himself. Such persons are said, as I understand its argument, to derive a right of residence *as a supplier of services* from Directive 73/148. [FN16] According to the French Government, only a very limited number of persons are involved, namely those who exercise management functions in the undertaking and are authorised to commit the undertaking as regards third parties. I am unable to share this narrow view, as will immediately appear when I give my own assessment. It does insufficient justice to the principle of the freedom to provide services on which Rush is entitled to rely.

FN16 Council Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of member-States with regard to establishment and the provision of services. Article 4 gives a right of residence to nationals of a member-State who wish to provide services in another member-State.

16. An 'intermediate solution' is advocated by the Commission whereby there would be excluded from the provisions of the Act of Accession staff possessing 'special skills' and staff holding 'positions of responsibility' in the undertaking providing the service. The Commission suggests in particular that reference should be made to the 'General Programme for the elimination of restrictions on the freedom to provide services,' established by the Council in 1962. [FN17] In Title II of that programme it is stated that:
Before the end of the second year of the second stage of the transitional period provisions laid down by law, Regulation or administrative action ... are to be amended ... where such provisions ... are liable to hinder the provision of

services by such nationals, or by staff possessing special skills or holding positions of responsibility accompanying the person providing the services or carrying out the services on his behalf.

FN17 O.J. Spec. Ed. 2nd Series IX, p. 3.

This provision affords an interesting point of comparison with the present case, because it is inspired by the idea that, if a supplier of services is effectively to be able to use his right to provide services freely, he must be allowed to operate with certain categories of personnel, even if that personnel does not come within the scope of the free movement of workers (the above mentioned General Programme was established in 1962, before the liberalisation of free movement of workers effected pursuant to **Articles 48** and **49** EEC). The comparison cannot however be taken too far because the provision cited above was established at a time when the freedom to provide *834 services had not been realised either. In the present case, we are in a way one stage further: the freedom to provide services is already *fully* applicable but encounters restrictions flowing from a (temporary) incomplete application of the freedom of movement of (Portuguese) workers.
17. Nevertheless, the criteria contained in the General Programme indicate the right direction and I shall use them as the starting point for my own assessment. Those criteria are based on the assumption, which in my view is correct, that the activity of an *undertaking* cannot be considered entirely separately from the persons who carry on the undertaking's activity. This consideration is all the more applicable in the case of a supplier of services who in principle is not permanently present in the member-State in which the service is being provided [FN18] and whose entrepreneurial activity is thus to a large extent dependent on his mobility across national borders. If one wishes an undertaking's freedom to provide services to be 'of use' in this regard, a supplier of services must, in my view, have the possibility to make use of the personnel which forms the core of his undertaking as he freely chooses, because that is indispensable for the efficient conduct of the undertaking's activity.

FN18 See E.C. Commission v. Germany, Already Cited Above In Footnote 4, In Particular at Paras. [19] to [21].

That seems to me to be the case with personnel who are entrusted with managerial functions in the undertaking or who may be regarded as belonging to the undertaking's trusted staff or staff in a position of responsibility. Contrary to the French Government's arguments, this does not mean only persons empowered to bind the undertaking with regard to third parties. In my view, employees who are charged by the undertaking with responsibility for carrying out the provision of services and who direct and/or supervise the undertaking's activity by directing and supervising the other members of staff who are employed for carrying out the undertaking's activity are also 'managerial personnel.' The expression 'personnel in a position of responsibility and trusted

personnel' also includes, in my view, workers having an employment the performance of which requires a special relationship of trust with the undertaking and/or the employer. [FN19] In so far as the presence of such persons in the member-State in which the service is provided is required for the efficient provision of the service, that member-State cannot refuse them a residence permit (possibly limited to the expected duration of the work).

FN19 This description is taken from the definition contained in the Annex to Regulation 1612/68 as regards the confidential nature of the post. In Article 16(3)(a) of this regulation offers of employment made to a named worker in view of the confidential nature of the post are excluded from the machinery for vacancy clearance provided in Articles 15 and 16.

Moreover, the host member-State cannot, in my view, refuse to *835 grant a residence permit to workers who have a specialisation or special qualifications which are essential for the provision of the service and who could not be obtained on the labour market of the 'old' member-States without great difficulties or considerable costs. By 'special qualifications' is meant a high degree of technical ability or a technical aptitude for a trade or profession which is rarely found and for which special technical knowledge is required. [FN20] The special nature of those qualifications may for example be reflected in the fact that the undertaking has made considerable investments in the recruitment or training of the relevant workers, and must of course be assessed in the light of the undertaking's activity and the nature of the service to be provided.

FN20 This description is also taken from the exclusion contained in Article 16(3) of Regulation 1612/68 of vacancies offered to a named worker in connection with the specialist qualifications of the post offered.

18. Underlying the foregoing interpretation is the idea that, in accordance with the Court's case law mentioned above, the right freely to provide services (which is not restricted by the Act of Accession) cannot be curtailed to such an extent that it loses its useful effect by unduly curtailing the dynamism of the undertaking providing the service. I further assume that the restriction of the freedom to provide services may not go further than is necessary in order to preserve the rationale of the Act of Accession. The fear that there might be a considerable, let alone a massive, influx of Portuguese nationals seeking work which may lead to a disturbance of the labour market in the old member-States is, in my view, not justified in relation to provisions intended to enable Community undertakings, when providing services in another member-State, to have recourse to personnel carrying out managerial functions or with whom a relationship of trust exists and to avail themselves of workers who have special qualifications which are essential for the service to be provided and are not readily available on the local labour market. Those criteria will primarily inure for the benefit of (in this case) Portuguese undertakings providing services and will not have the effect of opening the potential of the Portuguese labour market to suppliers of services

from the ' old' member-States.
It is true that the derogation operated by means of the foregoing criteria from the fundamental prohibition laid down in the Act of Accession is somewhat 'selective,' inasmuch as it will benefit mainly Portuguese undertakings which provide services for which the movement of a large number of workers is not required. This is, however, the inevitable consequence of the option, taken in the Act of Accession, of checking the movement of Portuguese labour during a transitional period, in order to prevent a disturbance of the labour market in the 'old' member-States.

*836 *What sanctions are permitted?*

19. The foregoing analysis provides an answer to the question for which kind of workers the 'old' member-States are obliged to issue a residence permit. However, it appears from the file that Rush did not apply for a residence permit for any of the workers whom he brought to France and that no such application was lodged by the workers themselves. The permissibility in such circumstances of an administrative fine in the form of a 'special contribution,' as was imposed by ONI, must be examined separately for workers in respect of whom a residence permit may be refused and such workers in respect of whom a permit can be denied.
20. Let us first consider the case of workers in respect of whom a permit may not be refused. As regards the provision of the relevant service, they may not be denied the right to pursue employment at the place where the service is provided and therefore have the right to the issue of a residence document as provided for in Article 6(3) of Directive 68/360. The Court has held on several occasions that the issue of such a residence document is only of declaratory effect and cannot be equated with a permit as is generally provided for in the case of aliens. [FN21] The Court inferred therefrom that sanctions for non-compliance with formalities relating to the establishment of a right of residence by a worker protected by Community law may be stricter than the sanctions which are applicable in the case of similar minor infringements committed by the country's own nationals (comparability requirement). [FN22] Moreover, no penalties may be imposed which are so disproportionate to the seriousness of the infringement that they become an obstacle to the free movement of persons. On this ground alone, deportation and imprisonment are unjustified. [FN23]

FN21 See Case 157/79, Pieck: [1980] E.C.R. 2171, [1980] 3 C.M.L.R. 220, In Particular at Paras. [11] to [13], Where Reference Is Made to Case 8/77 Sagulo: [1977] E.C.R. 1495, [1977] 2 C.M.L.R. 585.

FN22 See Pieck, At Paras. [15] to [19].

FN23 See Pieck, Ibid.; and Messner Cited In Footnote 13, at Para. [14].

The principles laid down in those judgments seem to me capable of being transposed to the penalties which the *employer* faces for not applying for

(declaratory) permits on behalf of his workers. It follows therefrom in my view that a penalty such as that at issue in the main proceedings is not permissible: its purpose is in effect to protect the discretionary power of the national authority to issue or refuse the permit applied for. What would be permissible is, for example, a light penalty imposed on the host country's own nationals for failure to apply for, or renew, an identity document.

21. It is otherwise with regard to workers in respect of whom the member-State retains a discretionary power as regards the issue of a worker or residence permit. The abovementioned requirement of proportionality does not apply in that case in so far as there is no right *837 to the free movement of workers conferred and guaranteed by the Treaty. However, the principle that the penalty imposed may not be so disproportionate to the seriousness of the infringement as to impair the freedom to provide *services* still applies.

The charging of fees for permits

22. I now come back, as I said I would, to the question whether member-States may make the issue of a work or residence permit to Portuguese nationals dependent upon the payment of certain fees by their employer.

Once again a distinction must be made according to whether or not workers are involved to whom a permit can be refused. As regards workers who were entitled to a residence permit, reference may be made to Article 9 of Directive 68/360, which requires the member-States to issue the documents in question, either free of charge or on payment of a fee not exceeding the dues and charges required for the issue of identity cards to a State's own nationals.

As regards workers in respect of whom the member-State may refuse to grant a residence permit, it is in my view permissible for the issue of a permit to be made subject to the levying of a charge on the employer of such workers, provided that that charge is levied on national employers and employers from another member-State alike, and provided that it is not disproportionately high with regard to its purpose. It is, of course, for the national courts to apply those criteria.

The third question

23. By this question the national court seeks to ascertain whether the members of Rush's staff whose employment led to the imposition of a special contribution by the ONI may be regarded as specialised personnel or personnel holding a position of trust within the meaning of the Annex to Regulation 1612/68.

It is rightly pointed out by Rush and the Portuguese and French Governments that this Annex (and Article 16(3) of the regulation to which it relates) applies only to the functioning of the machinery for vacancy clearance (see Articles 15 to 16 of the regulation). The 'machinery for vacancy clearance' is an intra-Community procedure for placing workers which provides for the exchange of information between the employment placement services of the member-States. Those provisions are of no relevance to the present proceedings. However, the definitions contained in the abovementioned Annex of the terms ' specialist' and 'the confidential nature of the post' may be a useful guide in determining the

categories of workers whom a supplier of services may recruit on the Portuguese market even before 1993 (see paragraph [17] above).

*838 *Conclusion*

24. I propose that the Court should reply to the questions raised by the Tribunal Administratif, Versailles as follows:
Articles 59 and **60** EEC and **Articles 215** to **218** of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic, signed on 12 June 1985, must be interpreted as meaning that a supplier of services established in a member-State of the Community may, for the purpose of providing a service in the territory of another member-State (the recipient member-State), take Portuguese workers belonging to the undertaking's managerial personnel or personnel having a special relationship of trust with the undertaking or special qualifications which are essential for the service to be provided who cannot be obtained without great difficulties on the labour market of the old member-States, on condition that the presence of such workers in the recipient member-State is required for the efficient conduct of the business activity of the supplier of the service. As regards such workers, the recipient member-State may not make the grant of a residence permit, as provided for in Article 6(3) of Directive 68/360, subject to any condition. The failure by the employer or the employee to apply for such a document may be penalised only by sanctions which are not stricter than those imposed on nationals for comparable minor infringements. Pursuant to Article 9 of Directive 68/360, the document must be issued either free of charge or on payment of an amount not exceeding the dues and taxes charged for the issue of identity documents to nationals.
In respect of other categories of Portuguese workers, the old member-States retain, until 1 January 1993, the power to make immigration for the purpose of pursuing paid employment subject to prior authorisation and also to impose a requirement to observe such rules on suppliers of services who employ such workers. The infringement of those rules may not, however, be sanctioned by a penalty which is so disproportionate in relation to the seriousness of the infringement as to impair the freedom to provide services. The issue of such a permit may be made subject to the levying of a charge on the employer of those workers, provided that such a charge is levied on national employers and employers from another member-State alike and is not disproportionately high with regard to its purpose.

JUDGMENT

[1] By an order of 2 March 1989, which was received at the Court on 7 April 1989, the Tribunal Administratif, Versailles, referred to the *839 Court under **Articles 177** EEC three questions on the interpretation of **Article 5** and **Articles 58** to **66** EEC and **Articles 2, 215, 216** and **221** of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter referred to as the 'Act of

Accession'), and of Council Regulation 1612/68 on freedom of movement for workers within the Community.

[2] Those questions arose in proceedings between Rush Portuguesa Lda, an undertaking established in Portugal specialising in construction and public works, and the Office National d'Immigration. Rush Portuguesa entered into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in the west of France. For that purpose it brought its Portuguese employees from Portugal. However, by virtue of the exclusive right conferred on it by section L341.9 of the French Labour Code, only the Office National d'Immigration may recruit in France nationals of non-member countries.

[3] After establishing that Rush Portuguesa had not complied with the requirements of the Labour Code relating to the activities of employed persons, carried on in France by nationals of non-member countries, the Director of the Office National d'Immigration notified Rush Portuguesa of a decision by which he required payment of a special contribution, which an employer employing foreign workers in breach of the provisions of the Labour Code is liable to pay.

[4] In the proceedings for the annulment of that decision, which it brought before the Tribunal Administratif, Versailles, Rush Portuguesa submitted that it had freedom to provide services within the Community and that, accordingly, the provisions of **Articles 59** and **60** EEC precluded the application of national legislation having the effect of prohibiting its staff from working in France. The Office National d'Immigration maintained that the freedom to provide services did not extend to all the employees of the provider of services, since such persons remained subject to the arrangements applicable to workers from non-member countries under the transitional provisions laid down in the Act of Accession as regards freedom of movement for workers.

[5] The Tribunal Administratif considered that the solution of the dispute depended on the interpretation of Community law. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1. Does Community law taken as a whole, and in particular Article 5 and Articles 58 to 66 of the Treaty of Rome and Article 2 of the Act of Accession of Portugal to the European Community, authorise a founding member-State of the Community, such as France, to preclude a Portuguese company whose registered office is in Portugal from providing services in the building and public works sector on the territory of that member-State by going there with its own Portuguese *840 workforce so that the workforce may carry out work there in its name and on its account in connection with those services, on the understanding that the Portuguese workforce is to return, and does in fact return, immediately to Portugal once its task has been carried out and the provision of the services has been completed?

2. May the right of a Portuguese company to provide services throughout the Community be made subject by the founding member-States of the EEC to conditions, in particular relating to the engagement of labour *in situ*, the obtaining of work permits for its own Portuguese staff or the payment of fees to an official immigration body?

3. May the workforce, which has been the subject of the disputed special contributions, and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the labour inspector recording the breaches committed by Rush Portuguesa, be regarded as 'specialised staff or employees occupying a post of a confidential nature' within the meaning of the provisions of the Annex to Regulation 1612/68 of the Council of 15 October 1968?

[6] Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

[7] The first two questions relate to the situation of an undertaking established in Portugal which provides services in the building and public works sector in a member-State belonging to the Community prior to 1 January 1986, the date of Portugal's accession, and which for that purpose brings its own labour force from Portugal for the duration of the works. The first question seeks to ascertain whether, in such a case, the person providing the services may claim a right under **Articles 59** and **60** of the Treaty and **Article 2** of the Act of Accession to move with his own staff. The second question seeks to ascertain whether the member-State on whose territory the works are to be carried out may impose conditions on the person providing services as regards the engagement of personnel *in situ* and the obtaining of work permits for the Portuguese labour force. It is appropriate to examine those two questions together.

[8] In accordance with **Article 2** of the Act of Accession, the provisions of the Treaty on freedom to provide services apply to relations between Portugal and the other member-States as from the date of the accession by Portugal to the Community. Only in respect of activities falling within the travel and tourist agencies sector and the cinema sector does Article 221 of the Act of Accession provide for transitional measures.

[9] The Act of Accession lays down different arrangements as regards freedom of movement for workers. According to **Article 215** of the Act of Accession, the provisions of **Article 48** of the Treaty are only to apply to the freedom of movement of workers between Portugal and the other member-States subject to the transitional provisions laid down in Articles 216 to 219 of the Act of Accession. **Article 216** delays *841 the application of Articles 1 to 6 of Regulation 1612/68 until 1 January 1993. During that period, national provisions or provisions of bilateral arrangements making prior authorisation a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment may be maintained in force. Article 218 of the Act of Accession states that that derogation entails the non-application of the Community rules regarding the movement and residence within the Community of workers of member-States and their families, in so far as the application of those rules may not be dissociated from the application of Articles 1 to 6 of Regulation 1612/68.

[10] The questions submitted for a preliminary ruling thus raise the problem of the relationship between the freedom to provide services as guaranteed by **Articles**

59 and **60** of the Treaty and the derogations from the freedom of movement for workers provided for in **Articles 215** *et seq.* of the Act of Accession.
[11] In that connection, it should be observed first of all that the freedom to provide services laid down in **Article 59** of the Treaty entails, according to **Article 60** of the Treaty, that the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided 'under the same conditions as are imposed by that State on its own nationals.'
[12] **Articles 59** and **60** of the Treaty therefore preclude a member-State from prohibiting a person providing services established in another member-State from moving freely on its territory with all his staff and preclude that member-State from making the movement of staff in question subject to restrictions such as a condition as to engagement *in situ* or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another member-State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.
[13] It should also be recalled that **Article 216** of the Act of Accession is intended to prevent disturbances on the employment market following Portugal's accession, both in Portugal and in the other member-States, due to large and immediate movements of workers, and that for that purpose it introduces a derogation from the principle of freedom of movement for workers laid down in **Article 48** of the Treaty. According to the Court's case law, that derogation must be interpreted in the light of the above mentioned purpose (see Case 9/88, Lopes Da Veiga v. Staatssecretaris Van Justitie). [FN24]

FN24 [1989] E.C.R. 2989, [1991] 1 C.M.L.R. 217.

[14] The derogation provided for in **Article 216** of the Act of Accession relates to Title I of Regulation 1612/68 on eligibility for employment. The national provisions or those provisions in *842 agreements which remain in force during the period of application of that derogation are those relating to the authorisation of immigration and eligibility to take up employment. It must accordingly be inferred that the derogation contained in **Article 216** applies when access by Portuguese workers to the employment market of other member-States and the entry and residence arrangements for Portuguese workers seeking such access and for members of their families are at issue. The application of that derogation is in fact justified since in such circumstances there is a risk that the employment market of the host member-State may be disrupted.
[15] The situation is different, however, in a case such as that in the main proceedings where there is a temporary movement of workers who are sent to another member-State to carry out construction work or public works as part of a provision of services by their employer. In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host member-State.
[16] It should be stated that, since the concept of the provision of services as defined by **Article 60** of the Treaty covers very different activities, the same

conclusions are not necessarily appropriate in all cases. In particular, it must be acknowledged, as the French Government has argued, that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host member-State. In such a case, **Article 216** of the Act of Accession would preclude the making available of workers from Portugal by an undertaking providing services.
[17] However, that observation in no way affects the right of a person providing services in the building and public works sector to move with his own labour force from Portugal for the duration of the work undertaken. Nevertheless, member-States must in such a case be able to ascertain whether a Portuguese undertaking engaged in construction or public works is not availing itself of the freedom to provide services for another purpose, for example that of bringing his workers for the purposes of placing workers or making them available in breach of **Article 216** of the Act of Accession. 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.
[18] Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude member-States from extending 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 *843 established; nor does Community law prohibit member-States from enforcing those rules by appropriate means (Joined Cases 52-63 63/81 Seco SA v. Evi [FN25]).

FN25 [1982] E.C.R. 223.

[19] It follows from all the foregoing considerations that the reply to the first and second questions should be that **Articles 59** and **60** EEC and **Articles 215** and **216** of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another member-State may move with its own labour force which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the member-State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower *in situ* or the obtaining of work permits for the Portuguese workforce.
[20] In view of the reply given to the first two questions, there is no need to give a ruling on the third question.

Costs

[21] The costs incurred by the French and Portuguese Governments and the Commission of the European Communities, which submitted observations to the

Court are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Order

On those grounds, THE COURT (Sixth Chamber), in answer to the questions submitted to it by the Tribunal Administratif, Versailles, by order of 2 March 1989, HEREBY RULES:
Articles 59 and **60** EEC and **Articles 215** and **216** of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another member-State may move with its own workforce which it brings from Portugal for the duration of the works in question. In such a case, the authorities of the member-State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower *in situ* or the obtaining of work permits for the Portuguese workforce.

[1991] 2 C.M.L.R. 818

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