

EUROPEAN ECONOMIC COMMUNITY—FREE MOVEMENT OF WORKERS—EUROPEAN COURT OF JUSTICE DETERMINES THAT IN A CASE OF TEMPORARY MOVEMENT OF WORKERS MEMBER STATES IN WHOSE TERRITORY THE WORK IS TO BE CARRIED OUT MAY NOT IMPOSE CONDITIONS RELATED TO THE RECRUITMENT OF MAN-POWER OR PROCUREMENT OF WORK PERMITS. Case C-113/89, *Rush Portuguesa Lda v. Office national d'immigration*, 1990 E.C.R. I-1439, 2 C.M.L.R. 818 (1991).

### I. FACTUAL BACKGROUND

Rush Portuguesa Limitada<sup>1</sup> (Rush) entered into a subcontract with a French company for work on the construction of a railway line in the west of France.<sup>2</sup> Rush brought in a Portuguese work force from Portugal to complete this project. However, under French law, only the *Office national d'immigration*<sup>3</sup> may recruit nationals of third countries, like these Portuguese workers, to work in France.<sup>4</sup> After the French Labour Inspectorate<sup>5</sup> established that Rush had not complied with the requirements of the *Code du travail* (French Labour Code) regarding workers in France who are nationals of non-member countries<sup>6</sup>, the Director of the *Office national d'immigration* notified

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<sup>1</sup> Rush Portuguesa Limitada is a building and public works undertaking company governed by Portuguese law and whose registered office is in Portugal. Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1419; Case C-113/89, *Rush Portuguesa Lda v. Office national d'immigration*, 1990 E.C.R. I-1439, 2 C.M.L.R. 818 (1991) [hereinafter *Rush*].

<sup>2</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1419.

<sup>3</sup> The *Office national d'immigration* is the French National Immigration Office.

<sup>4</sup> The *Code du travail*, the French National Labour Code, gives the *Office national d'immigration* the exclusive right to recruit in France nationals of third countries. CODE DU TRAVAIL [C. TRAV.] art. L 341.9 para. 3 (Fr.).

<sup>5</sup> The French Labour Inspectorate (*l'inspection du travail*) is an administrative agency responsible for the enforcement of the French Labour Code.

<sup>6</sup> The French Labour Inspectorate carried out checks on two of the sites at which Rush was working under a sub-contract. The Inspector noted infringements of the *Code du travail* involving a total of 58 workers who did not have the work permits prescribed by Article L 341.6 of the *Code du travail*. In addition, it appeared that

Rush that it must pay a special penalty fee (called a contribution) because it had imported and employed non-national workers.<sup>7</sup>

Rush initiated proceedings before the *tribunal administratif, Versailles*,<sup>8</sup> asking for the annulment of the decisions of the Director of the *Office national d'immigration* regarding the special contribution.<sup>9</sup> In support of its objection to the special contribution, Rush claimed that it had freedom to provide services within the European Economic Community<sup>10</sup> and that Articles 59 and 60 of the EEC Treaty<sup>11</sup> precluded the application of those provisions of the *Code du travail* which have the effect of prohibiting its staff from working in France.<sup>12</sup>

these workers had not been recruited by the *Office national d'immigration*, on which Article L 341.9 of the *Code du travail* confers the exclusive right to recruit nationals of third states to work in France. Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1419.

<sup>7</sup> Article 341.7 of the *Code du travail* provides that without prejudice to such legal proceedings as may be commenced against him, any employer who has employed a foreign worker in breach of Article L 341.6(1) is required to pay a special contribution to the *Office national d'immigration*. C. TRAV. art. L 341.6(1).

<sup>8</sup> The *tribunal administratif, Versailles*, is a national court of France.

<sup>9</sup> By decisions of January 28 and March 26, 1987, the Director of the *Office national d'immigration* informed Rush that it was required to pay the above-mentioned special contribution and served enforcement notices on it for the relevant amounts. On March 17, 1987, Rush challenged, by letter to the *Office national d'immigration*, the validity and basis of the enforcement notice served on it on January 28. Rush did not receive a reply to that letter. Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1419.

<sup>10</sup> The European Economic Community [hereinafter EEC] was created by the Treaty of Rome. Treaty Establishing the European Economic Community, *opened for signature*, March 25, 1957, 1973 Gr. Brit. T.S. No.1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.) [hereinafter EEC Treaty]. Article 2 of the EEC Treaty sets forth the purpose of the EEC. It states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

*Id.* at art. 2. The twelve Member States of the EEC are: France, Belgium, the United Kingdom, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Greece, Portugal, Denmark, Ireland, and Spain.

<sup>11</sup> Articles 59 and 60 of the EEC Treaty guarantee the freedom to provide services among Member States. EEC Treaty, *supra* note 10, arts. 59-60. For a detailed discussion of articles 59 and 60 and the freedom to provide services, *see infra* notes 37-39 and accompanying text.

<sup>12</sup> These provisions include articles 341.6 to 341.9 of the *Code du travail*. For a detailed discussion, *see supra* notes 4-7.

In response, the *Office national d'immigration* argued that the freedom to provide services did not extend to all the employees of a provider of services, because such persons remained subject to the conditions applicable to workers from non-member countries under the transitional provisions laid down in the Act of Accession<sup>13</sup> regarding freedom of movement for workers.<sup>14</sup>

The *tribunal administratif* determined that a decision on the dispute required interpretation of European Economic Community law.<sup>15</sup> Therefore, it stayed the proceedings and requested that the Court of Justice of the European Communities (the Court)<sup>16</sup> render a preliminary ruling pursuant to article 177 of the EEC Treaty<sup>17</sup> resolving the conflict of law between transitional rules on freedom of movement for workers in the Act of Accession and the freedom to provide services guaranteed by the EEC Treaty.<sup>18</sup>

<sup>13</sup> Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, 1985 O.J. (L 302) 23 [hereinafter Act of Accession]. The Act of Accession laid out conditions under which Portugal and Spain acceded to the EEC. *Id.*; see *infra* notes 45-50.

<sup>14</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420. The Act of Accession delayed the application of the freedom of movement for workers between Portugal and Member States until 1993. Act of Accession, *supra* note 13, at arts. 216-219. For a detailed discussion of those provisions see *infra* notes 51-55 and accompanying text.

<sup>15</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420.

<sup>16</sup> EEC Treaty, *supra* note 10, at art. 177. The European Court of Justice was created "to ensure that through the interpretation and application of the EEC Treaty the law is observed." *Id.* at art. 164. The Court is composed of thirteen judges, one from each Member State, a President of the Court, and six Advocates-General. EEC law takes precedence over all conflicting domestic law. *Id.* at arts. 164-167.

<sup>17</sup> Article 177 states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretations of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member State, that court or tribunal may if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC Treaty, *supra* note 10, at art. 177.

<sup>18</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420.

In accordance with procedure established by Article 177 of the EEC Treaty,<sup>19</sup> the *tribunal administratif* submitted three issues to the Court for a preliminary ruling:<sup>20</sup> (1) Whether Community law, particularly Article 5<sup>21</sup> and Articles 58 to 66<sup>22</sup> of the EEC Treaty and Article 2<sup>23</sup> of the Act of Accession, authorizes France to restrict the

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<sup>19</sup> See *supra* note 17. Although the Court does not have jurisdiction to rule on the compatibility of domestic law with EEC law, it can render an abstract interpretation of EEC law on the matter in question. EEC Treaty, *supra* note 10, at arts. 164-167. For information concerning conflict of laws when domestic law is incompatible with EEC law, see Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 3 C.M.L.R. 425 (1964).

<sup>20</sup> The three questions referred to the Court for a preliminary ruling read as follows:

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

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

3. May the work-force, which has been the subject of the disputed special contributions and whose names and qualifications are mentioned in the list appearing in the annex to the reports drawn up by the Labour Inspector recording the breaches committed by *Rush Portuguesa*, be regarded as "specialized staff or employees occupying a post of a confidential nature" within the meaning of the provisions of the annex to Regulation No. 1612/68 of the Council of 15 October 1968?

Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420.

<sup>21</sup> EEC Treaty, *supra* note 10 at art. 5. Article 5 reads:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

*Id.*

<sup>22</sup> Articles 58 to 66 of the EEC Treaty guarantee the freedom to provide services to natural and legal persons in Member States throughout the EEC. EEC Treaty, *supra* note 10, at arts. 58-66. For a more detailed description of these articles, see *infra* notes 37-38 and accompanying text.

<sup>23</sup> Article 2 of the Act of Accession states that EEC law becomes binding on

temporary movement of workers from Portugal into France to complete a public works subcontract for a Portuguese company;<sup>24</sup> (2) Whether the right of a Portuguese company to provide services in the Community<sup>25</sup> may be made subject to conditions<sup>26</sup> by EEC Member States;<sup>27</sup> (3) Whether the Portuguese work force in question "may be regarded as 'specialized staff or employees occupying a post of a confidential nature' within the meaning of the provisions of the Annex to Regulation No. 1612/68<sup>28</sup> of the Council of 15 October 1968."<sup>29</sup> *Held*: in such a case of the temporary movement of workers, authorities of Member States, in whose territory the work is to be carried out, may not impose conditions restricting the recruitment of man-power or the procurement of work permits.<sup>30</sup> Case C-113/89, *Rush Portuguesa Lda v. Office national d'immigration*, 1990 E.C.R. I-1439, 2 C.M.L.R. 818 (1991).

## II. LEGAL BACKGROUND

### A. *Freedom Guarantees by the EEC Treaty*

A primary goal of the European Economic Community, illustrated by Article 2 of the EEC Treaty, is to promote interstate economic activity between Member States.<sup>31</sup> To promote this homogeneous

new Member States (Portugal and Spain) on the date of Accession. Act of Accession, *supra* note 13, at art. 2. For the text of Article 2, *see infra* note 48.

<sup>24</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420.

<sup>25</sup> *See infra* notes 37-43 and accompanying text.

<sup>26</sup> The conditions imposed were those relating to the engagement of labor *in situ* (*see infra* note 82), the obtaining of work permits, and the payment of fees to an official immigration body. *See supra* note 21. Specifically, the conditions in question in the present case are those found in articles 341.6 to 341.9 of the *Code du travail*. For a discussion of these conditions, *see supra* notes 4-7.

<sup>27</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420.

<sup>28</sup> Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 On Freedom Of Movement For Workers Within The Community, 1969 O.J. SPEC. ED. 475, as last amended by Reg. 312/76, 1976 O.J. (L 39) 2 [hereinafter Regulation No. 1612/68]. For a detailed description of this regulation, *see infra* note 36.

<sup>29</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1420. The Court decided that in view of its reply to the first two questions, there was no need to give a ruling on this third question. *Rush*, 1990 E.C.R. I-1445, 2 C.M.L.R. 843 (1991).

<sup>30</sup> *Rush*, 1990 E.C.R. I-1445, 2 C.M.L.R. 843 (1991).

<sup>31</sup> This provision states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

EEC Treaty, *supra* note 10, at art. 2.

development of economic activities within the Community, the Member States agreed in Article 3(c)<sup>32</sup> that Community activities should include the abolition of obstacles to the free movement of workers. For this purpose, the EEC laid out several provisions designed to secure freedom of movement for workers.<sup>33</sup>

Article 48 provides the basis for the freedom of movement of workers in the EEC Treaty by stating that workers of Member States should be allowed to move freely and without discrimination within the Community for the purposes of employment.<sup>34</sup> To reinforce and augment Article 48, the EEC Council<sup>35</sup> passed Regulation No. 1612/68, which guarantees the right of workers to move with their families between Member States, free from discrimination based on nationality, for the purpose of employment.<sup>36</sup>

<sup>32</sup> Article 3(c) states:

For the purposes set out in Art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services, and capital . . . .

EEC Treaty, *supra* note 10, at art. 3.

<sup>33</sup> R. PLENDER & J. USHER, *CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES* 334, (1980).

<sup>34</sup> Relevant provisions of Article 48 include:

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to the conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

EEC Treaty, *supra* note 10, at art. 48.

<sup>35</sup> The EEC Council consists of representatives from each of the Member States. Its purpose is as follows:

To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

-ensure coordination of the general economic policies of the Member States;

-have power to take decisions.

EEC Treaty, *supra* note 10, at art. 145.

<sup>36</sup> Relevant provisions of Regulation No. 1612/68 include:

Another right guaranteed by the EEC Treaty in furtherance of interstate economic expansion is the freedom to provide services, as set forth in Articles 59 through 66 of the EEC Treaty.<sup>37</sup> Article 60 of the EEC Treaty defines services broadly.<sup>38</sup> Included in this catch-all definition are activities of an industrial or commercial character, activities of craftsmen, and activities of the professions.<sup>39</sup> EEC Treaty Article 3(c)<sup>40</sup> includes freedom of services in the "activities" of the Community on the same terms as it includes free movement of goods in Article 3(a).<sup>41</sup> Relying upon these clauses, the Court in several cases has ruled that freedom to provide services, like the free movement of goods,<sup>42</sup> is one of the fundamental rights granted by the EEC Treaty.<sup>43</sup> In addition, Articles 66 and 58 require that the principle of freedom of services be applied to businesses and corporations, as legal persons, as well as to natural persons.<sup>44</sup>

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1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

Regulation 1612/68, *supra* note 28, at art. 1.

<sup>37</sup> Article 59 states in pertinent part:

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 rendered.

EEC Treaty, *supra* note 10, at art. 59.

<sup>38</sup> Article 60 reads:

Services shall be considered to be "services" within the meaning of this Treaty where they are normally for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

EEC Treaty, *supra* note 10, at art. 60.

<sup>39</sup> *Id.*

<sup>40</sup> For the text of article 3(c), see *supra* note 32.

<sup>41</sup> Steindorff, *Freedom of Services in the EEC*, 11 *FORDHAM U. INT'L L. J.* 347, at 353-54 (1988).

<sup>42</sup> EEC Treaty, *supra* note 10, at art. 3. See also, *Id.*, at arts. 9-10.

<sup>43</sup> Case 205/84, *Re Insurance Services: Commission v. Federal Republic of Germany*, 1986 E.C.R. 3755, 2 C.M.L.R. 69 (1987); Case 279/80, *State v. Webb*, 1981 E.C.R. 3305, 1 C.M.L.R. 719 (1982); Case 118/75, *State v. Watson and Belman*, 1976 E.C.R. 1185, 2 C.M.L.R. 552 (1976).

<sup>44</sup> Article 58 provides that businesses and corporations are to be considered legal persons and treated the same as natural persons under Articles 55 to 58. By virtue

### B. *The Conditions of Portugal's Accession to the EEC*

Portugal's accession<sup>45</sup> and integration into the European Economic Community became final on January 1, 1986.<sup>46</sup> The Act of Accession outlines the conditions under which Portugal was admitted to the EEC.<sup>47</sup> Article 2 of the Act of Accession<sup>48</sup> states that all treaties and acts of the Community become binding on the new Member States.<sup>49</sup> By virtue of this Act, particularly Article 2, Portugal was granted the freedoms guaranteed by the EEC Treaty, including the freedom to provide services.<sup>50</sup>

However, Articles 215 to 232 of the Act of Accession set forth special conditions concerning the accession of Portugal.<sup>51</sup> Specifically,

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of Article 66, which governs the freedom to provide services, Article 58 is applied to the articles related to freedom to provide services. Articles 66 and 58 read as follows:

Art. 66: The provisions of Articles 55 to 58 shall apply to the matters covered by this chapter.  
EEC Treaty, *supra* note 10, at art. 66.

Art. 58: Companies or firms 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.  
EEC Treaty, *supra* note 10, at art. 58.

*See also* EEC Treaty arts. 52-58 regarding freedom of establishment, similar to the freedom to provide services.

<sup>45</sup> Spain, as well as Portugal, acceded on Jan. 1, 1986. *See infra* note 46.

<sup>46</sup> Portugal's integration into the EEC became final under the following treaty: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Communities) and the Kingdom of Spain, the Portuguese Republic, Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community. 1985 O.J. (L 302) 9.

<sup>47</sup> Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, 1985 O.J. (L 302) 23.

<sup>48</sup> This provision states that:

From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.

*Id.* at art. 2.

<sup>49</sup> *Id.*

<sup>50</sup> For a discussion of the freedom to provide services throughout the EEC, *see supra* notes 37-44 and accompanying text.

<sup>51</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1418. For a discussion of articles 215 through 232, *see infra* notes 54-55.

Articles 215 to 232 require a transitional period delaying the application of the free movement of workers.<sup>52</sup> Although the policy of free movement of workers is fundamental to the EEC in order to prevent a severe disruption to the labor market of the EEC, Portugal's right to free movement of workers will be phased in gradually.<sup>53</sup> Article 215 of the Act of Accession provides that the freedom of movement for workers guaranteed by the EEC Treaty shall only apply according to Articles 216 through 219 of the Act.<sup>54</sup> Articles 216 through 219 delay the obligation of Portugal and Member States to fully apply the policy of freedom of movement of workers until January 1, 1993.<sup>55</sup>

The Court has interpreted this derogation from Article 48 (free movement of workers) in light of the purpose of Article 216, which is to prevent disturbances on the labor market immediately following accession.<sup>56</sup> The Court has refrained from interpreting broadly the

<sup>52</sup> Negotiations leading to Portugal's admission into the EEC were difficult. Portugal's economy was a main barrier to admission into the EEC. At the time of Accession, Portugal was by far the poorest and least developed country in Western Europe. The seven years of negotiations that lead to the admission of Portugal into the EEC concentrated on the economic difficulties of integrating into the EEC a poor, semi-industrialized country with high unemployment, producing products not generally favored by the EEC. Weingardt, *Portugal's Accession and Integration Into the European Economic Community*, 15 DEN. J. INT'L L. & POL'Y 317, 321 (1987).

<sup>53</sup> Even though the Portuguese would certainly benefit if their workers were allowed to migrate freely throughout the EEC, the host countries, who already have enough trouble taking care of their own workers, would suffer. *Id.* at 323.

<sup>54</sup> Article 215 reads:

Article 48 of the EEC Treaty shall only apply, in relation to the freedom of movement for workers between Portugal and other Member States subject to the transitional provisions laid down in Articles 216 to 219 of this Act. Act of Accession, *supra* note 13, at art. 215.

<sup>55</sup> Article 216 of the Act of Accession states in pertinent part:

1. Articles 1 to 6 of Regulation (EEC) No. 1612/68 on the freedom of movement of workers within the Community shall apply in Portugal with regard to nationals of the other Member States and in the other Member States with regard to Portuguese nationals only as from 1 January 1993. The Portuguese Republic and the other Member States may maintain in force until 31 December 1991, with regard to nationals of the other Member States and to Portuguese nationals respectively, national provisions or those resulting from bilateral arrangements making prior authorization a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment.

Act of Accession, *supra* note 13, at art. 216.

<sup>56</sup> Case 9/88, Lopes da Veiga v. Staatssecretaris van Justitie, 1989 E.C.R. 2989, 1 C.M.L.R. 217 (1991).

restrictions on free movement of workers because these restrictions can limit the freedom to provide services when the restriction affects the service provider's work force.

### C. *EEC Directives Regulating Public Works Contracts*

The freedom to provide services and the freedom of movement of workers are fundamental principles of EEC law intended to promote non-discrimination on grounds of nationality.<sup>57</sup> These principles are directly applicable in more specific contexts such as EEC law regulating the awarding of public works contracts.<sup>58</sup> EEC directives regulating public procurement reemphasize this goal of nondiscrimination.<sup>59</sup> The EEC regulates the awarding of public works contracts to prevent discrimination based on nationality.<sup>60</sup> In order to effectuate Treaty mandates, such as the freedom to provide services,<sup>61</sup> and foster competitiveness in the area of public procurement, contractors from within the Community must have equal opportunity to bid for available public contracts.<sup>62</sup> Additionally, their bids must be considered by the contracting authority without discrimination.<sup>63</sup> To this end, the Council<sup>64</sup> issued several directives<sup>65</sup> to regulate public

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<sup>57</sup> This goal is expressly set forth in Article 7, which reads:

Within the scope of application of this treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

EEC Treaty, *supra* note 10, at art. 7. The freedom to provide services and the freedom of movement of workers are guaranteed by Articles 59 and 48, respectively, of the EEC Treaty. *Id.* at arts. 48-49.

<sup>58</sup> Weiss, *Public Procurement in the EEC - Public Supply Contracts*, 13 EUR. L. REV. 318, 320 (1988).

<sup>59</sup> *Id.*

<sup>60</sup> The EEC Council considers the nondiscriminatory awarding of public works contracts a specific example of the freedom to provide services throughout the EEC. *Id.*

<sup>61</sup> Article 59 of the EEC Treaty guarantees the right of freedom to provide services throughout the EEC. EEC Treaty, *supra* note 10, at art. 59.

<sup>62</sup> J. Riga, *Recent Council Directives and Commission Proposals Affecting Public Procurement in the European Communities*, 12 B. C. INT'L & COMP. L. REV. 387, 391 (1989).

<sup>63</sup> *Id.*

<sup>64</sup> Council authority to issue directives that ensure freedom of services is found in Article 63(2) of the EEC Treaty.

Article 63(2) reads:

In order to implement this general programme or, in the absence of such programme, in order to achieve a stage in the liberalization of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, issue directives, acting unanimously until the end of the first stage and by a

works contract offerings, bid tenders, and awards.<sup>66</sup> Two directives in particular, Directives 71/304 and 71/305,<sup>67</sup> set forth a coordinated procedure for the award of public works contracts and abolish restrictive and abusive practices in the area of public works contracts.<sup>68</sup> These procedures forbid any discriminatory administrative practices as well as any practice which, although applied generally, provides a de facto advantage for the domestic contractor.<sup>69</sup> These directives seek to ensure that persons from all Member States have an equal opportunity to bid and be considered for the awarding of public works contracts.

### III. ANALYSIS

The linchpin of the ruling in *Rush Portuguesa Limitada v. Office national d'immigration*<sup>70</sup> is the fact that the Act of Accession<sup>71</sup> con-

qualified majority thereafter.

EEC Treaty, *supra* note 10, at art. 63(2).

<sup>65</sup> In particular, the Council issued two directives regulating the awarding of public works contracts:

Directive 71/305 defines a public works contract as a contract "for pecuniary consideration concluded in writing between a contractor . . . and an authority awarding contracts . . . which have as their object one of the activities [set forth by the Council]." Directive 71/305, Council Directive of July 26, 1971 Concerning the Coordination of Procedures for the Award of Public Works Contracts, 1971 J.O. (L 185) 5, art. 1(b) [hereinafter Directive 71/305]. The activities referred to in this definition are set forth in an annex and in article 2 of Directive 71/304, below. These activities include: construction; demolition; general building work; roofing; weatherproofing; general civil engineering; highway construction; installation of heat, ventilation, or electricity; woodwork; and painting. Directive 71/305, *supra*, at Annex.

Directive 71/304 states that "Member States shall abolish, in respect of . . . natural persons and companies or firms . . . restrictions . . . affecting the right to enter into, award, perform or participate in the performance of public works contracts on behalf of the State, or regional or local authorities or legal persons governed by public law." Directive 71/304, Council Directive of 26 July, 1971 Concerning the Abolition of Restrictions on Freedom to Provide Services in Respect of Public Works Contracts to Contractors Acting Through Agencies or Branches, 1971 J.O. (L 185) 1, at art. 1 [hereinafter Directive 71/304].

<sup>66</sup> Riga, *supra* note 62, at 389.

<sup>67</sup> For a detailed discussion on Directives 71/304 and 71/305, see *supra* note 65.

<sup>68</sup> For example, "article 3(1)(a) abolishes any restriction which prevents beneficiaries from providing services under the same conditions and with the same rights as nationals of [the Member State from which the contract is being offered]." Directive 71/304, *supra* note 65, at art. 3(1)(a), as reprinted in Riga, *supra* note 62, at 391.

<sup>69</sup> *Id.*

<sup>70</sup> Case C-113/89, *Rush Portuguesa Lda v. Office national d'immigration*, 1990 E.C.R. I-1439, 2 C.M.L.R. 818 (1991).

<sup>71</sup> The Act of Accession, *supra* note 13, provides the conditions under which Portugal accedes to the EEC. For a detailed discussion of the relevant provisions of this Act, see *supra* notes 47-55 and accompanying text.

tains no transitional measures or other special conditions specifically concerning the freedom to provide services guaranteed by the EEC Treaty.<sup>72</sup> The transitional provisions in the Act of Accession apply only to the first six articles of Regulation No. 1612/68 and EEC Treaty Article 48, which guarantee the free movement of workers.<sup>73</sup> Thus, the Act of Accession delays the application of the free movement of workers to Portugal, but it does not delay the application of the freedom to provide services.<sup>74</sup>

Although the freedom of movement of workers and the freedom to provide services are distinguished and governed by different provisions in the EEC Treaty and other EEC law,<sup>75</sup> the two principles are related and often overlap. "The availability of such an undertaking's work-force as a whole determines its production capacity and therefore its capacity to provide the service in question."<sup>76</sup> Restrictions on the work force or the freedom of movement of workers, therefore, can be an obstacle to the freedom to provide services. How the Court<sup>77</sup> interprets law governing freedom of movement of workers will have a significant impact on the freedom to provide services.

In *Rush*, the questions submitted to the Court<sup>78</sup> raise the problem of the relationship between the freedom to provide services as guar-

<sup>72</sup> The only transitional provision in the Act of Accession related to freedom to provide services is Article 221 which reads:

The Portuguese Republic may maintain restrictions on the right of establishment and of the freedom to provide services:

-until 31 December 1988, for activities falling within the travel and tourism sector;

-until 31 December 1990, for activities falling within the cinema sector.

Act of Accession, *supra* note 13, at art. 221.

<sup>73</sup> The relevant transitional provisions of the Act of Accession are Articles 216 to 219. Act of Accession, *supra* note 13, at arts. 216-219. The first six articles of Regulation No. 1612/68 and Article 48 of the EEC Treaty provide for the enforcement of freedom of movement for workers throughout the Member States of the EEC. Regulation No. 1612/68, *supra* note 28; EEC Treaty, *supra* note 10, at art. 48. The obligation of Member States and Portugal to fully apply these provisions is delayed by Articles 216 to 219 of the Act of Accession until January 1, 1993. Act of Accession, *supra* note 13, at arts. 216-219. For discussion of Regulation No. 1612/68, see *supra* note 36 and accompanying text. For discussion of EEC Treaty Article 48, see *supra* note 34 and text accompanying notes 34 and 36.

<sup>74</sup> *Rush*, 1990 E.C.R. I-1443, 2 C.M.L.R. 840-41 (1991).

<sup>75</sup> The Act of Accession and Regulation 1612/68 distinguish between the freedom of movement for workers and the freedom to provide services by regulating these freedoms under separate articles and provisions. See Act of Accession, *supra* note 13, at arts. 216 to 219; Regulation No. 1612/68, *supra* note 28, at arts. 1 to 6.

<sup>76</sup> Report for the Hearing, Case C-113/89, 1990 E.C.R. I-1422.

<sup>77</sup> The Court referred to is the European Court of Justice, discussed *supra* note 16.

<sup>78</sup> "The first two questions relate to the situation of an undertaking established

anted by Articles 59 and 60 of the EEC Treaty<sup>79</sup> and the derogations from the freedom of movement for workers in Articles 215 to 232 of the Act of Accession.<sup>80</sup> In response to this issue, the Court first noted that the freedom to provide services established in Articles 59 and 60 of the Treaty guarantee the right of a person providing a service to 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."<sup>81</sup> Therefore, the Court reasoned, Articles 59 and 60 preclude a Member State from prohibiting a person providing services from moving freely on its territory with his staff or making the movement of such staff subject to conditions concerning employment *in situ*<sup>82</sup> or to a requirement to obtain a work permit.<sup>83</sup> Imposing such conditions discriminates against that service provider in relation to his competitors already established in the host country who are able to use their own service staff without restrictions, thus limiting the ability to provide service.<sup>84</sup>

The Court also reasoned that Article 216 of the Act of Accession should be interpreted in light of its purpose: preventing disturbances on the labor market following Portugal's accession, due to large and abrupt migrations of workers.<sup>85</sup> The derogation contained in Article

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in Portugal which provides services in the building and public works sector in a Member State belonging to the Community prior to 1 January 1986, the date of Portugal's accession, and which for that purpose brings its own labour force from Portugal for the duration of the works. The first question seeks to ascertain whether, in such a case, the person providing the services may claim a right under Articles 59 and 60 of the Treaty and Article 2 of the Act of Accession to move with his own staff. The second question seeks to ascertain whether the Member State on whose territory the works are to be carried out may impose conditions on the person providing services as regards the engagement of personnel *in situ* and the obtaining of work permits for the Portuguese labour force." *Rush*, 1990 E.C.R. I-1442, 2 C.M.L.R. 840 (1991). For a full discussion of the facts in *Rush*, see *supra* notes 1-29 and accompanying text. For the text of the questions submitted to the Court, see *supra* note 20.

<sup>79</sup> Articles 59 and 60 of the EEC Treaty guarantee to natural and legal persons the freedom to provide services throughout the Member States. EEC Treaty, *supra* note 10, at arts. 59-60 (pertinent text of Articles 59 and 60 is reproduced at *supra* notes 37-38).

<sup>80</sup> *Rush*, 1990 E.C.R. I-1443, 2 C.M.L.R. 841 (1991).

<sup>81</sup> *Id.*

<sup>82</sup> Employment *in situ* refers to employment in a location within that Member State's territory.

<sup>83</sup> *Rush*, 1990 E.C.R. I-1443, 2 C.M.L.R. 841 (1991).

<sup>84</sup> *Id.*

<sup>85</sup> The court cites *Lopes da Veiga*, in which the Court also limited its application of Article 216 in circumstances involving freedom of movement for workers. Case 9/88, *Lopes da Veiga v. Staatssecretaris van Justitie*, 1989 E.C.R. I-2989, 1 C.M.L.R. 217 (1991).

216<sup>86</sup> applies when Portuguese workers and their families seek entry and residence in other Member States.<sup>87</sup> The Court acknowledged that this "derogation is in fact justified since in such circumstances there is a risk that the employment market of the host Member State may be disrupted."<sup>88</sup> The Court distinguished the case at hand from a situation which could affect the labor market of a Member State because *Rush* involves only a temporary movement of workers who are sent to a Member State to carry out construction work or public works as an integral part of a provision of services by their employer.<sup>89</sup> These workers return immediately to Portugal when the project is complete and never actually gain access to the employment market of the host Member State.<sup>90</sup>

However, "services" as defined by Article 60 of the Treaty<sup>91</sup> covers a wide variety of activities, and the Court recognized that the same conclusion (that the freedom to provide services may not be unnecessarily restricted by the delayed application of the free movement of workers) is not appropriate in all cases.<sup>92</sup> There are many undertakings which, although they are services within the meaning of Article 60 of the EEC Treaty, are specifically intended to enable workers to gain access to the labor market of the host Member State.<sup>93</sup> In such a case, there would be a risk of disruption to the employment market of the host Member State if these workers were granted access. Therefore, the Court reasoned that in circumstances where the workers would gain access to the host Member State's labor market, Article 216 of the Act of Accession would allow a Member State to prohibit a service provider from moving with a work force from Portugal.<sup>94</sup>

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<sup>86</sup> Article 216 derogates from the freedom of movement for workers by delaying the application of this freedom to Portugal until 1993. Act of Accession, *supra* note 13, at art. 216.

<sup>87</sup> *Rush*, 1990 E.C.R. I-1444, 2 C.M.L.R. 841-42 (1991).

<sup>88</sup> *Rush*, 1990 E.C.R. I-1444, 2 C.M.L.R. 842 (1991).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The definition of services in Article 60 includes activities of an industrial or commercial character, activities of craftsmen and of the professions. EEC Treaty, *supra* note 10, at art. 60. For the text of Article 60 and a detailed discussion of the definition of services as defined by Article 60, see *supra* note 38 and accompanying text.

<sup>92</sup> *Rush*, 1990 E.C.R. I-1444, 2 C.M.L.R. 842 (1991).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* Specifically, the Court stated that "In such a case, Article 216 of the Act of Accession would preclude the making available of workers from Portugal by an undertaking providing services." *Id.*

The Court emphasized, however, that "that observation in no way affects the right of a person providing services in the building and public works sector to move with his own labor force from Portugal for the duration of the work undertaken."<sup>95</sup>

Therefore, the Court responded to the questions submitted for a preliminary ruling<sup>96</sup> as follows: Articles 59 and 60 of the EEC Treaty and Articles 215 and 216 of the Act of Accession must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own labor force which it brings from Portugal for the duration of the works in question.<sup>97</sup> In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower *in situ* or the obtaining of work permits for the Portuguese work force.<sup>98</sup>

The Court's ruling in *Rush* furthers the purpose of the EEC<sup>99</sup> in several ways. First, the decision enables natural and legal persons in new Member States (Portugal and Spain) to exercise their freedom to provide services in old Member States.<sup>100</sup> Second, it does not unreasonably limit those transitional provisions of the Act of Accession which delay the application of freedom of movement of workers to new Member States until 1993.<sup>101</sup> The Court's ruling merely interpreted those provisions narrowly and in light of the purpose of the Act. The Court allowed a limited freedom of movement of workers for the Portuguese work force, but only for the completion of a temporary public works project. Thus, in no way does the ruling put the labor market of old Member States at the risk of a significant disruption. Moreover, *Rush* ensures that the freedom to provide

<sup>95</sup> *Rush*, 1990 E.C.R. I-1445, 2 C.M.L.R. 842 (1991).

<sup>96</sup> For the text of the questions submitted, see *supra* note 20.

<sup>97</sup> *Rush*, 1990 E.C.R. I-1445, 2 C.M.L.R. 843 (1991).

<sup>98</sup> *Id.*

<sup>99</sup> The purpose of the EEC, as set forth in Article 2 of the EEC Treaty, is "to promote throughout the Community a harmonious development of economic activities . . . and closer relations between the states belonging to [the EEC]." EEC Treaty, *supra* note 10, at art. 2. See *supra* notes 31-32 and accompanying text.

<sup>100</sup> Those Member States of the EEC which acceded before the Act of Accession on January 1, 1986 include: France, Belgium, the United Kingdom, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Greece, Denmark, and Ireland. Act of Accession, *supra* note 13, at art. 1.

<sup>101</sup> Those transitional provisions are Articles 216 to 219 of the Act of Accession. Act of Accession, *supra* note 13, at arts. 216-19.

services guaranteed to the new Member States<sup>102</sup> is not unnecessarily restricted. Third, the *Rush* decision promises economic advantages to both old and new Member States. The ruling enables a new Member State with a comparatively low wage level to utilize its competitive advantage in labor-intensive work throughout the EEC. At the same time, the old Member State benefits from a public works project completed at a lesser cost to the taxpayer.

In addition to the broad ramifications discussed above, the ruling in *Rush* is likely to have an effect on another area of EEC law—that of public works contracts. The awarding of public works contracts within the EEC is regulated to avoid discrimination based on nationality.<sup>103</sup> Directives 71/304 and 71/305 set forth a non-discriminatory procedure for the awarding of public works contracts.<sup>104</sup> These Directives seek to afford persons from all Member States an equal opportunity to compete for the awarding of public works contracts.<sup>105</sup> The ruling in *Rush* reinforces this goal and increases the ability of new Member States to compete for these public works contracts. Because of the competitive advantage in low wage levels enjoyed by new Member States in comparison to old Member States, the EEC is likely to experience an increase in the number of public works contracts awarded to new Member States. The economic significance of these public works contracts in the EEC is considerable.<sup>106</sup> The closure of the EEC market for public works contracts to new Member States with competitive wages would be costly.<sup>107</sup> Because of the cost efficiency to the Member State awarding the contract and the labor benefits to the new Member States who receive such contracts, this

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<sup>102</sup> New Member States are Portugal and Spain. Act of Accession, *supra* note 13, at art. 1.

<sup>103</sup> These regulations include Directives 71/304 and 71/305, *supra* note 65.

<sup>104</sup> Directive 71/304 states in pertinent part:

Member States shall abolish, in respect of . . . natural persons and companies or firms . . . restrictions . . . affecting the right to enter into, award, perform or participate in the performance of public works contracts on behalf of the State, or regional or local authorities or legal persons governed by public law.

Directive 71/304, *supra* note 65, at art. 1.

<sup>105</sup> *Id.*

<sup>106</sup> The economic stakes regarding public works contracts in the EEC are very high. An estimated nine percent of the EEC's gross domestic product (GDP) is attributable to public supply and works contracts. Riga, *supra* note 62, at 387.

<sup>107</sup> The cost to the taxpayer of the effective closure of relevant markets to competition has been estimated to amount to 40 billion ECUs a year. Weiss, *supra* note 58, at 318.

ruling and its ramifications are advantageous to the new Member States and to the EEC as a whole.

#### IV. CONCLUSION

The old Member States' need to check the influx of new Member State workers into their employment market is vital to the economic stability of each Member State and the EEC as a whole. However, the provisions of the Act of Accession that permit such control must not be interpreted in a manner that unnecessarily restricts the freedom to provide services. Such an interpretation would discourage economic development and is undesirable for all Member States of the EEC. The ruling in *Rush* protects the labor markets of the old Member States while encouraging cost-effective construction projects which benefit both parties to a public works contract. The *Rush* decision takes the EEC one step closer to fulfilling its goal of economic integration and expansion.

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