OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 7 March 1990 *

Mr President,
Members of the Court,

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 of the EEC Treaty 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.* of the EEC Treaty 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 subcontracts 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 Article L 341.6 of the code du travail (French Labour Code), did not have work permits. For further details as to the tasks of those workers, I refer to the Report for the Hearing, at Section I.2. The aforementioned article of the code du travail forms part of Chapter I 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 Article L 341.9 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 pursuance of Article L 341.7 of the code du

* Original language: Dutch.

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 Article L 141.8 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 FF 1.5 million. 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 penalized 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 authorization. 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 Article L 341.8 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/EEC [1] (see also paragraph 5 below, *in fine*) provides that the Member State 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).

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 [2] contained in the Act of Accession.

1 — Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).

2 — 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.

Article 215 of the Act of Accession imposes a restriction on the freedom, guaranteed by Article 48 of the EEC Treaty, of movement of workers between Portugal and the 10 'old' Member States. In accordance with this provision, Article 48 of the EEC Treaty 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 (EEC) No 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 other Member States may maintain in force until 31 December 1992, with regard to ... Portuguese nationals ..., national provisions ... making prior authorization 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 No 1612/68 acknowledge, in implementation of Article 49 of the EEC Treaty, 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 of the EEC Treaty.

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 No 1612/68 whose application is deferred pursuant to Article 216 of the Act of Accession, the 10 '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 No 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 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 Article L 341.7. 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 of the EEC Treaty 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, at Section I.4. 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 of the EEC Treaty 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 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 straight away 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 the *Webb* judgment (in which reference was made to the earlier *Van Wesemael*[3] 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'.[4]

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.[5]

In the *Webb* judgment 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.[6] 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 goods to repeat technical or chemical analyses if such analyses have already been carried out in another Member State.[7]

9. The principles laid down in *Webb* were further clarified in the *Seco* judgment of 1982,[8] whose factual background bears certain similarities with that of the present case.

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.[9] The question was therefore whether such a provision complied with Community law, regard being had to the

3 — Judgment of 18 January 1979 in Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35.

4 — Judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; see also the judgment of 18 January 1979 in the *Van Wesemael* case and the subsequent judgment of 4 December 1986 in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755, in particular paragraph 27 of the judgment.

5 — See the judgment of 4 December 1986 in *Commission* v *Germany*, cited above, paragraph 27.

6 — See paragraph 20 of the judgment.

7 — See the judgment of 17 December 1981 in Case 272/80 [1981] ECR 3277, in particular paragraphs 13 to 15.

8 — Judgment of 3 February 1982 in Joined Cases 62/81 and 63/81 *Seco* v *IVI* [1982] ECR 223.

9 — See paragraph 3 of the judgment. 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 paragraph 4 of the judgment).

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.

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. [10] 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'. [11]

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 use those powers in order to impose a discriminatory burden on a supplier of services from another Member State. [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

10 — See paragraph 8 of the judgment.
11 — Paragraph 9 of the judgment.
12 — Paragraphs 11 to 12 of the judgment.

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. [13]

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 authorization. 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. [14] To this end, a transitional period was introduced into the Act of Accession during which the movement of employees is restricted.

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

13 — In respect of the freedom of movement of persons, reference may be made to the judgments of 7 July 1976 in Case 118/75 *Watson en Belmann* [1976] ECR 1185, in particular paragraphs 17 to 21, of 3 July 1980 in Case 157/79 *Pieck* [1980] ECR 2171, and of 12 December 1989 in Case C-265/88 *Messner* [1989] ECR 2409. As regards the free movement of goods, reference be made to the judgments of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595, in particular paragraph 27, and of 15 December 1976 in Case 41/76 *Donckerwolcke* [1976] ECR 1921, in particular paragraphs 32 to 38.

14 — See the judgments of 27 September 1989 in Case 9/88 *Lopes de Veiga* [1989] ECR 2989, in particular paragraph 10, and of 23 March 1983 in Case 77/82 *Peskeloglou* [1983] ECR 1085, in particular paragraph 12 (this case involved the interpretation of an identical provision in the Act of Accession relating to Greece).

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 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 of the EEC Treaty: 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 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 No 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.[15] 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 No 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 No 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 the Act of Accession (see paragraph 5 above). Article 216 is therefore based on the same broad

15 — See for example the judgment of 3 June 1986 in Case 139/85 *Kempf* [1986] ECR 1741, in particular paragraphs 8 to 14, together with the reference to the judgment of 23 March 1982 in Case 53/81 *Levin* [1982] ECR 1035.

definition of 'worker' as Article 48 of the EEC Treaty.

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/EEC.[16] 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 authorized 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.

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.[17] 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.'

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 abovementioned General Programme was established in 1962, before the liberalization of free movement of workers effected pursuant to Articles 48 and 49 of the EEC Treaty). The comparison cannot however be taken too far because the provision cited above was established at a time when the freedom to provide services had not been realized 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.

16 — Council Directive 73/148/EEC of 21 May 1973 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.

17 — OJ, English Special Edition, Second Series IX, p. 3.

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 [18] 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.

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. [19] 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).

Moreover, the host Member State cannot, in my view, refuse to grant a residence permit to workers who have a specialization 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. [20] 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.

18. Underlying the foregoing interpretation is the idea that, in accordance with the Court's case-law mentioned above, the right

18 — See the *Commission* v *Germany* judgment, already cited above in footnote 4, in particular paragraphs 19 to 21.

19 — This description is taken from the definition contained in the annex to Regulation (EEC) No 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.

20 — This description is also taken from the exclusion contained in Article 16(3) of Regulation (EEC) No 1612/68 of vacancies offered to a named worker in connection with the specialist qualifications of the post offered.

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.

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.[21] 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

21 — See the judgment of 3 July 1980 in Case 157/79 *Pieck* [1980] ECR 2171, in particular paragraphs 11 to 13, where reference is made to the judgment of 14 July 1977 in Case 8/77 *Sagulo* [1977] ECR 1495

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).[22] 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.[23]

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 work or residence permit. The abovementioned requirement of proportionality does not apply in that case in so far as there is no right to the free movement of workers conferred and guaranteed by the Treaty.

22 — See the abovementioned *Pieck* judgment, paragraphs 15 to 19.

23 — See the abovementioned *Pieck* judgment, ibid., and paragraph 14 of the *Messner* judgment cited in footnote 13.

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 specialized personnel or personnel holding a position of trust within the meaning of the annex to Regulation No 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).

Conclusion

24. I propose that the Court should reply to the questions raised by the tribunal administratif, Versailles, as follows:

'Articles 59 and 60 of the EEC Treaty 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 penalized 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 authorization 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.'