JUDGMENT OF THE COURT (Sixth Chamber)
27 March 1990 *

In Case C-113/89

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal administratif (Administrative Court), Versailles, for a preliminary ruling in the proceedings pending before that court between

Rush Portuguesa Lda

and

Office national d'immigration (National Immigration Office),

on the interpretation of Article 5 and Articles 58 to 66 of the EEC Treaty and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), 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,

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, T. Koopmans, G. F. Mancini, T. F. O'Higgins and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

the applicant, Rush Portuguesa Lda, by A. Desmazières de Séchelles, of the Paris Bar,

* Language of the case: French.

the French Government, by G. de Bergues, Legal Adviser, assisted by G. A. Delafosse, Director at the Ministry of Employment, Paris, acting as Agents,

the Portuguese Government, by Mrs M. L. Duarte, Legal Adviser, and L. I. Fernandes, Director of Legal Affairs, acting as Agents,

the Commission, by E. Lasnet, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 11 January 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 March 1990,

gives the following

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 Court under Article 177 of the EEC Treaty three questions on the interpretation of Article 5 and Articles 58 to 66 of the EEC Treaty 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 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

2 Those questions arose in proceedings between Rush Portuguesa Lda, an undertaking established in Portugal specializing 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 Article L 341.9 of the French Labour Code, only the Office national d'immigration may recruit in France nationals of third 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 of the EEC Treaty 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, authorize 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 work-force so that the work-force may carry out work there in its name and on its account in connection with those services, on the understanding that the Portuguese work-force 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 work-force, 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 "specialized staff or employees occupying a post of a confidential nature" within the meaning of the provisions of the annex to Regulation No 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 the application of Articles 1 to 6 of Regulation No 1612/68 until 1 January 1993. During that period, national provisions or provisions of bilateral arrangements making prior authorization 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 No 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 abovementioned purpose (see the judgment of 27 September 1989 in Case 9/88 *Lopes da Veiga* v *Staatssecretaris van Justitie* [1989] ECR 2989).

14 The derogation provided for in Article 216 of the Act of Accession relates to Title I of Regulation No 1612/68 on eligibility for employment. The national provisions or those provisions in agreements which remain in force during the period of application of that derogation are those relating to the authorization 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 established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (judgment of 3 February 1982 in Joined Cases 62/81 and 63/81 *Seco SA and Another* v *EVI* [1982] ECR 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 of the EEC Treaty 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 work-force.

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.

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 of the EEC Treaty 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 work-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 recruitmment of manpower *in situ* or the obtaining of work permits for the Portuguese work-force.

Kakouris Koopmans

Mancini O'Higgins Díez de Velasco

Delivered in open court in Luxembourg on 27 March 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber