OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 25 June 1998 *

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* Original language: Spanish.

1. The Tribunal Correctionnel (Criminal Court), Huy (Belgium), seeks an interpretation of Articles 59 and 60 of the EC Treaty in order to decide two cases pending before it which have arisen from charges brought by the Inspection des Lois Sociales (Social Law Inspectorate) in Belgium accusing two French undertakings of having failed to comply with certain provisions of Belgian labour legislation. The Tribunal seeks to determine in particular whether Community law precludes a Member State from requiring an undertaking established in another Member State which posts workers to the territory of the first State in order to provide services there to comply with provisions of national law relating to the keeping and storage of documents concerning workers and the observance of minimum wage requirements, which provisions are intended to protect workers and to combat labour fraud, where that undertaking is already subject, in respect of the same workers and for the same period of employment, to requirements which are identical or similar to obligations in the Member State where it is established.

I — The facts in the main proceedings

2. It appears from the documents before the Court that, in 1990, Sucrerie Tirlemontoise de Wanze (Belgium) entered into a contract with the French company Atelier de Construction Metallique du Bocage (ACMB) for the construction of a 40 000 tonne capacity silo complex for the storage of white crystallised sugar. ACMB subcontracted the assembly of the metallic structure of the complex to various French companies, in particular to Sofrage SARL (hereinafter 'Sofrage') and to BSI, which in turn subcontracted to Arblade et Fils SARL (hereinafter 'Arblade').

Arblade posted 17 workers to Wanze on two occasions, for periods of approximately six months respectively; Sofrage posted nine workers on four occasions, for periods of between five and eight months respectively.

3. In the course of 1993, the Inspection des Lois Sociales in Belgium requested Arblade and Sofrage to produce various documents prescribed by Belgian social legislation, which they both refused to do on the ground that they were under no obligation to do so given that the workers providing their services in Belgium remained subject to French social legislation. The Inspection des Lois Sociales, taking the view that those undertakings were required to comply with the obligations laid down by Belgian law, brought charges against them.

A — *The charge against Mr Arblade and Arblade et Fils SARL*

4. The Ministère Public accuses Jean Claude Arblade and Arblade itself, residing and established respectively in France, of

having committed various offences both in France and elsewhere in the judicial district of Huy from 1 January to 31 May 1992 and from 26 April to 15 October 1993. Mr Arblade is charged, in his capacity as employer, servant or agent, with having:

— failed to keep the documents required by social legislation (staff register and individual account for each worker), in the absence of a company seat in Belgium, at the Belgian residence of a natural person responsible for keeping those documents in his capacity as the employer's agent or servant;

— failed to pay his workers the minimum remuneration laid down in the Collective Labour Agreement of 28 March 1991 concluded in the context of the Construction Sector Joint Committee regarding working conditions and, in particular, minimum wages for workers employed by a construction undertaking, made binding by the Royal Decree of 22 June 1992;

— failed to keep a special staff register at the place of employment;

— failed to issue to his 17 workers the individual record referred to in Article 4(3) of Royal Decree No 5 of 23 October 1978 concerning the documents required by social legislation, and the Royal Decree of 8 March 1990 concerning the keeping of the individual record;

— failed to appoint an agent or servant responsible for keeping individual accounts in Belgium;

— failed to pay, for 17 workers, contributions in respect of *timbres-fidélité* and *timbres-intempérie* (loyalty stamps and bad-weather stamps) for the first and second quarters of 1992 and the second and third quarters of 1993, amounting, according to the accounts adopted on 3 October 1995, to BEF 343 762.

5. Each of those offences is punishable by a prison sentence of between eight days and three months and by a fine ranging from BEF 50 000 to BEF 100 000.

6. The Ministère Public claims that Arblade should be found liable at civil

law for the fines and costs imposed on the manager.

B — *The charge against Messrs Leloup and Sofrage SARL*

7. The Ministère Public accuses Bernard Leloup and Serge Leloup, in their capacity as director and manager respectively, and Sofrage itself, residing and established respectively in France, of having committed various offences both in Wanze and elsewhere in the judicial district of Huy, from 1 January 1991 until 31 August 1991, from 1 July 1991 until 31 December 1991, from 1 March 1992 until 31 July 1992, and from 1 March 1993 until 31 October 1993. The first and second defendants are charged with having:

— failed to appoint an agent or servant responsible for keeping the individual accounts in Belgium;

— obstructed the inspection conducted under Royal Decree No 5 of 23 October 1978 on the keeping of the documents required by social legislation;

— obstructed the inspection conducted under the Law of 16 November 1972 concerning labour inspections;

— failed to draw up the individual accounts of nine workers for the years 1991, 1992 and 1993;

— failed to keep a special staff register at the place of employment;

— failed to draw up working regulations;

— failed to keep the documents required by social legislation (staff register and individual account for each worker), in the absence of a company seat in Belgium, at the Belgian residence of a natural person who is to keep those documents in his capacity as the employer's agent or servant;

— failed to issue to his nine workers the individual record referred to in Article 4(3) of Royal Decree No 5 of 23 October 1978 concerning social documents, and the Royal Decree of

8 March 1990 concerning the keeping of individual records.

8. Most of those offences are punishable by prison sentences of between eight days and three months and by fines ranging to BEF 50 000 and BEF 100 000.

9. The Ministère Public claims that Sofrage should be found liable at civil law for the fines and costs imposed on the director and the manager.

II — The formulation of the questions referred for a preliminary ruling

10. Before giving judgment in these two cases, the Tribunal Correctionnel, Huy, has ordered the proceedings to be stayed and has referred to the Court of Justice for a preliminary ruling two questions in each case which are partly identical and can be combined as follows:

'(1) Must Articles 59 and 60 of the Treaty be interpreted as meaning that they preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out work in the first State:

1. to keep social documents (staff register and individual accounts) at the Belgian residence of a natural person who is to keep those documents in his capacity as agent or servant of the employer;

2. to pay its workers the minimum remuneration laid down in a collective labour agreement;

3. to keep a special staff register;

4. to issue an individual record for each worker;

5. to appoint an agent or servant responsible for the individual accounts of employees;

6. to pay contributions in respect of *timbres-fidélité* and *timbres-intempérie* (loyalty stamps and bad-weather stamps) for each worker);

7. not to obstruct inspections organised pursuant to the legislation of

that State relating to the keeping of social documents;

8. not to obstruct inspections organised pursuant to the legislation of that State relating to social inspections;

9. to draw up an individual account for each worker;

10. to draw up working regulations;

where that undertaking is already subject to obligations which, while not identical, are at least comparable on account of their aim in respect of the same workers and for the same period of activity in the State where it is established?

(2) Can Articles 59 and 60 render inoperative the first paragraph of Article 3 of the Civil Code on Belgian public order legislation?'

III — The national provisions

A — *The Belgian legislation*

11. The obligations relating to the keeping and storage of social documents are laid down in Royal Decree No 5 of 23 October 1978, which was amended by the Royal Decree of 8 August 1980 and the Royal Decree of 8 March 1990. That legislation is intended to protect the individual rights of workers and imposes on the employer an obligation to keep the following documents at the undertaking's registered office or company seat, if located in Belgium, or, if not, at the Belgian residence of a natural person who is to keep them in his capacity as the employer's agent or servant:

— the main staff register, which must contain information on both the undertaking and its employees. In addition, the employer must have at each place of work a special staff register relating to the workers employed there. In the case of construction undertakings, the special staff register is replaced by an individual document for each employee working at a particular site. The Royal Decree of 8 March 1990 required employers to issue each worker with an individual record. The individual record for 1990 was treated in the same

way as the individual document and workers were required to carry it with them at all times. On 1 January 1995, the individual record was replaced by the social identity card, the purpose of which is intended to make it possible to monitor attendance at construction sites;

— an individual account for each worker, which lists the services which a worker has performed for an employer in the course of a year, by period of paid employment, and the remuneration received. It provides a means of verifying that the rates of pay laid down in the collective agreement have been observed, and that remuneration in respect of public holidays, annual leave and end-of-year bonuses has been paid. At the end of the contract of employment or at the end of the year, the worker must receive a copy of his individual account.

The Inspection des Lois Sociales is responsible for verifying that employers comply with the rules on the keeping and storage of social documents, failure to observe which can lead to the imposition of criminal penalties.

12. Employers are also required to draw up working regulations.

13. As regards wages, the law imposes three obligations on the employer: he must, on pain of criminal penalty, pay his employees the minimum wage laid down in the relevant collective agreement and must, through the payment of contributions, help finance both the loyalty stamp scheme and the scheme involving stamps to supplement workers' wages on days when adverse weather conditions prevent normal working (hereinafter 'bad-weather stamps').

14. In this case, the minimum wage was laid down in the Construction Sector Collective Agreement of 28 March 1991, which was made binding by the Royal Decree of 22 June 1992.

15. The loyalty stamp scheme consists of a payment made to workers in the construction industry once a year to reward them for having worked in that industry for a given period of time. The bad-weather stamp scheme was introduced by construction undertakings to compensate employees for wage losses incurred when they are prevented them from starting work or are laid off because of bad weather. Both schemes are administered by the Fonds de sécurité d'existence des ouvriers de la construction (Construction Workers Subsistence Fund) (hereinafter the 'Fund') and

are financed from the contributions paid by undertakings in the sector.

16. The functioning of the loyalty stamp and bad-weather stamp schemes is governed by the provisions of the collective agreement signed within the context of the Construction Sector Joint Committee on 28 April 1988, which was made binding by the Royal Decree of 15 June 1988. Article 2 of the collective agreement requires all undertakings in that sector to pay to the Fund a contribution amounting to 9.12% of the gross wages payable to each worker, 9% of which is to cover loyalty stamps for workers, and 0.12% to cover running costs. Article 3 states that construction undertakings employing workers who may have to be laid off because of bad weather must also contribute to the Fund 2.1% of the gross wages payable to each worker, 2% of which is to cover bad-weather stamps for workers, and 0.1% to cover running costs.

17. At the end of each financial year, which, in the case of loyalty stamps, runs from 1 July to 30 June and, in the case of bad-weather stamps, from 1 January to 31 December, the Office Patronal d'Organisation et Contrôle des Régimes de Sécurité d'Existence (hereinafter 'OPOC'), the body responsible for collecting contributions to the Fund, sends cards showing that the contributions have been paid. The loyalty stamp cards must be issued to each worker no later than 30 September, while the bad-weather stamp cards must be issued to each worker no later than 29 April of the following financial year. Workers can obtain payment of the exchange value of the stamps either from OPOC or from their trade union organisation. The exchange value of the loyalty stamps is paid on the first working day in November, while the exchange value of the bad-weather stamps is paid on 30 April. The Belgian Government states in its written observations, and confirmed at the hearing, that employees of foreign undertakings receive the exchange value of the loyalty and bad-weather stamps by international money order.

B — *The French legislation*

18. The obligations relating to the keeping and storage of social documents are laid down in the Labour Code and are, for our purposes here, as follows:

— To keep a single staff register which must contain the names and personal details of all employees listed in order of engagement. That register is to be kept at the company seat and at each place of business and must be available

for use by the Inspection du Travail (Labour Inspectorate);

— To issue to each worker a pay statement which must specify the name and address of the employer, the employee's place of work, the body to which contributions are paid, the relevant collective agreement, the employee's name and address, his job title and occupational classification, the hours of work, the gross pay, any bonuses and allowances, and the contributions paid by the employer and the employee;

— To keep a paybook, which must contain the same information as the pay statements so that the Inspection du Travail can verify that the employer complies with his obligations;

— To keep available for use by the Inspection du Travail, at the company seat, a list of all construction sites and other temporary places of business;

— Throughout the period at issue, that is to say between 1991 and 1993, French legislation required employers to issue to workers, upon engaging them, either an individual extract from the single staff register, a certificate of employment, a contract of employment or any other document prescribed by the collective agreement recording the date on which the employee was engaged. The employer was required to keep a copy of those documents until such time as the first pay statement had been issued to the employee and copied into the paybook.

Failure to comply with most of those obligations may lead to the imposition of criminal penalties.

19. Employers are also required to draw up internal company rules, which must include, *inter alia*, provisions on safety and hygiene at work, a code of discipline and employees' rights of defence.

20. As regards remuneration, the freedom to fix pay is subject to certain limits. First, employers have a duty to observe the multi-industry minimum wage, laid down by regulation and known as the 'salaire minimum interprofessionnel de croissance' (SMIC), which is intended to guarantee

purchasing power for the lowest-paid and to enable them to participate in the economic development of the country. Secondly, an employer must observe the industry-wide minimum wage laid down in the collective agreement applicable to his undertaking, which, in the case of Arblade and Sofrage, is that relating to the construction industry.

Furthermore, the Labour Code requires employers in the construction industry to pay their employees compensation when adverse weather conditions prevent normal working. Payment of that compensation, which the employer makes directly, is charged to the 'Caisses des Congés Payés' (Paid Leave Funds), which are financed exclusively from employers' contributions.

The Construction Sector Collective Agreement likewise provides for the payment of a 'holiday' bonus, which is granted on the basis of length of service, ie to employees who, at the end of the year, have completed more than six months' or 1 675 hours' work, depending on their occupational category. Under the provisions of the chapter on paid leave, employees are also entitled to between two and four extra days, depending on their length of service with the undertaking.

IV — The Community provisions

21. Freedom to provide services in the Community is governed by the provisions of Title III, Chapter 3, of the Treaty, which concerns the free movement of persons, services and capital. The relevant provisions for the purposes of these two cases are Articles 59 and 60, which are worded as follows:

'*Article 59*

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...

Article 60

Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for

remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, 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.'

22. Article 66 of the Treaty states that Articles 55 to 58, which appear in the Chapter relating to the right of establishment, are applicable to the freedom to provide services. Articles 56 and 58 in particular are of interest here.

'*Article 56*

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

...'

'*Article 58*

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

23. By 30 June 1993, Member States were required to have incorporated into their domestic legislation Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1] ('Directive 91/533'). In addition to specifying the information which an employer is required to communicate to his employees in writing, it provides for the situation of expatriate employees and sets out the additional information which must be in their possession before their departure.

24. At the end of December 1996, the European Parliament and the Council adopted Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2] ('Directive 96/71'), which governs some of the situations at issue in these two disputes. However, no direct reliance can be placed on the interpretation of its provisions for the purposes of resolving the questions raised by the national court given that it had not even been adopted at the time of the facts in the main proceedings. In any event, Member States have until 16 December 1999 to adapt their legislation.

V — Course of the proceedings before the Court of Justice

A — *Observations*

25. Written observations in these proceedings have been submitted, within the period laid down in Article 20 of the EC Statute of the Court of Justice, by the defendants in both main actions, the Governments of Belgium, Germany, Austria and Finland, and the Commission.

26. At the end of the written procedure, the President of the Court of Justice decided, by order of 6 June 1997, to join the two cases for the purposes of the oral procedure and the judgment.

27. At the hearing, which took place on 19 May 1998, representatives of the defendants in the main actions, the Belgian Government, the Government of the Federal Republic of Germany, the Government

1 — Council Directive 91/533/EEC of 14 October 1991 (OJ L 288, p. 32).

2 — Directive 96/71/EC of the European Parliament and of the Council of 16 November 1996 (OJ 1997 L 18, p. 1).

of the Netherlands, the Finnish Government, the Government of the United Kingdom, and the Commission, appeared before the Court in order to present their observations orally.

28. The defendants examined one by one the various paragraphs of the first question, each of which relates to one of the offences with which they are charged. They contend that the Belgian provisions which the plaintiff seeks to have imposed on them are in general contrary to Articles 59 and 60 of the Treaty, in so far as they deter undertakings established in other Member States from posting their workers to Belgium in order to provide services there. In their submission, none of the restrictions laid down by those provisions is justified. They maintain that the requirements which the Belgian legislation imposes on undertakings, such as, in the case of foreign undertakings, keeping the staff register and workers' individual accounts at the residence of a natural person in Belgium for him to keep in his capacity as the employer's agent or servant, keeping a special staff register at each construction site, appointing an agent or servant to be responsible for keeping workers' individual accounts, drawing up an individual account for each worker, and adopting working regulations, were laid down for administrative purposes. They do not constitute under any circumstances overriding reasons relating to the public interest which could, if applicable, justify the imposition of restrictions on the freedom to provide services. In the event that the Court does not take that view, they contend that the public interest is already safeguarded by similar requirements imposed on them by the legislation of the Member State in which they are established. In the alternative, they contend that the Belgian provisions are inconsistent with the principle of proportionality, since the same results could be achieved by less restrictive measures.

29. As regards the obligation not to obstruct the work of the Inspection des Lois Sociales in seeking to monitor compliance with the Belgian provisions on keeping and storing the documents required by social legislation, the defendant undertakings contend that, since those provisions are contrary to Article 59 of the Treaty, the inspections conducted to verify compliance with them are also contrary to that article.

30. It is their contention that the obligation to pay workers the Belgian minimum wage deters undertakings established in Member States which do not have a compulsory minimum wage or in which the amount of the minimum wage is lower than that applicable in Belgium from moving to Belgium since they will be subject to higher costs than they would if they did not move; furthermore, in practice, it discriminates in favour of undertakings established in Belgium, which do not have to pay their workers transfer allowances in order to provide the same services. That restriction on the freedom to provide services, they

argue, is not intended primarily to protect workers, who are already adequately protected in France, but pursues a purely economic objective, as is clear from the reports of the inspections which gave rise to the charges at issue, which refer to the 'unlawful attitude of a foreign employer who threatens the opportunities for Belgian employers in the same industry to compete in that industry'.

31. As for the payment of contributions to finance loyalty and bad-weather stamps, the defendant undertakings consider that, although it constitutes a restriction on the freedom to provide services, it is a restriction necessitated by the public interest associated with the social protection of workers in the construction sector. They add, however, that such workers already enjoy a comparable level of protection by virtue of the employer's contributions paid in the Member State of establishment, which cover the same risks and serve a very similar, if not identical, purpose.

As regards the requirement that each worker should have an individual record, they submit that that record, both the provisional and validated forms of which are issued by the Fund, serves only to verify that the employer is paying the aforementioned contributions, since the provisional record, which must be completed by the employer on a worker's first day of employment in Belgium, is validated only if he fulfils his obligations vis-à-vis the Fund, which are to join it, to pay to it a sum of BEF 250 per worker, and to make the relevant contributions to it. They go on to say that the employer is likewise required to submit a copy of Form E 101 to show that he is still paying social security contributions in the Member State where he is established, which exempts him from having to pay them in Belgium also.

32. The Belgian Government submits that, in so far as Directive 96/71 crystallises the state of Community law in relation to the posting of workers in the framework of the provision of services, those of its provisions which do not need to be transposed by the Member States must be capable of being relied upon straight away for the purposes of interpreting the rights and obligations arising from Articles 59 and 60 of the Treaty. Accordingly, after stating that all the employer's obligations listed in the first question derive from public order legislation the infringement of which is punishable under criminal law, it examines those obligations in the light of the provisions of Directive 96/71.

33. In its submission, the obligations in question fall into three groups: those relating to documents concerning workers; those relating to the minimum wage; and

the obligation to adopt working regulations. With regard to the first group, it observes that, as Community law now stands, the practical problems which make it difficult for a host Member State to accept the documents issued by a Member State of origin as proof of compliance with the former State's social legislation are insurmountable. First of all, the labour inspectorate's jurisdiction in respect of infringements of social legislation is territorial. Secondly, it is practically impossible for the authorities of the host Member State to have accurate knowledge of the nature and effects of the working conditions laid down in the legislation of the State of origin, given that there is as yet no organised system of cooperation or exchange of information between States. In those circumstances, compliance with the host State's legislation relating to documents concerning workers, which is also the State whose conditions of work and employment are applicable to the employer, is the only means of ensuring proper verification.

34. With regard to the obligations in the second group, which include the obligation to pay the minimum wage, the obligation to pay contributions in respect of loyalty stamps, and the obligation to help finance bad-weather stamps, the Belgian Government says that it is for the provider of services to furnish proof that the workers in question already enjoy the same rights for the same period under the regimes of the Member State of origin as they do under the legislation of the host Member State. It must also be verified that the regimes in both States cover the same risks and have the same purpose, and that the social protection of workers is guaranteed in the same manner and to the same degree. It states finally that the purpose of the regimes must be assessed with regard not only to their nature, but also to the importance of the rights which those provisions grant to workers.

35. The obligation to draw up working regulations, which is intended to ensure that workers are informed of their rights and obligations and to enable the Inspection des Lois Sociales to monitor working conditions, cannot be deemed to be discharged by the production of working regulations adopted abroad, since these will not be capable of providing workers posted for the purpose of providing services with information regarding the working conditions in force in the host Member State, such as the procedure to be followed in the event of an accident at work, or the work schedule, in particular local public holidays or leave in lieu of public holidays falling on a Sunday.

36. The German Government considers that Articles 59 and 60 of the Treaty do not preclude a Member State from requiring an undertaking established in another Member State which posts workers to the territory of the first State in order to carry out work there to pay them the minimum remuneration laid down in the relevant collective labour agreement. With regard to the remaining obligations laid down by the Belgian legislation, the German Govern-

ment takes the view that the duty to ensure observance of the social legislation in force in the State where an undertaking is established allows the authorities of that State to monitor compliance with the working conditions applicable under its legislation, but it is not sufficient to enable the authorities of another State to which that undertaking posts workers to monitor compliance with the working conditions applicable in its territory.

37. The Finnish Government states that in Finland, as in Belgium, conditions relating to pay laid down in collective agreements are also applicable to work performed in Finland by foreign workers, irrespective of the system of law which the parties to the contract have chosen. At the request of the Labour Inspectorate, an employer who has posted workers to Finland is required to supply information regarding the working conditions applicable to them. In its submission, there is no reason why the obligation for the employer to pay the minimum wage in force in the Member State in which the service is provided, or any other equivalent benefit which the worker receives directly from the employer, should constitute a twofold burden for the employer; in any event, it contends, the provisions enacted by a Member State in order to guarantee a minimum level of protection in respect of working conditions, in particular minimum pay conditions, are compulsory at national level and are not contrary to Community law, irrespective of the employer's State of origin. With regard to the administrative obligations, it contends that they can be imposed on an undertaking from another Member State in so far as they are necessary in order to ensure compliance with mandatory provisions of national labour law, even if this means that the employer is subject, in the Member State of origin, to comparable obligations serving the same purpose.

38. The Austrian Government considers that Articles 59 and 60 of the Treaty do not preclude a host Member State from requiring a foreign employer to comply with provisions laid down by law or agreement relating to the payment of the minimum wage to workers posted to its territory; that employers' contributions in respect of loyalty and bad-weather stamps form part of the minimum wage in so far as they are a form of remuneration for work performed; and that, if the Court of Justice has recognised that Member States are entitled to restrict the freedom to provide services for overriding reasons relating to the public interest, they must by implication be entitled to monitor compliance with measures to protect that public interest.

39. According to the Commission a worker who has been posted by his employer to the territory of another Member State in order

to carry out work there must receive the minimum wage established in that State for workers in the same sector, without losing his entitlement to the more favourable conditions which he enjoyed in the Member State of origin. As regards the obligation to pay contributions in respect of loyalty and bad-weather stamps, it states that undertakings which post workers to Belgium must be exempt from paying contributions in that State only if they are already liable in their State of origin for contributions, in respect of the same workers and the same risks, to schemes which, in practice, serve the same purpose. It will be for the national court to compare the wage which an employee would earn if he worked in the country of origin with that which he would receive under the applicable Belgian provisions, and to compare the contributions payable in both States. In the Commission's submission, the host Member State has competence to monitor the application of social law, but that it must in any event observe the principle of proportionality. More specifically, the requirement to issue an individual record to each worker, and to keep the remaining social documents, should not increase the administrative burden or create additional financial costs for the employer. As regards the requirement to draw up working regulations, the Commission states that the information which they must contain under the Belgian rules is considerably more detailed than that required of the equivalent regulations in France. There, however, such information is largely contained in other documents such as the employee's pay statement and the staff register, which must be made available for use by the Belgian authorities. Finally, the Commission maintains that undertakings which post workers to another Member State must submit to the measures taken by the public authorities to monitor compliance with the legislation relating to working conditions.

40. At the end of the period laid down in Article 20 of the EC Statute of the Court of Justice for submitting observations, the Court decided to put certain questions to the parties which did so. By the first, the Court asked them all whether performance of the obligations laid down by the Belgian legislation — namely to appoint an agent or representative responsible for keeping individual accounts in Belgium, and to keep the staff register and the individual accounts at the Belgian residence of a natural person — could amount to the setting up of an agency, branch or subsidiary, within the meaning of Article 52 of the Treaty. The second, which was addressed to the Member States and the Commission, referred to the same obligations and asked whether they constitute overt discrimination on grounds of nationality. The third was addressed to the Belgian Government and asked it to specify the legislation or practice by virtue of which the loyalty and

bad-weather stamps form part of the minimum wage.

B — *The answers to the first written question put by the Court of Justice*

41. The defendants in the main proceedings state in reply that the term 'establishment' within the meaning of Article 52 of the Treaty is not confined to the setting up of a branch, subsidiary or agency, but includes other, less defined forms of establishment, provided there is a degree of permanence. They take the view that the characteristic features of an establishment are present in this case — namely: there are physical premises, i.e. the place where the documents concerning workers is kept; there is a degree of permanence, in so far as the obligation for the employer to keep such documents for a period of five years extends to the agent or representative resident in Belgium; and there is dependence on a principal place of business situated in another Member State. They go on to say that the representative in Belgium of an employer established in another Member State must of necessity be vested with such legal and administrative powers as to engage the liability of that employer in the event of failure to fulfil the obligations laid down by Belgian law.

42. The Belgian Government, on the other hand, contends that the obligations in question do not give rise to the setting up of an establishment within the meaning of Article 52 of the Treaty and that, in practice, an employer who does not have a registered office in Belgium normally goes to a manpower agency, a trust company or an accountancy firm and gives it authority to keep the staff register and documents relating to employees. The function of the agent in this capacity is confined to physically storing the documents and acting as a depositary; it has no power to represent the employer vis-à-vis third parties. The conditions necessary for the setting up of an establishment within the meaning of Article 52, namely permanence and the capacity to represent, are not therefore fulfilled.

At the hearing, the representative of the Belgian Government went on to say that, while the work is in progress, the staff register and workers' individual accounts can be kept on site, the site manager assuming responsibility for making them available to the Inspection des Lois Sociales. Once the work is completed, however, those documents must be kept for five years at the Belgian residence of a natural person. It is therefore necessary to appoint an agent or servant to be responsible for keeping them.

43. The German Government notes that the Belgian legislation requires an undertaking to maintain a presence in Belgium. It must be determined in this case whether that requirement is compatible with Arti-

cle 59 of the Treaty, in the light of the principle of proportionality.

44. The Finnish Government states that the answer to this question will depend on whether the Belgian legislation requires the staff register and workers' individual accounts to be kept in Belgium or whether they can simply be made available to the Inspection des Lois Sociales as and when it so requests, and also on how long those documents have to be kept, details which are not contained in the order for reference from the national court.

45. The Austrian Government maintains that an agent or servant can be charged with keeping the staff register and individual accounts simply by means of a contract. While an establishment may need to be set up, depending on the circumstances, this is not necessarily the case. It will, in any event, depend on the duration of the activity engaged in by the provider of services in the host Member State, and on the overall conduct of the employer, that is to say whether, for example, he has business premises for a sufficient period of time at the place where the services are provided, and whether he joins the professional organisations of the host State.

46. The Commission's answer is that, since the agent which must be appointed by an undertaking without a registered office in Belgium is not empowered to enter into contracts on the undertaking's behalf, its role being confined to storing certain documents relating to employees, the requirement to appoint such an agent does not amount to an obligation to set up an establishment.

47. At the hearing, the representative of the United Kingdom argued that the obligation imposed on foreign undertakings to appoint a person in Belgium to be responsible for keeping certain documents at his residence does not mean that those undertakings are pursuing an economic activity through that person, and cannot therefore be construed as an obligation to set up a branch or an agency within the meaning of Article 52 of the Treaty.

C — *The answers to the second written question put by the Court of Justice*

48. The Governments of Belgium, Germany, Finland, Austria and the United Kingdom, and the Commission, consider that the obligation to keep the staff register and workers' individual accounts, in so far as it is applicable without distinction to Belgian undertakings and to foreign under-

takings which provide services in Belgium, does not constitute direct discrimination on grounds of nationality.

D — *The answer to the third written question put by the Court of Justice*

49. In reply to this question, the Belgian Government merely points out that both the loyalty stamp and bad-weather stamp schemes were set up in 1988 under a collective agreement made binding by Royal Decree of 15 June 1988; that the loyalty stamps, which amount to 9% of gross remuneration, amount in fact to an end-of-year bonus for construction sector workers; that the bad-weather stamps, which amount to 2% of the gross wages payable to each worker, represent a reimbursement by the Fund of 50% of the wages which an employer has not duly paid to an employee for days on which the employee attended work but was unable to start work or was laid off because of bad weather. It accordingly concludes that both loyalty stamps and bad-weather stamps undoubtedly constitute remuneration to which the worker is entitled by virtue of the employment relationship, and form part of the annual income payable to construction workers pursuant to provisions of public policy, while the contributions intended to finance both schemes are a method of paying part of the remuneration which employers in the construction sector must pay their workers.

VI — Examination of the questions referred

A — *Preliminary observations*

50. By the first question in both cases, the Tribunal Correctionnel, Huy, wishes to ascertain whether the obligations which Belgian legislation imposes on construction undertakings which post their workers to Belgium in order to carry out particular works there, constitute restrictions which are contrary to the principle of freedom to provide services where the undertakings in question are established in another Member State in which they are already subject to obligations serving a similar purpose in respect of the same workers and for the same periods of employment.

51. I do not think there is any doubt at this stage that the obligations which the Belgian authorities wish to impose on the defendant undertakings do, in practice, constitute restrictions on the freedom to provide services in so far as they are liable to add to the expenditure and administrative burden of undertakings established in another Member State, thereby making it more difficult and less appealing for them to

move to Belgium in order to carry out construction work there. The issue will be to determine whether, in the light of the Court's case-law, those restrictions are justified by an overriding reason relating to the public interest, or whether they are contrary to Community law.

52. In order to answer the questions referred, I shall first outline the Court's statement of the law as it applies to restrictions on the freedom to provide services. I shall then address the first question, analysing the ten obligations listed by the national court in three groups: obligations requiring undertakings to pay posted workers the minimum wage in force in the host Member State and to pay, for each worker, contributions in respect of loyalty stamps and bad-weather stamps (Nos 2 and 6); obligations intended to make it easier for the authorities of the host Member State to monitor compliance with its social legislation (Nos 1, 3, 4, 5, 9 and 10); and obligations requiring undertakings to cooperate with the Inspection des Lois Sociales (Nos 7 and 8). Finally, I shall examine the second question.

B — *The Court's statement of the law as it applies to restrictions on the freedom to provide services within the Community*

53. The first paragraph of Article 59 of the Treaty imposes on Member States the obligation to abolish restrictions on freedom to provide services within the Community during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The third paragraph of Article 60 of the Treaty entitles a person providing a service to pursue his activity temporarily in another Member State under the same conditions as are imposed by that State on its own nationals. Both those provisions have direct effect and may be relied on before national courts from the end of the transitional period. [3]

54. As construed by the Court's case-law, Articles 48 and 59 of the Treaty are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community and preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. [4]

55. The obligation to abolish restrictions on the freedom to provide services was interpreted by the Court of Justice, first, as the prohibition of all discrimination against the person providing the service by reason of his nationality or the fact that he is

3 — Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraphs 24 and 27.

4 — Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897, paragraph 13; and Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraph 28.

established in a Member State other than that in which the service is to be provided. [5] As the Court has consistently held, the principle of equal treatment, of which Article 59 of the Treaty embodies a specific instance, prohibits not only overt discrimination by reason 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]

56. The Court of Justice maintains in this regard that national rules which are not applicable to services without distinction as regards their origin and which are therefore discriminatory are compatible with Community law only if they can be brought within the scope of an express derogation. [7] Article 66 of the Treaty states that Articles 55 to 58, which appear in the Chapter devoted to the right of establishment, are to apply to the freedom to provide services. Article 56 identifies as exceptions to both freedoms measures contained in national provisions providing for special treatment for foreign nationals on grounds of public policy, public security or public health. Economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty. [8]

57. The Court has also held that, in the absence of harmonisation of the rules applicable to services, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation. [9] There is settled case-law in this respect to the effect that Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services. [10] The Court later held that, in the perspective of a single market and in order to permit the realisation of its objectives, the freedom to provide services precludes the application of any national legislation which has the effect of making the provision of services between Member States

5 — *Van Binsbergen*, cited at footnote 3 above, paragraph 25. See also Joined Cases 110/78 and 111/78 *Ministère Public and ASBL* v *van Wesemael* [1979] ECR 35, paragraph 27; and Case 279/80 *Webb* [1981] ECR 3305, paragraph 14.

6 — Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 8; and Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

7 — Case 352/85 *Bond van Adverteerders* v *Netherlands State and Others* [1988] ECR 2085, paragraph 32; and Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 24.

8 — *Bond van Adverteerders* v *Netherlands State and Others*, cited at footnote 7 above, paragraph 34.

9 — Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 12; and Joined Cases C-34/95, C-35/95 and C-36/95 *KO* v *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 51.

10 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; and Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091, paragraph 16.

more difficult than the provision of services purely within one Member State. [11]

58. In this connection, the Court has held that the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which:

(1) are justified by overriding reasons relating to the public interest and are applied to all persons or undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established;

(2) are necessary to ensure that the objective which they pursue is attained; and

(3) do not go beyond what is necessary in order to attain that objective. [12]

59. Over the years, the Court has taken a case-by-case approach to overriding reasons relating to the public interest which are capable of justifying obstacles to the freedom to provide services laid down by national law. For example, the Court has recognised the following as constituting such reasons (this list is not intended to be exhaustive): protection of intellectual property; [13] the need to protect the persons for whom a service is provided in so far as that need justifies the application to the provider of services of the professional rules of conduct in force in the host Member State; [14] social protection of workers; [15] consumer protection; [16] fair trading; [17] a cultural policy aimed at maintaining a national radio and television system which secures pluralism; [18] protecting the sound administration of justice; [19] safe-

11 — Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17.

12 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; and *Ramrath*, cited at footnote 4 above, paragraphs 29 to 31.

13 — Case 62/79 *Coditel* [1980] ECR 881, paragraph 18.

14 — *Ministère Public and ASBL* v *van Wesemael*, cited at footnote 5 above, paragraph 28.

15 — *Webb*, cited at footnote 5 above, paragraph 19; Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18; Case C-43/93 *Vander Elst* v *Office des Migrations Internationales* [1994] ECR I-3803, paragraph 23; and Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 16.

16 — Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 20; *Commission* v *Germany*, cited at footnote 12 above, paragraph 30; Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 20; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 21; and Case C-222/95 *Parodi* v *Banque H. Albert de Bary* [1997] ECR I-3899, paragraph 32.

17 — *KO* v *De Agostini and TV-Shop*, cited at footnote 9 above, paragraph 53.

18 — *Collectieve Antennevoorziening Gouda*, cited at footnote 9 above, paragraphs 23 and 25; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 30; and Case C-148/91 *Vereniging Veronica* v *Commissariaat voor de Media* [1993] ECR I-487, paragraph 15.

19 — Case C-3/95 *Reisebüro Broede* v *Sandker* [1996] ECR I-6511, paragraph 36.

guarding the cohesion of the tax system;[20] maintaining the good reputation of the national financial sector;[21] conservation of the national historical and artistic heritage;[22] appreciation of the places and things of archaeological, historical and artistic interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country;[23] and the risk of serious damage to the financial equilibrium of the social security system.[24]

60. The Court has likewise held that, while the principal aim of Articles 59 and 60 of the Treaty is to enable the provider of the service to pursue his activities in the Member State where the service is given, without suffering discrimination in favour of the nationals of that State, it does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.[25] It has also made clear that conditions imposed by the host Member State may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established, and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment.[26]

C — *The obligation to pay posted workers the minimum wage in force in the host Member State and to pay, for each worker, contributions in respect of loyalty stamps and bad-weather stamps (obligations Nos 2 and 6 in the first question)*

61. This is the first time that a national court has referred to the Court of Justice a question relating to the effects which the obligation to pay the minimum wage in force in the host Member State has on the freedom to provide services of undertakings established in another Member State which post their workers to the first State. Strangely enough, however, there is in this respect settled case-law to the effect 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

20 — Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraph 28; Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21; and Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, paragraph 16.

21 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 44.

22 — *Commission* v *Italy*, cited at footnote 12 above, paragraph 20.

23 — Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 17; and *Commission* v *Greece*, cited at footnote 16 above, paragraph 21.

24 — Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41.

25 — *Webb*, cited at footnote 5 above, paragraph 16; and Case C-294/89 *Commission* v *France* [1991] ECR I-3591, paragraph 26.

26 — *Commission* v *Germany*, cited at footnote 15 above, paragraph 14.

minimum wages, 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. The Court first made these findings in *Seco*,[27] and has reiterated them on three occasions.

62. In the case which gave rise to the judgement in *Seco*, the plaintiff undertakings were established in France and had posted workers who were nationals of non-member countries to Luxembourg in order to carry out construction and maintenance work on the railway network there. While the work was in progress, the posted workers were compulsorily affiliated to French social security. The disputes pending before the Cour de Cassation, Luxembourg, the referring court, concerned the obligation under Luxembourg law for undertakings temporarily carrying out work in Luxembourg and using workers of its own who are nationals of non-member countries to pay the employer's share of contributions to old-age and invalidity insurance in respect of those workers. Other factors were also present in that case: the employers were still liable under French legislation for similar contributions in respect of the same workers and for the same periods of employment; and the contributions for which they were liable in Luxembourg did not entitle the workers to any social security benefits.

The Luxembourg social security institution contended that the obligation imposed on employers should be deemed justified in so far as it was intended to offset the economic advantages which the employer might have gained by not complying with the national legislation on minimum wages. It maintained that Luxembourg was a country with high wages and that, despite the fact that, under Luxembourg law, the minimum wage was a matter of public policy and applied to everyone in paid employment in Luxembourg, it was in practice difficult for the authorities of the host State to enforce those rules in relation to undertakings which post their staff there for relatively short periods. In order therefore to prevent a distortion of competition to the detriment of providers of the same services established in Luxembourg, providers of services established in other Member States were not to be exempt from the aforementioned contributions.

63. In its reply, the Court held that Community law precludes a Member State from requiring an employer who is in the same situation as Seco, as described above (that is to say where the employer is already

27 — Cited at footnote 15 above, paragraph 14.

liable for contributions in respect of the same workers and for the same periods of employment under the legislation of the Member State in which he is established, and where the contributions paid in the host Member State do not entitle those workers to any social security benefits), to pay the employer's share of social security contributions in respect of the workers whom it posts to that State, and that such a requirement could not be justified even if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed. [28]

64. The judgment in *Seco* therefore makes it quite clear 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, and that it likewise does not prohibit Member States from enforcing those rules by appropriate means. In the light of that statement of the law, it might seem that answering the questions referred by the Tribunal Correctionnel, Huy, ought not to present major problems. That is not the case, however, as I shall have occasion to demonstrate below, after I have examined the other three judgments directly related to the case now under consideration.

65. The Court reiterated that statement of the law in *Rush Portuguesa*. [29] The dispute, in the course of which the Tribunal Administratif, Versailles, referred several questions for a preliminary ruling, arose from reports made by the French Inspection du Travail (Labour Inspectorate), which, while carrying out verifications on the sites at which Rush was working in France, noted a number of infringements of French labour legislation. Those infringements lay in the fact that the workers did not have the work permits prescribed for nationals of non-member countries employed in France, and had not been recruited through the Office national d'immigration, on which the law confers the exclusive right to recruit nationals of non-member countries. Rush, which is established in Portugal, had posted its own workers to France; those workers were Portuguese nationals who, at the material time, were covered by the transitional measures agreed between the Community and Portugal in the Act of Accession [30] relating to the free movement of

28 — *Ibidem*, paragraph 15.

29 — Cited at footnote 15 above, paragraph 18.

30 — Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

workers and, more specifically, conditions for taking up employment.

66. The legislation which Rush was accused of infringing related to matters of public policy and, as such, was applicable to all persons within the national territory. The Court of Justice none the less interpreted Article 60 of the Treaty, which provides that the person providing a service may temporarily pursue his activity in another Member State under the same conditions as are imposed by that State on its own nationals, as meaning that the imposition on a provider of services from another Member State of conditions which restrict the movement of his staff, such as the requirement to engage staff *in situ* or the obligation for employees to be in possession of a work permit, 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. [31] Again, in response to the concern expressed by the French Government, which had contended that the workers were receiving very low pay, the Court reiterated that Community law does not preclude Member States from extending their legislation relating to minimum wages to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.

67. The question whether or not workers who are not entitled to freedom of movement (in this instance, nationals of non-member countries) could work in France in the context of the provision of services by a Belgian undertaking specialising in demolition work which had posted them there, arose once again in *Vander Elst.* [32] The Tribunal Administratif, Châlons-sur-Marne, referred to the Court for a preliminary ruling two questions by which it sought to ascertain whether Community law precludes a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority, and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.

68. The Court's reply was of course in the affirmative and, although the judgment does not add anything new to the earlier case-law on the subject, it contains two clarifications which are of special relevance to this case.

31 — *Rush Portuguesa*, cited at footnote 15 above, paragraph 12.

32 — Cited at footnote 15 above, paragraph 23.

First, the Court infers from the judgment in *Seco* that legislation of a Member State which requires undertakings established in another Member State to pay fees in order to be able to employ in its own territory workers in respect of whom they are already liable, for the same periods of employment, to pay similar fees in the State in which they are established entails an additional financial burden which is more onerous for those undertakings than for providers of services within the national territory. [33]

Secondly, the Court once more refuted the argument that the French legislation was necessary in order to prevent undertakings from other Member States using workers from non-member countries, making their remuneration and other working conditions less favourable than those normally guaranteed by the laws of the host State. It reiterated that any Member State may extend its legislation on the minimum wage to any person who is employed within its territory, no matter in which country the employer is established, and emphasised that the workers employed by Vander Elst who were nationals of non-member countries possessed valid employment contracts governed by Belgian law.

69. The latest judgment in this series to contain the same statement of the law is that in *Guiot*, [34] delivered by the Court in 1996 in reply to a question referred for a preliminary ruling by the Tribunal Correctionnel, Arlon (Belgium). That judgment is interesting in two respects. First, because in it the Court reiterates its settled case-law to the effect that Community law does not preclude Member States from extending 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, nor from enforcing those rules by appropriate means. Secondly, because the case concerned the restrictive effects on the freedom to provide services resulting from the obligation under Belgian law for employers established in another Member State and temporarily carrying out works in Belgium to pay, for each worker, contributions in respect of loyalty stamps and bad-weather stamps.

70. In that judgment, the Court held that national legislation which requires an

33 — *Ibidem*, paragraph 15.

34 — Cited at footnote 15 above, paragraph 12.

employer, as a person providing a service within the meaning of the Treaty, to pay employer's contributions in the host Member State in addition to the contributions already paid by him in the Member State where he is established places an additional financial burden on him, so that he is not, as far as competition is concerned, on an equal footing with employers established in the host State. Accordingly, the Court continued, such legislation, even if it applies without distinction to national providers of services and to those of other Member States, is liable to restrict the freedom to provide services within the meaning of the Treaty. [35]

The Court went on to acknowledge that, while it is true that the public interest relating to the social protection of workers in the construction industry may, because of circumstances specific to that sector, constitute an overriding requirement justifying such a restriction on the freedom to provide services, this is not the case where the workers in question enjoy the same protection, or essentially similar protection, by virtue of employer's contributions already paid by the employer in the Member State of establishment. It concluded that it was for the national court to determine whether the requirements imposed by the legislation of the State of establishment are similar, or in any event comparable, to those imposed by the legislation of the State where the service is provided. [36]

The Court also pointed out that, since the social protection of workers is the only consideration of public interest capable of justifying restrictions on the freedom to provide services such as those at issue in that case, any technical differences in the operation of the two schemes could not justify such a restriction. Accordingly, Articles 59 and 60 preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned State to pay employer's contributions in respect of loyalty stamps and bad-weather stamps with respect to workers assigned to carry out those works, where that undertaking is already liable for similar contributions, with respect to the same workers and for the same periods of work, in the State where it is established. [37]

71. I can say here and now that, in my view, there is no reason for any change in that case-law. The issue in this case will be to decide, given that the Belgian rules imposing restrictions on the freedom to provide services may be justified by overriding reasons relating to the public interest, such as the social protection of workers, and apply to any person or undertaking pursuing an activity in the construction sector, if that interest is already safeguarded

35 — *Ibidem*, paragraph 14.

36 — *Ibidem*, paragraph 17.

37 — *Ibidem*, paragraphs 21 and 22.

by the rules to which the undertakings are subject in the Member State in which they are established, if those rules are necessary in order to ensure that the objective which they pursue is attained, and if they go beyond what is necessary in order to attain that objective.

To that end, it is essential, in order to clarify the terms which the Court has used, to look closely at the conditions under which a Member State may extend its legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person employed within its territory.

72. I shall proceed from the premise that the term 'wage' is to be understood as meaning all the economic advantages received by workers, whether in cash or in kind, for the performance of services of work as an employee, whether in respect of actual work, however remunerated, or of rest periods reckonable as work. It excludes amounts received by a worker by way of compensation for expenses incurred in connection with the performance of his work.

73. It follows from the case-law of the Court which I have examined that, for the purposes of this case, two types of minimum wage can be identified.

First of all, some Member States have a multi-industry minimum wage, consisting of an amount laid down by law or regulation on the basis of factors such as the consumer price index, average national productivity and the general economic climate. It is periodically revised, serves a political/social function, and is intended to guarantee that no worker will under any circumstances receive less than the prescribed rate of pay for a full day's work, irrespective of the sector in which he is employed.

Secondly, there are industry-wide minimum wages, laid down for each industry by collective agreements which generally introduce pay rises on the basis of the multi-industry minimum wage, often applicable throughout the national territory, and are binding on all undertakings within the industry. The industry-wide minimum wage, arrived at through collective bargaining between employers and workers, usually has a complex structure, for which there are frequently historical reasons, but which is explained above all by the power relationships prevailing during the negotiations. A wage therefore usually includes basic pay, which is calculated exclusively on the basis of working time, and wage supplements, which may relate to: the employee personally, e.g.

length of service; the job, e.g. night work and work in highly toxic, physically demanding or dangerous conditions; the quality or quantity of work, e.g. bonuses, incentives, bonuses for exceptional duties or attendance, and overtime; special bonuses such as Christmas pay, end-of-year premiums, profit-sharing, holiday supplements, etc.; and holiday pay.

74. It now remains to be determined whether loyalty stamps and bad-weather stamps fall within the concept of a minimum wage applicable to any person employed within the territory of a Member State. The documents before the Court show that loyalty stamps are a special bonus amounting to 9% of gross remuneration which workers receive once a year, which serves to reward their commitment to the construction industry, and which is paid four months after the end of the financial year. Bad-weather stamps amount to 2% of the gross wages payable to each worker and are intended to compensate workers on a flat-rate basis for that part of their wages not paid to them by their employer on days when bad weather has prevented normal working, irrespective of the amount of wage losses incurred. These are both emoluments which a worker obtains in consideration of his work, and I am in no doubt that the definition of industry-wide minimum wages which I have given necessarily encompasses amounts to which workers are entitled under those two schemes.

75. It is not of course unusual for a collective agreement to provide for special bonuses which the employer is to pay to workers once, twice, three times a year or even more frequently, and which usually amount at least to monthly basic pay plus the length-of-service supplement. Nor is it unusual for agreements in the construction sector to contain rules intended to govern the consequences of stoppages due to *force majeure*, atmospheric disturbances, bad weather or any other factor for which the undertaking cannot be held responsible, during which the employer remains liable for wages.

76. What makes the loyalty stamps and the bad-weather stamp scheme in Belgium unique is the way they are financed: instead of the employer being directly responsible for paying workers a special bonus once a year, and paying the agreed daily or monthly wage without taking into account stoppages due to bad weather, he contributes in respect of both those payments to a fund set up by all the undertakings in the

sector to take over those wage-related liabilities in his place.[38] The fact that it is remuneration which the worker receives from his employer indirectly does not deprive it of its status as a wage component and, in this case, as a component of the industry-wide minimum wage.

77. It is therefore not incompatible with Community law for Member States to extend their legislation, or collective labour agreements, relating to the minimum wage — whether it be a multi-industry minimum wage or an industry-wide minimum wage — to any person employed, even temporarily, within their territory, no matter in which country the employer is established.

78. However, if loyalty stamps and bad-weather stamps are to be regarded as forming part of the industry-wide minimum wage payable to construction sector workers, how can the Court's approach to minimum wages be reconciled with the principle laid down in *Guiot* to the effect that Articles 59 and 60 of the Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned State to pay employer's contributions to those two schemes with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable contributions, with respect to the same period and for the same periods of work, in the State where it is established?

79. It my opinion, minimum wage legislation in force in a Member State cannot automatically be extended to undertakings providing services in its territory and using their own workers to do so, especially given that the Court has held that the conditions imposed by the host Member State may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established.[39] Accordingly, before imposing on such undertakings the obligation to pay the minimum wages in force in its territory, as defined by its domestic law, the host Member State must ensure that the social protection of workers pursued by the national legislation is not guaranteed to an equal or greater extent by the legislation of the State where the undertaking is established.

80. And how is it to be determined whether the social protection of workers is already guaranteed to an equal or greater extent

38 — Setting up a fund to finance the payment of wages not paid in the event of stoppages due to bad weather is not of course the only option. There are alternatives: the employer could, for example, remunerate periods not worked as normal, with the outstanding hours being made up, at a rate of say an hour per day, on the following working days; or hours not worked for the above reason could be deducted from annual leave, up to a limited number of days.

39 — Principle cited in paragraph 60.

through the application of the legislation of the Member State where the undertaking is established? For the purposes of that determination, I consider that the authorities of the host Member State, including the courts, must compare, on an overall annual basis, the emoluments to which a worker is entitled under the provisions of the Member State where his employer is established with those to which he would be entitled if he worked for the entire year in the host Member State. The worker must be able to benefit, for the period during which he is posted by his employer to the territory of another Member State in order to provide services there, from the legislation which is more advantageous to him on an annual basis.

81. I should like to lay particular emphasis on the need for national courts — for it is they which will generally be responsible for dealing with situations such as those at issue in these cases — to ensure, when determining which legislation is more beneficial to a worker, that they conduct the examination of the emoluments to which he would be entitled in one situation as compared with another on an overall annual basis.

Given the disparity between national collective agreements in the construction industry as regards wage components, forms of remuneration, and amounts and frequency of payment of special bonuses, and the differences in the way the latter are financed, the aforementioned approach seems to me to be the only way to provide real protection for workers' rights. Assuming that application of the minimum wage in force in the host Member State is intended to protect workers who go there with their firm in order to provide services, I have my doubts as to what extent a worker who, in his Member State of origin, is entitled, for example, to a special bonus every three months, or to a full wage at the end of each month irrespective of how many days he has been unable to work because of bad weather, will be better protected by the provisions of a host Member State such as those in force in Belgium, under which he has to wait four months after the end of the financial year before receiving an annual bonus, will be paid only 50% of his wages for the days on which he cannot work because of bad weather, and will not receive compensation for such wage losses until four months after the end of the financial year.

82. I therefore believe that Articles 59 and 60 of the Treaty do not preclude the authorities of a host Member State from requiring employers established in another Member State who post their workers to the territory of the first State in order to provide services there to pay the industry-wide minimum wage applicable in its territory to the sector or field of activity in question, and in particular to pay contributions to a fund set up by the undertakings in that sector in order to take over some of the employers' wage-related liabilities, provided that, under the legisla-

tion of the Member State of establishment, those employers are not already subject, for the same periods and in respect of the same workers, to wage-related liabilities which mean that the remuneration payable to a worker, viewed on an overall annual basis, is the same as or greater than that which he would receive for working all year in the host Member State.

83. It should also be borne in mind that, in *Vander Elst*, the Court, like Advocate General Tesauro in his Opinion in the same case, [40] stated, with regard to the employees of that undertaking, who were nationals of non-member countries in possession of valid employment contracts governed by Belgian law, 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 excluded any substantial risk of workers being exploited or of competition between undertakings being distorted. [41]

I do not see any reason to conclude otherwise where the flow is in the opposite direction, that is to say in the case of workers lawfully employed by an undertaking in France who move to Belgium in order to provide services there.

D — *Monitoring, by the authorities of the host Member State, of compliance with its labour legislation (obligations Nos 1, 3, 4, 5, 9 and 10 in the first question)*

84. In this section, I shall examine a second group of obligations which Arblade and Sofrage are charged with having failed to fulfil. Those obligations, grouped together on account of their purpose, are as follows: to keep the documents required by social legislation (staff register and workers' individual accounts) at the Belgian residence of a natural person who is to keep them in his capacity as the employer's agent or servant; to keep a staff register; to issue an individual record to each worker; to appoint an agent or servant responsible for keeping workers' individual accounts in Belgium; to draw up an individual account for each worker; and to adopt working regulations.

All those obligations are, to a greater or lesser extent, intended to make it easier for the authorities of the host Member State to

40 — Opinion delivered in *Vander Elst*, cited at footnote 15 above, I-3805 et seq., in particular I-3816 and I-3817.

41 — *Ibidem*, paragraphs 24 and 25.

monitor compliance with its social legislation.

85. There is no doubt that, in the Member States, a substantial part of the legislation comprising social law relates to matters of public policy and is, as such, applicable to all persons within the territory of the State in question and, of course, to undertakings established in another Member State which go with their workers to the first State in order to provide services there. I am thinking, for example, to cite some of the most obvious, of provisions on safety and hygiene at work, provisions laying down minimum wages, provisions recognising the principle of freedom of association or the principle of equal pay for men and women.

However, where rules which apply without distinction to undertakings established within national territory and to those established in another Member State restrict the freedom to provide services, they must, like all others, pass the test as to whether they are justified by overriding reasons relating to a public interest which is not met by the rules of the Member State of establishment, they must be objectively necessary in order to ensure that the result which they pursue is attained, and it must be shown that the same result cannot be achieved by less restrictive rules.

86. The obligation to issue an individual record to each worker is directly linked to the obligation for employers in the construction sector to pay contributions in respect of loyalty stamps and bad-weather stamps for each worker. It is in my view an ancillary obligation which must be treated in the same way as the principal obligation in so far as it serves to verify that the latter has been discharged. More specifically, if it is shown that the remuneration payable to a construction sector worker in the host Member State, viewed on an overall annual basis, is better than that which he receives under the rules of the Member State of establishment, the employer may be obliged to pay contributions in respect of loyalty stamps and/or bad-weather stamps, and he may also be required to comply with the obligation to issue the worker with an individual record. If this is not shown to be the case, he will be exempt from the latter obligation.

87. As regards the obligations imposed on undertakings which do not have a company seat in Belgium, namely that they must keep the staff register and workers' individual records at the Belgian residence of a natural person (obligation No 1 in the first question), and appoint an agent or servant to keep workers' individual accounts (obligation No 5 in the first question), I do not

think that they amount in this case to an obligation to set up an establishment within the meaning of Article 52 of the Treaty. I disagree in this respect with the defendants and concur with the arguments put forward by both the Belgian Government and the Commission in their answers to the first written question put to them by the Court.

Nor do I consider them to be obligations which give rise to discrimination based on nationality or on the fact that the providers of services have established themselves in another Member State. In actual fact, they apply without distinction since the obligation imposed on all employers generally requires them to keep the staff register and workers' individual accounts at the undertaking's registered office or company seat. The reason for the distinction drawn (whereby an employer who does not have a registered office or a company seat in Belgium must keep the staff register and workers' individual accounts at the Belgian residence of a natural person and appoint an agent or servant in Belgium to be responsible for keeping the individual accounts) lies in my view in the fact that the two situations are different; it is not that there are special provisions applicable only to undertakings established in other Member States.

88. I do consider, however, that those obligations, as they stand, may go beyond what is necessary in order to attain the objective which they pursue, which appears to be to ensure that the data relating to the workers whom an undertaking employs on a construction site are available to the national authorities.

With regard to the first of those obligations, given that officials from the Labour Inspectorate visit sites to verify compliance with social legislation, it might be sufficient, for example, for the site manager to make available to it the staff register and workers' individual accounts, or any equivalent documents which the undertaking is required to keep under the legislation of the Member State of establishment.

I take the same view with respect to the obligation to appoint an agent or servant resident in Belgium to be responsible for keeping workers' individual accounts for five years once the work is completed. The individual account is a document containing details of the services performed by a worker for an employer in the course of a year, listed by period of paid employment, and the remuneration received. It provides

a means of verifying that the rates of pay laid down in the collective agreement have been observed, and that remuneration in respect of public holidays, annual leave and end-of-year bonuses has been paid. I think it excessive that, with a view to making it easier for the national authorities of a Member State to be able to carry out such verifications, if they so wish, undertakings which temporarily move to that Member State in order to provide services there should be required, in the manner and for the purpose described, to appoint an agent, who must of course be paid for his services. It would be far more consistent with the principles governing the freedom to provide services for such undertakings to be required, on completion of their work, to send those documents say to the Inspection des Lois Sociales, which could then examine them and, if it saw fit, keep them.

I therefore consider those two obligations, as they stand, to be disproportionate, since the same objective can be attained by procedures which are less onerous for undertakings.

89. It remains for me to analyse a series of obligations the imposition of which on undertakings established in one Member State which temporarily post their workers to another Member State in order to provide services there is not in principle prohibited by Community law. They are: the obligation to keep a special staff register; the obligation to draw up an individual account for each worker; and the obligation to adopt labour regulations. Member States are indeed entitled to require such undertakings to comply with their social legislation by appropriate means. In so doing, however, they must examine whether those undertakings already meet similar obligations under the legislation of the Member State of establishment, having regard not so much to the names of the various documents as to their content and the purpose they serve. If they do, the two bodies of legislation must be recognised as equivalent, and such undertakings may be required to comply with the legislation of the host Member State only in so far as it supplements the legislation of the State of establishment, but not if the two overlap.

90. In any event, it should be borne in mind that, by 30 June 1993, Member States were required to have incorporated into their domestic legislation Directive 91/533, which lays down the information which employers must provide to employees, by means of a contract of employment or other written document. Such information includes the identities of the parties, the category of the work, a description of the work, the date of commencement of the employment relationship and its duration, the amount of paid leave, periods of notice, initial basic pay and other component elements, the periodicity of payment, the length of the working day or week and details of the collective agreements governing the employee's conditions of work. Where the employee concerned is usually

required to work in other countries, that document must have been issued to him before his departure and must include at least the following additional information: the duration of the employment abroad; the currency to be used for the payment of remuneration; and, where appropriate, the benefits in cash or kind attached to the employment abroad.

There is no doubt that the fact that an expatriate worker possesses a document containing such information will make it easier for the labour inspectorate in each Member State to monitor compliance with its labour legislation by undertakings from other Member States which post their workers to the territory of the first State in order to provide services there.

E — *The obligation for undertakings to cooperate with the labour inspectorate in the host Member State (obligations Nos 7 and 8 in the first question)*

91. As I have already said, Community law does not prohibit Member States from enforcing compliance with the rules of social law by appropriate means. One of the most effective ways of monitoring compliance with social legislation is by means of the labour inspectorate, which monitors compliance not only with strictly national legislation but also with Community law in the field of social security for migrant workers. Consequently, the movement of an undertaking established in one Member State to the territory of another Member State for the purpose of providing services using its own workers, within the meaning of Articles 59 and 60 of the Treaty, carries with it an obligation for that undertaking not to obstruct or frustrate the work of the officers of the inspectorate carried out pursuant to the legislation of the host Member State.

F — *The second question*

92. By the second question in both cases, the Tribunal Correctionnel, Huy, seeks to ascertain whether Articles 59 and 60 can render inoperative the first paragraph of Article 3 of the Civil Code which defines the scope of the Belgian laws on public order.

93. As I indicated earlier, the provisions of social law, even if they relate to matters of public policy and are, as such, applicable to all persons within the territory of the State in question, do not fall outside the principles governing the freedom to provide services within the Community.

Accordingly, public-order legislation which is not applicable without distinction to the provision of services, irrespective of the origin thereof, and which is therefore discriminatory, will be compatible with Community law only if it can be brought within the scope of an express derogating provision. In the present case, recourse would have to be had to Article 56 of the Treaty, which lays down as exceptions to the freedom to provide services measures contained in provisions of national law providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

If, on the other hand, the public-order legislation which gives rise to the restriction applies without distinction to national providers of services and to providers of services from other Member States, it must, like all other legislation of like effect, be justified by overriding reasons relating to the public interest in so far as that interest is not safeguarded by the provisions to which Community nationals are subject in the Member State in which they are established, it must be objectively necessary in order to ensure that the result which it pursues is attained, and it must not go beyond what is necessary in order to achieve that result.

VII — Conclusion

94. In the light of the foregoing considerations, I propose that the Court of Justice give the following answer to the questions referred by the Tribunal Correctionnel, Huy:

(1) Articles 59 and 60 of the EC Treaty do not preclude a Member State from requiring an undertaking established in another Member State which temporarily posts its workers to the first State in order to provide services there to pay the statutory minimum wage or the industry-wide minimum wage applicable in its territory to the sector or field of activity in question, and to pay contributions to a fund set up by the undertakings in that sector in order to take over some of the employers' wage-related liabilities, provided

that, under the legislation of the Member State of establishment, the undertaking in question is not already subject, for the same periods and in respect of the same workers, to wage-related liabilities which mean that the remuneration payable to a worker, viewed on an overall annual basis, is the same as or greater than that which he would receive for working the entire year in the host Member State. If the minimum wage in force in the host Member State is applicable, other obligations, such as the issue of an individual account to each worker, for the purpose of monitoring compliance with the obligation to pay contributions, may be called for.

(2) Articles 59 and 60 of the Treaty preclude a Member State from imposing on an undertaking established in another Member State which temporarily moves with its workers to the first State in order to carry out works there obligations such as those set out under points 1 and 5 of the first question, because, in going beyond what is necessary in order to attain the objective which they pursue, namely to ensure that information relating to the workers whom an undertaking employs or has employed on a construction site is available to the national authorities, they infringe the principle of proportionality.

(3) Articles 59 and 60 of the Treaty do not preclude a Member State from monitoring the application of its social legislation by all appropriate means. In the case of an undertaking established in another Member State which temporarily moves with its workers to the first State in order to carry out works there, obligations such as those described under points 3, 4, 9 and 10 of the first question may be imposed only if that undertaking does not already satisfy similar obligations under the legislation of the Member State of establishment, having regard not so much to the names of the various documents as to their content and the purpose they serve; that undertaking may be required to comply with the legislation of the host Member State only in so far as it supplements the legislation of the Member State of establishment, but not if the two overlap.

(4) Articles 59 and 60 of the Treaty do not exempt an undertaking established in a Member State which temporarily moves with its workers to another Member State in order to provide services there from the duty to cooperate with the officers of the labour inspectorate in that State where they propose to verify compliance by that undertaking with the social laws in force in its territory.

(5) Articles 59 and 60 of the Treaty do not alter the scope of national public-order legislation. However, if that legislation is discriminatory, it will be compatible with Community law only if it can be brought within the scope of an express provision laying down an exception such as those listed in Article 56 of the Treaty. If, on the other hand, the legislation which gives rise to the restriction on the freedom to provide services applies without distinction, it must, like all other legislation of like effect, be justified by overriding reasons relating to the public interest, in so far as that interest is not already safeguarded by the provisions to which Community nationals are subject in the Member State of establishment, it must be objectively necessary in order to ensure that the result which it pursues is achieved, and it may not go beyond what is necessary in order to achieve that result.