OPINION OF ADVOCATE GENERAL TESAURO
delivered on 1 June 1994 *

Mr President,
Members of the Court,

1. These proceedings relate to an issue already considered by the Court in previous decisions on the subject of the provision of services. The situation is that an undertaking is established in one Member State and provides services in another Member State, using for that purpose its own workers who are nationals of non-member countries. In such a case, the provision of services necessarily involves the '*temporary posting*' of workers from non-member countries to the Member State in which the services are to be provided. [1] It follows that if, pursuant to its own employment legislation, the host country imposes conditions which may in some way hinder the posting of workers, those conditions will also come indirectly to hinder the provision of services by the undertaking which employs the workers.

The national legislation concerned

2. That is the background to the questions referred by the national court in these proceedings. The problem raised concerns specific aspects of the French legislation on the '*taking up of employment*' in France by nationals of non-member countries. That legislation — part of which was earlier considered by the Court in its judgment in *Rush Portuguesa* [2] — is set out below.

* Original language: Italian.

1 — It should be borne in mind that the temporary posting of (Community) workers has been taken into consideration by the Community legislature with regard to social security. Article 14(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (see the consolidated version in Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6) provides on this subject that:
'(1)(a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.'

2 — Case C-113/89 *Rush Portuguesa* v *Office National d'Immigration* [1990] ECR I-1417.

3. Article L.341-2 of the French Labour Code provides that:

'In order to enter France to take up paid employment there, all aliens must submit an employment contract countersigned by the administrative authorities or a work permit and a medical certificate, in addition to the documents and visas required by the international conventions and regulations in force.'

4. A specific obligation imposed on employers forms the counterpart to those obligations imposed on foreign workers intending to work in France, as provided for in the first paragraph of Article L.341-6:

'It shall be unlawful for any person to engage or continue to employ an alien who has not been granted permission to take up paid employment in France, whether possession of a permit is required under national laws or regulations or under international agreements or treaties'.

5. The application of those provisions is a matter for the Office des Migrations Internationales (OMI). The task of the OMI, a body governed by public law, which is closely connected to the Ministry of Employment, is essentially to oversee the employment of foreign workers wishing to come and work in France and of workers, whether or not French, already resident in France and wishing to go and work abroad. The law confers on the OMI a monopoly on such operations. [3] Article L.341-9 of the Labour Code provides as follows:

'Subject to international agreements, the recruitment of foreign workers or those from the overseas territories in France and their entry into the country, and the recruitment of workers of any nationality in France to work abroad, shall be entrusted to the Office des Migrations Internationales alone. No person or body other than that Office may carry out such operations'.

Article R.341-9, inserted by a decree of 1975, has added to the essential kernel of the OMI's activities the power to carry out 'any connected operation relating to the reception of migrant workers, provision of information, social and occupational integration and also any assistance offered for their repatriation.'

3 — See *Lamy Social*, 1994, paragraph 29: 'In principle, all foreigners wishing to work in France must follow the so-called introduction procedure organized by the OMI. That body has in effect a monopoly on the recruitment of foreigners and on bringing them into France. Infringement of that monopoly is a punishable offence'. As to the consequences, including the financial ones, of infringing the OMI's monopoly, see ibid., paragraph 52 et seq.

6. Under Article R.341-25, to fund its activities the OMI has at its disposal, in addition to public grants and gifts, fees in respect of expenses incurred ('redevances représentatives de frais') or lump-sum contributions ('contributions forfaitaires') paid by 'employers using workers' engaged through the intervention of the OMI.

7. The penalty for breach of those provisions is, *inter alia*, an administrative fine. According to Article L.341-7 of the Labour Code:

'Without prejudice to any legal proceedings which may be instituted against him, an employer who engages a foreign worker in breach of the provisions of the first paragraph of Article L.341-6 shall pay a special contribution to the Office des Migrations Internationales. The amount of such contribution may not be less than 500 times the guaranteed minimum hourly rate laid down by Article L.141-8'.

Facts of the case

8. Mr Vander Elst, a Belgian national, owns an undertaking in Belgium specializing in demolition work. In addition to Belgians, the workforce of the undertaking includes some workers who are Moroccan nationals and who have been continuously employed by Vander Elst for some years; they are lawfully resident in Belgium, have been issued with proper work permits in that country and possess proper contracts of employment.

9. In April 1989 Mr Vander Elst sent a team of eight workers, comprising four Belgians and four Moroccans, to carry out work in Reims, France.

It is established that the four Moroccan workers were regularly employed by the undertaking and had obtained from the French Consulate in Brussels the visa required to enter France and stay there as long as necessary to carry out the work.

10. When French employment inspectors made a check at the Reims site, they found that those four Moroccan workers did not hold the work permits required under Article L.341-6 of the Labour Code and had been engaged to provide services in France without complying with the special employment procedures laid down in Article L.341-9 of the Code.

Pursuant to Article L.341-7, Mr Vander Elst was ordered to pay a special contribution of FF 121 520, later reduced to FF 30 380, for infringing the rules.

The question submitted

11. In the action brought by Mr Vander Elst challenging that measure, the Tribunal Administratif, Châlons-sur-Marne, France, decided to stay the proceedings and refer to the Court two questions for a preliminary ruling which may be formulated as follows:

'Where an undertaking established in one Member State provides services in another Member State and to that end sends to the latter State workers who are nationals of non-member countries and are lawfully and habitually employed by that undertaking, does Article 59 et seq. of the Treaty preclude the application of national legislation such as the French legislation described above which makes the employment of those workers subject to:

— the requirement to apply to a national body entrusted by law with a monopoly on the recruitment of workers from non-member countries for the issue of work permits;

— the requirement to pay to that body a fee for the service rendered,

and which imposes an administrative fine where such workers are employed even though they have not obtained the said work permits?'

Summary of the case-law relating to the free movement of services

12. It is clear that the issue in this case is the provision of services within the meaning of Article 59 et seq. of the Treaty. The economic activity in question is performed for consideration by an undertaking established in a Member State other than that in which the services are to be provided. [4]

13. Having said that, and before I consider whether the contested French legislation

4 — On the concept of 'services' within the meaning of Article 59 et seq., see most recently the judgment in Case C-275/92 *Schindler* [1994] ECR I-1039.

constitutes a barrier incompatible with the rights conferred on individuals by Article 59 et seq., it would be appropriate to outline the essential points of the relevant case-law.

It should first of all be borne in mind that the Court has more than once stated that the actual rationale of such provisions is essentially to be found in the need to further the complete integration of the European market by the abolition of national measures liable to hinder the cross-frontier provision of services. From that point of view, the Court has made it clear that Article 59, in the same way as Article 48, is intended to facilitate the pursuit by Community citizens of economic activities of all kinds throughout the Community and precludes any national legislation which might hinder them when they wish to extend their activities beyond the territory of a single Member State. [5]

14. In accordance with that purpose, the Court then gradually determined the scope of the rights arising from Article 59 et seq. of the Treaty. According to settled case-law, Article 59 of the Treaty prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [6]

15. Moreover, the Court — restating in relation to the provision of services the principles of *mutual recognition* and *proportionality* long since established in relation to the free movement of goods — has held that the free movement of services guaranteed by Article 59 et seq. also implies the abolition of restrictions ensuing from the application to a person providing services who is established in another Member State of legislation, applicable without distinction, in force in the Member State in which the services are to be provided.

As is made clear in the most recent case-law, [7] in the absence of harmonization of the rules applicable to services, or even of a system of equivalence, the freedom guaranteed by the Treaty in this field may be restricted by the application of national rules which affect any person established in the national territory to persons providing services who are established in the territory of another Member State and who already have to sat-

5 — See the judgments in Case 279/80 *Webb* [1981] ECR 3305; in Case 143/87 *Stanton* v *Institut National d'Assurances Sociales pour Travailleurs Indépendants* [1988] ECR 3877 and in Case C-106/91 *Ramrath* [1992] ECR I-3351.

6 — See the judgments in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401 and in Case C-3/88 *Commission* v *Italy* [1989] 4035. Both judgments concerned cases of indirect discrimination, that is to say based on criteria which, although the nationality of the provider of services was not a direct factor, none the less led to the same result; in the first case, a quota in regard to public works contracts was reserved for undertakings having their registered office in the region where the work was carried out, while in the second case a quota in regard to public procurement contracts was reserved for mainly or wholly state-controlled companies.

7 — See, in particular, the judgments in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* v *Commissariat voor de Media* [1991] ECR I-4007 and in Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4072.

isfy the requirements laid down by that State's legislation.

Such restrictions fall within the prohibition laid down in Article 59 where the application of the national legislation to foreigners providing services is not justified by overriding reasons relating to the public interest, or where the requirements underlying that legislation are already protected by the rules imposed on providers of services by the Member State in which they are established. To this end, it must be shown that the application of the national rules (to providers of services established in other Member States) must be capable of ensuring that the objective which they pursue is attained and may not go beyond what is necessary for that purpose; in other words, it must be established that the same result cannot be obtained by less restrictive rules. [8]

16. In the light of the criteria referred to, it may be stated by way of summary that a given national rule is *applicable* to services provided by an undertaking established in another Member State on condition that:

(i) the rule does not give rise to any discrimination in form or substance against a provider of services established in another Member State,

(ii) and, where the rule in question concerns any provider of services operating in the national territory without distinction, the application of the national system:

(a) satisfies mandatory requirements justified in the general interest,

(b) and cannot be replaced by measures which are less restrictive on trade.

Restrictions on the free movement of services arising from the contested legislation

17. In the present case, it is clear that the effect of the national legislation at issue is to restrict freedom to provide services within the Community. As I said earlier, in its *Rush Portuguesa* judgment the Court has already considered the French rules which require undertakings established in other Member

8 — See the judgments in Case C-154/89 *Commission* v *France* [1991] ECR I-659, in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709 and in Case C-159/89 *Commission* v *Greece* [1991] ECR I-691.

States and intending to provide services in France, posting their own workers there, to approach the OMI and apply for work permits for the employees posted. In that regard, the Court stated that:

'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*' (emphasis added).

The Court's reasoning starts from the premiss that undertakings established in one Member State which intend — like Rush Portuguesa or Vander Elst — to provide services in another Member State, transferring *their own workers* there for that purpose, have *already* followed the legal procedures laid down in the State of establishment for engaging workers (whether or not aliens) and have *already* borne the attendant administrative and financial burdens. Such undertakings, in so far as they employ their own regular staff, do not therefore need to approach employment bodies in the host country and comply with the relevant procedures; to impose such a requirement on them, as provided for in the French legislation at issue, thus constitutes a wholly unjustified *duplication* of burdens and formalities liable to put them at a disadvantage in competing with national providers of services.

18. Those restrictive effects can only be increased by the fact — which was not considered by the Court in the *Rush Portuguesa* judgment — that, according to Article R.341-25 of the French Labour Code, employers must pay the OMI a fee in respect of the engagement procedure and that Article L.341-7 of the Code imposes an administrative fine on those employers who employ workers without the required work permits, in breach of the OMI's monopoly on employment.

Those charges — especially the fee provided for by Article R.341-25 — might be warranted if the OMI *actually* provided the undertaking with the service of recruiting foreign workers, over which it holds a statutory monopoly. That however is not the case where businesses — like Vander Elst — merely post their own workers to France temporarily: since those undertakings do not

have to engage any workers on the French labour market, *they are not recipients of a service from the OMI and are not in breach of any monopoly.*

'A Member State's power to control the employment of nationals from a non-member country may not be used to impose a discriminatory burden on an undertaking from another Member State enjoying the freedom under Articles 59 and 60 of the Treaty to provide services.' [9]

19. The Governments which have intervened in these proceedings have nevertheless argued that the express findings of the Court in the *Rush Portuguesa* judgment cannot be extended to this case. In *Rush Portuguesa* the workers posted to France were in fact Portuguese and, although at the material time under a specific transitional system Portuguese workers did not yet enjoy all the rights conferred on Community workers, the mere fact that they were nationals of a Member State could justify broader protection of the right of the business by which they were employed freely to provide services.

That objection would appear to be wholly invalid. To begin with, from a general point of view, it should be noted that in the case in point — as in the *Rush Portuguesa* case — the issue was not the *workers' own* rights but the rights of the *undertakings* employing them. The Court has already laid down the general principle that:

From this point of view, therefore, any difference in the legal status of the workers posted — allegedly arising from the fact that one case concerns workers from a Member State under a transitional scheme and the other concerns workers from non-member countries — seems to be totally irrelevant. What matters is to ascertain whether, and if so how far, the application of the national rules relating to (the taking up of) employment leads to unjustified restrictions on the rights of Community *undertakings* guaranteed by Article 59 et seq. of the Treaty.

20. Having said that, let me now add for the sake of completeness that examination of the French legislation at issue reveals no real difference between the situation of the Portuguese workers involved in the *Rush Portuguesa* case and that of the Moroccan workers involved in these proceedings: with regard to the application of the contested legislation — in particular, the requirement that foreign workers should be recruited through the OMI and the prohibition on engaging staff without work permits — each group is in fact in the same position.

9 — See the judgment in Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* v *Établissement d'Assurance contre la Vieillesse et l'Invalidité* [1982] ECR 223.

The Portuguese workers were subject to a transitional scheme which deprived them of the rights given to other Community workers by Articles 1 to 6 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; [10] in particular, those workers did not receive equal treatment as regards *the right to take up employment* (as provided for by Article 1 of the regulation) and could therefore be subjected to 'special recruitment procedures for foreign nationals' (in accordance with Article 3(2)(a) of the regulation); on the other hand, those workers enjoyed full equality of treatment *in the pursuit of employment* (specifically, conditions relating to pay, dismissal, re-employment, social and tax advantages and so on) as provided for by Article 7 et seq. of the regulation. Precisely because they did not fall within the rules set out in Articles 1 to 6 of the regulation, the workers in question were not able to claim any *original* right not to have applied to them the provisions of the French Labour Code concerning the obligation to recruit through the OMI and to obtain work permits; however, they were able to claim a *derived* right in those terms, provided that they were employed by an undertaking established in another Member State, as was the case in the circumstances before the Court.

Similarly, the Moroccan workers employed by Vander Elst have no right to equal treatment vis-à-vis Community nationals, as far as the conditions and procedures relating to *taking up employment* are concerned. They are entitled to equal treatment only as far as *conditions of work or remuneration and social security arrangements* are concerned, as provided for in Articles 40 and 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco. [11]

From the point of view of the application of the French legislation on the right of aliens to take up employment, the status of the Moroccans employed by Vander Elst would therefore appear to be just the same as that of the Portuguese nationals employed by Rush Portuguesa.

In both cases it was perfectly compatible with the status of such workers for the French authorities to control and limit their access to employment; in both cases, however, the application of the national legislation was capable of conflicting with Article 59 et seq. of the Treaty, in so far as those workers were temporarily posted to France to provide services by undertakings established in other Member States.

10 — OJ, English Special Edition 1968 (II), p. 475.

11 — Agreement signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1).

The reasons relied on to justify the contested legislation

21. The Governments which have intervened in these proceedings have also claimed that the application of the French rules at issue is in any event necessary in order to safeguard certain requirements in the public interest connected in particular with controlling the movements of nationals of non-member countries, the proper operation of the labour market, the protection of workers and competition between undertakings.

Controlling the movements of nationals of non-member countries

22. Here it should be noted that the contested French legislation requiring the OMI to act as intermediary and work permits to be obtained (as well as the relevant fee to be paid and penalties for non-compliance with those requirements to be imposed) falls within the scope of the rules governing the conditions for taking up employment and does not seem to be aimed at controlling the entry into France of nationals of non-member countries or their stay there.

23. However, even if we leave that consideration aside, the point is that the Member States do have at their disposal *other* means of controlling on their own territory the movements of nationals of non-member countries. The requirements of public policy and public security — expressly provided for by Articles 48(3) and 56(1) of the Treaty — allow the Member States to subject the movements of those individuals to specific controls and permits, particularly by requiring them to be issued with entry visas and residence permits. Moreover, that was what the French authorities had in view in providing for the compulsory issue of visas for nationals of various non-member countries, including in particular Moroccan nationals (in the case in point, moreover, it has been established that the Moroccan workers employed by Vander Elst had applied for, and obtained from the competent consular authorities, the visas required to enter France and remain there as long as was necessary to carry out the work).

It follows that, from that point of view as well, the contested legislation merely creates a futile *duplication* of controls which are already effectively carried out by other, more appropriate, means.

The need to protect the national labour market

24. Both the French and German Governments have argued that to permit an under-

taking established in one Member State to post its own workers, who are nationals of non-member countries, to other Member States to provide services there could lead to disruption of the host country's labour market.

That objection does not however appear to be valid. As I have already pointed out, and as the Commission has emphasized, an undertaking using its *own* workers to provide services in another Member State *does not in any way gain access* to the host country's labour market. In that situation, workers are engaged in the Member State of establishment in accordance with the procedures there in force and are sent only temporarily to the country where the service is to be provided. Those findings are moreover supported by the judgment in *Rush Portuguesa*, in which the Court, referring to 'a temporary movement of workers who are sent to another Member State to carry out (...) work', pointed out that such workers return 'to their country of origin without at any time gaining access to the labour market of the host Member State.'

25. Still in that connection, it has also been argued that if Article 59 et seq. is seen as granting an undertaking established in one Member State the right to send its own workers temporarily to other Member States in order to provide services there, the authorities of the host country should in any event have the right to ensure that the undertaking concerned is not *abusing* the right conferred on it by the Treaty. In particular, the authorities of the host country should be able to ascertain whether the undertaking is availing itself of that right solely in order to transfer its own employees to another Member State for purposes of employment or to make them available to other businesses.

26. In that regard, it should be borne in mind that in *Rush Portuguesa* the Court acknowledged that checks for such purposes were lawful. The Court stated that:

'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.'

27. In this case, it seems to me that Court can develop further the implications of the statement just quoted, along the following lines:

— For such checks to be *effective*, the national authority must be informed *in advance* when workers from non-member

countries are to be sent temporarily to that State and it may, for that purpose, require the undertaking moving its workers to obtain a document (work permit or other similar document) certifying that the workers in question hold *lawful employment contracts in the country of establishment*;

— checks carried out to that end must be formal in nature and must not lead to a discretionary assessment; this means that, once it has been established that a lawful contract of employment exists, authorization for the workers to move must *automatically* be given;

— such checks must be carried out in good time and on the basis 'of the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment'. [12]

Protection of workers and of competition

28. Finally it has been claimed that the national legislation is necessary to protect workers and prevent competition between undertakings from being distorted since, in the absence of checks carried out by bodies such as the OMI, there would be a risk of undertakings from other Member States making use of workers from non-member countries, allowing their remuneration and other working conditions to be less favourable than those normally guaranteed by the laws of the host country.

29. The first point to note is that that objection has already been considered and rejected by the Court in its judgments in *Seco* and *Rush Portuguesa*. In particular, the Court ruled in *Seco* that:

'It is well established that Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means.'

30. Secondly, I must point out, for the sake of completeness, that the problem should not in any event arise in this particular case, since

12 — See the judgment in *Webb*, cited above.

the Moroccan workers employed by Vander Elst have valid employment contracts governed by Belgian law and, in accordance with Articles 40 and 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, workers of Moroccan nationality are entitled in the Member States to equal treatment vis-à-vis Community workers as regards conditions of work or remuneration, and also as regards social security arrangements. It follows that, irrespective of the possibility of applying national rules of public policy governing the various aspects of the employment relationship to workers sent temporarily to France, the application of the Belgian system should in any event be considered to exclude any substantial risk of workers being exploited or of competition between undertakings being distorted.

Conclusion

31. In the light of those considerations, I propose that the Court give the following answers to the questions referred by the national court:

Where an undertaking established in one Member State provides services in another Member State and to that end sends to the latter State workers who are nationals of non-member countries and are lawfully and habitually employed by that undertaking, Article 59 et seq. of the Treaty precludes the application of national legislation such as the French legislation described above which makes the employment of those workers subject to:

— the requirement to apply to a national body entrusted by law with a monopoly on the recruitment of workers from non-member countries for the issue of work permits;

— the requirement to pay to that body a fee for the service rendered;

and which imposes an administrative fine where such workers are employed even though they have not obtained the said work permits.