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and The Movement
of Labour in the Countries
of the European Union

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**INTERNATIONAL MIGRATION AND LABOUR MARKET POLICIES
OCCASIONAL PAPERS
No.2**

**THE PROVISION OF SERVICES AND THE MOVEMENT OF LABOUR IN THE COUNTRIES OF
THE EUROPEAN UNION
by
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OCCASIONAL PAPERS

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The report treats both activities involving the temporary migration of labour and the measures taken to combat the illegal employment of foreigners and immigrants.

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SUMMARY

Service contracts which involve the movement of workers can result in a certain number of social problems. For example, it is generally difficult to measure labour flows stemming from such contracts and to know their impact on the labour market. In addition, legislation on social matters, in particular that relating to labour and to social security, differs from one country to another. In this context, international labour mobility can give rise to a fraudulent use of service contracts and lead to forms of "social dumping".

In her report, the author defines service contracts in the context of Community law and specifies the conditions under which contracted services can be freely supplied in the European Communities. This right has been extended to other non-Community countries and was considered in the GATT negotiations on trade in services. The author then identifies restrictions on the free supply of services and examines their impact on movements of non-EC workers and on fraudulent practices (failure to apply labour and social security regulations or to respect legislation on immigration) resulting from a misuse of contracted services.

Finally, the author describes national and Community initiatives to regulate service contracts to foreign firms.

THE PROVISION OF SERVICES AND THE MOVEMENT OF LABOUR IN THE COUNTRIES OF THE EUROPEAN UNION

The intention to combat the partitioning of markets and dismantle economic frontiers between Member States is one of the most characteristic features of Community law. In the service sector, the existence of a single market means that businesses and consumers should be free to choose the service provider they wish from among all those established in the Community. This presupposes that nationals of EC Member States should be able to work and offer their services in all Member States. These objectives are reflected in the commitment in the Treaty of Rome to abolish obstacles to freedom of movement for services (Article 3) and restrictions on freedom to provide services (Article 59). The White Paper¹ presented by the European Commission to the European Council at Milan on 28 and 29 June 1985 proposed a "common market for services", enshrined following the Single European Act in Article 8a of the Treaty of Rome which defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

The concept of the freedom to provide services as expressed in the Treaty of Rome is essentially an economic one. However such freedom, when it entails the movement of labour, poses a number of problems of a social nature. It is difficult, for example, to measure the labour flows resulting from the provision of services and their effects on the labour market. In addition, application of the labour law of the place where the service is provided is uncertain. Differences in labour law from one country to another and the opportunities for evading controls and legal action afforded by international mobility may encourage abuse. Two examples of such fraud are organised for-profit loaned labour networks on an international scale and forged documents attesting to the holders' welfare coverage in their countries of origin, a means of avoiding the payment of employers' contributions. In this context a risk of social dumping arises, with the possible consequences of corporate relocations or the adoption of deregulation policies. National and EC authorities, aware of these difficulties, are seeking to identify the necessary initiatives and legal instruments that will create a framework within which services may be freely provided. Inter-governmental co-operation would appear to be the best means for achieving this end.

1. The freedom to provide services limits the application of national laws

The notion of the freedom to provide services is primarily a Community one: one of the fundamental principles of the Treaty of Rome, it has also been treated extensively in the case law of the Court of Justice of the European Communities. However, it is not an exclusively Community notion: such freedom has already been extended to the European Economic Area and may subsequently be extended to other countries, especially those of Central and Eastern Europe, in the context of international agreements and GATT negotiations.

The Member States of the European Union and the States of the European Economic Area are prohibited from hindering the free provision of services by requiring foreign service providers to comply with onerous national regulations. This limits their powers to control and supervise workers, whether self-employed or salaried, who are posted to another country in order to provide a service there. In

addition, employees on secondment tend to elude the constraints of national legislation because of the law governing employment contracts, which in many cases is not the same as the law of the State where the service is provided.

The free provision of services, a notion defined by Community law

The abolition of restrictions on the freedom to provide services, set out in general terms in Articles 59 and 60 of the Treaty of Rome, was supposed to be achieved gradually through specific measures for each category of service. Although these measures are absent in a certain number of sectors, the Court of Justice, having confirmed that Articles 59 and 60 of the Treaty have direct effect², has sought to elucidate what is meant by the freedom to provide services.

Definition of the provision of services

The notion of the provision of services is difficult to define. In economic terms, services cover a substantial part of the activity of the tertiary sector. Services represent a growing share of economic activity, whether related to goods (after-sales service, maintenance), financial (banking and insurance), intellectual (data processing, management, consulting), or in the construction, communication, tourism or transport industries, etc. The Treaty of Rome does not give a precise legal definition.

According to Article 60 of the Treaty, services are considered to be such 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. Within the meaning of the article, services include:

- activities of an industrial character;
- activities of a commercial character;
- activities of craftsmen;
- activities of the professions.

By endorsing the residual nature of the notion of services, Article 60 leaves considerable scope for the freedom to provide them granted by the Treaty of Rome. It does not allow for any distinction to be made between the service as such and its provision, from which it may be concluded that the latter is the essential factor³. The notion of the provision of services thus implies a specific activity on the part of the provider, involving his skills or abilities. However, this notion applies only to economic activities because the services must normally be provided against remuneration (which, according to the Court of Justice, constitutes the criterion for economic activity). In order to fall within the scope of Community law, services must be provided for a consideration that can be assessed objectively. In Community law, the provision of services applies only to activities of a transnational nature: Article 59 of the Treaty, extensively interpreted by the Court of Justice, requires that services falling within the scope of Community law should be provided from an establishment in a Community Member State other than that of the recipient⁴. The provision of services within the meaning of the Treaty of Rome concerns only activities of a temporary nature: the law applicable to a service provider carrying on his activity on a permanent basis in a Member State is the law relating to the freedom of establishment and not the freedom to provide services⁵.

Services within the meaning of Community law must be provided by Community nationals, whether natural or legal persons. Still more restrictively, because the provision of services concerns situations which are not governed by rules relating to the free movement of persons, it only applies to "undertakings" or self-employed workers who are able to enter into a service agreement, or what in the meaning of French law would be a leasing agreement. Nonetheless, provision of the service often involves the contracting company's employees, which is why the "general programme for the elimination of restrictions on the freedom to provide services"⁶ has provided for the amendment of laws and regulations insofar as they are likely to hinder the provision of services by the nationals of Member States or by specialist staff or staff occupying a position of trust accompanying the service provider or providing the service on his behalf.

Broad interpretation of the freedom to provide services

The purpose of Community legislation concerning the provision of services was to eliminate unjustified restrictions on the international exercise of service activities. On the basis of this aim, the Court of Justice has outlined the principle of the freedom to provide services. For the Court, such freedom implied the abolition of all restrictions on the performance in a Member State of a service agreement by an undertaking or self-employed person established in another Member State. The application of national regulations which constitute discrimination on the basis of the service provider's nationality is prohibited, as is differential treatment on the basis of the presence or absence of an establishment in the Member State where the service is provided. Court of Justice case law also rejects all indirect discrimination, which means discrimination resulting from national conditions for carrying on the activity which, while uniformly applicable to all service providers, prove to be more difficult to comply with for non-nationals or those not established on the national territory. Thus, the Court of Justice ruled against the requirement in British law for the crew of British fishing boats to be resident in the United Kingdom⁷.

Although established and non-established service providers must be treated equally, the principle of equal treatment does not authorise Member States to apply all national rules to service providers, even if they are not discriminatory. Any barrier to the freedom to provide services is likely to render national regulations incompatible with Community law. The Court of Justice, in a judgement of 3 February 1982 in *Seco, Desquenne and Giral*⁸, ruled against Luxembourg regulations which required, in the event of the employment in Luxembourg of non-Community workers, the payment of the employer's share of employee pension and invalidity contributions even when contributions of a similar kind were paid in another Member State and such contributions did not give the employees any benefit entitlements.

The Court of Justice also ruled against restrictions on the movement of the means necessary for the service provider to provide the service (machines, equipment, materials, etc.) or of employees to help carry out the work. In a judgement of 27 March 1990 in *Rush Portuguesa*⁹, the Court ruled on those grounds that it was contrary to Articles 59 and 60 of the Treaty of Rome for a Member State to subject the movement of the employees of a service provider established in another Member State to restrictive conditions such as recruitment in situ or a work permit requirement. The Court's argument was based on the idea that a service provider must neither be subject to discrimination in comparison with competitors established in the host country who may freely use their own employees, nor have his ability to provide the service affected by restrictions on the use of his employees.

The freedom to provide services outside the framework of the European Union

The freedom to provide services is not an exclusively Community principle. The entry into effect of the European Economic Area agreement extends this freedom to a further five States. It has also been included in agreements with certain Eastern and Central European countries and discussed in the GATT negotiations on services.

The European Economic Area

The development of closer ties between the countries of the European Union and the European Free Trade Association (Austria, Switzerland, Liechtenstein, Iceland, Sweden, Norway and Finland) culminated in the signing, on 2 May 1992 in Oporto, of the agreement on the European Economic Area (EEA) which extended the geographical scope of the freedom to provide services to the 19 signatory States. The agreement came into effect on 1 January 1994 in all the States with the exception of Switzerland. Since that date, nationals of EEA Member States enjoy the freedom to provide services within the meaning of Community law. However, for certain regulated activities the freedom to provide services will be recognised only after the conditions for its implementation have been set out in specific legislation.

Agreements between the European Union, its Member States and the countries of Central and Eastern Europe

In December 1991, the European Union and its Member States signed association agreements with three countries, the purpose of which was to bring the associate States back into European political and economic life, ultimately leading to membership of the Community. The countries in question are Poland, Hungary and Czechoslovakia (the agreement was renegotiated in the same terms with the two States resulting from partition). The association agreements recognise, under certain conditions, the possibility for nationals of the signatory States to provide services in EC Member States. For example, Article 65 of the association agreement with Czechoslovakia states: "the parties shall take the necessary steps gradually to allow the free provision of services. The parties shall temporarily accord the movement of nationals providing the service to employees constituting "key staff" of the enterprise providing the service, including representatives of enterprises who are temporarily posted in order to negotiate sales or seek customers for the service provider but do not themselves sell or provide the service." All the association agreements are drafted in similar terms. The association agreements with Poland and Hungary came into effect on 1 February 1994. The freedom to provide services will thus gradually be implemented between these two States and the Member States of the European Union.

Comparable agreements were signed with Romania and Bulgaria on 17 November and 22 December 1992. Economic and commercial co-operation agreements containing provisions relating to the free movement of services were signed with the Baltic republics in 1992. Other agreements are currently being negotiated with Russia and a number of other republics of the former Soviet Union, also including provisions to introduce the freedom to provide services. However, these agreements are only partnership agreements whose purpose is the restoration of the economies of the countries concerned and not their ultimate integration into the Community, unlike the association agreements mentioned above. An agreement between the European Union, its Member States and Morocco is currently being negotiated. However, the agreement is likely to maintain considerable restrictions on the freedom of Moroccan nationals to provide services in France.

The GATT negotiations on services

Community proposals in the GATT negotiations on services concern restrictively listed categories of persons and services:

- "intra-corporate transferees", natural persons attached to a parent company who, as managerial or highly specialised technical staff, are given the task of developing a subsidiary of the parent company;
- "negotiator-investors", responsible for negotiating commercial agreements without making direct sales;
- a certain number of self-employed members of the professions carrying on their business on the basis of a contract with a service receiver.

The last category, defined in very vague terms, is no doubt able to lead to a considerable increase in the number of persons to whom the agreements apply. However, no agreement was reached on the issue of the movement of persons in connection with the provision of services in the final set of negotiations in the Uruguay round and the difficulties encountered during discussions suggest that there is little likelihood of rapid agreement on this point within the GATT framework. The decision to continue negotiations on this point has nevertheless been taken.

Limits on the application of national laws

The requirements of Community law

The broad interpretation of the freedom to provide services that has emerged from the case law of the Court of Justice of the European Communities does not mean that certain restrictions on that freedom cannot be countenanced. However, such restrictions are allowed only in a limited number of cases.

For example, the Court tolerates restrictions justified by legitimate goals or interests or on the grounds of "imperative reasons relating to the public interest"¹⁰. However, the Court seems to have adopted a fairly flexible position with regard to the definition of legitimate goals or interests. In a judgement of 17 December 1981 in *Webb*¹¹ the Court, considering that providing manpower constituted the provision of a service, ruled that Member States could require temporary employment agencies to possess a licence provided that the justifications and guarantees already presented in the company's State of establishment were taken into account. Likewise in its judgements in *Seco*, *Desquenne* and *Giral* and subsequently *Rush Portuguesa*, mentioned earlier, the Court held that it was not contrary to Community law for Member States to extend their labour laws or collective labour agreements to any person carrying on salaried work on their territory, albeit of a temporary nature, whatever the State in which the employer was established.

However, this tolerance in Community case law does not allow Member States to require service providers to comply with national obligations if they have already complied with a similar obligation in their State of origin. Furthermore, under Community law the restriction imposed must be strictly proportional to the objective pursued, meaning that States have to seek the least restrictive measures that enable them to protect the interest in question.

While certain restrictions may be imposed in the defence of vital interests, no discrimination may be tolerated if it falls outside the scope of the express exception provided in Article 56 of the Treaty of Rome relating to measures intended to safeguard public policy, public security and public health¹². The Court further ruled that objectives of an economic nature did not constitute grounds of public policy within the meaning of Article 56.

National laws may therefore be applied in order to safeguard legitimate interests. They may also be applied in all cases where the freedom to provide services may serve to conceal fraudulent activity. An early judgement of the Court¹³ which has served as the basis for certain recent decisions¹⁴ authorises a Member State to take measures to prevent the exercise by a person whose activity is entirely or principally directed towards its territory of the freedom to provide services for the purpose of avoiding professional rules of conduct which would be applicable to him if he were established within that State.

National laws may also apply in sectors where the freedom to provide services is subordinate to the implementation of a common policy. Under the terms of Article 61, paragraph 1 of the Treaty of Rome this is the case with transport, an area in which Member States are authorised to retain their specific regulations until Community legislation is introduced¹⁵.

Determination by the Rome convention of the law governing employment contracts

The provision of a service in another country often requires the displacement of employees of the enterprise providing the service. Such employees, generally employed in one State, are temporarily performing the obligations arising from their employment contract in another State. Under these circumstances, the international nature of the employment contract means that several different sets of laws may govern the contract, in which case the applicable law needs to be determined in accordance with each State's rules concerning conflict of laws. As the specific nature of national rules concerning conflict of laws was regarded as an obstacle to the unification of the markets of EC Member States, the States concluded a convention in order to unify the rules regarding conflicts in contractual matters. This convention, signed in Rome on 19 June 1980, came into effect on 1 April 1991. The States that have ratified the convention must henceforth comply with its provisions concerning determination of the law applicable to employment contracts performed temporarily on the territory of those States by the employees of a service provider.

The convention provides for employment contracts to be governed by the law of the parties' choice. However, such a choice may not deprive employees of the minimum protection afforded by the law of the place where they habitually work. The latter applies by default if the parties do not choose a law for the contract. In the case of workers who regularly change their place of work, the governing law is the law of the country where the establishment hiring them is located. The rules of the Rome Convention, applied to the temporary posting of employees, thus mean that the employment contract is governed by the law of the employee's habitual place of work, which is usually the law of the place where the undertaking that employs him is established.

However, under the convention the applicable mandatory rules are those of the place where the work is carried out. Article 7 of the Convention, entitled "Mandatory rules", states that the provisions of the convention may not restrict the application of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract. Under the terms of the article, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.

On the basis of these principles, it is up to the national courts to determine the mandatory nature of the rules of their national law and to decide whether rules exist in the law of the place where the work is being carried out whose mandatory nature justifies their application. In civil matters, however, application of the law of the place where the work is temporarily carried out is rendered more uncertain by the rules of jurisdiction resulting from the Brussels Convention of 27 December 1968 as amended by the San Sebastian and Lugano Conventions. The Brussels Convention provides that legal action may be taken against the employer in the place where the work is habitually carried out or, when the work is carried out in several States, in the place where the establishment hiring the worker is established. This rules out the jurisdiction of the courts of the place where the work is temporarily carried out even though they are in a better position to determine the mandatory nature of the rules of their national law. However, this applies solely to civil matters and criminal action can always be taken in the place where the work is temporarily carried out.

The Court of Justice has not yet been asked to rule on the scope of the notion of mandatory rules because the Member States have not yet ratified the two protocols giving the Court a certain measure of competence¹⁶.

Principle governing the application of national law in social security matters

EC Member States have concluded various bilateral agreements concerning the social security of workers moving between States. In particular, these agreements make provision for the national laws which should govern employees posted for the purposes of providing services.

Between EC Member States, matters concerning the social security of workers moving within the Community are covered by Regulation 1408/71 of 14 June 1971, the detailed rules of application of which are contained in Regulation 574/72 of 27 March 1972. The first of these regulations defines the notion of posting and sets out the rules applicable to the social security situation of workers on postings. Article 14 of Regulation 1408/71 states that a worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the duration of the work does not exceed 12 months and that the employee has not been sent to replace another worker who has completed his term of posting. The posting can be extended by a further 12 months at most provided that the State in whose territory the worker is posted gives its consent.

Under the terms of Regulation 574/72, the worker on a posting or his employer must apply for a certificate of posting (Form E 101) prior to departure in the State where he is habitually employed. The certificate is issued by the competent authority of the State whose laws continue to apply and certifies that the employee is subject to such laws until the end of the posting. Pursuant to a decision of the Commission of the European Communities¹⁷, partially filled-out copies of Form E 101 may be issued to the employer for periods of posting not exceeding three months. In this case, the employer fills in the form and hands it to the worker prior to his departure.

2. The need for national and community approaches to the social consequences of the freedom to provide services

Limited control of the entry and work of foreign employees in the context of the freedom to provide services

Member States have very imperfect knowledge of the numbers of foreign workers providing services on their territory, a situation which is partly explained by the free movement of workers who are nationals of an EC Member State. The freedom to provide services granted to Community undertakings, even when they employ workers who are nationals of non-Member States, may equally deprive States of the ability to control the activity of such workers within their own frontiers.

Difficulty of obtaining information on the activity exercised by nationals of EC Member States in the context of the freedom to provide services

The free movement of workers in the European Union and the free access to employment in each Member State mean that EU nationals are not required to obtain a work permit in order to take up salaried employment in a State of which they are not nationals. If the period of residence in another State is less than three months, no residence permit is required. If it is more than three months, Community nationals are issued with a residence permit. The value of these residence permits is purely declarative since workers who are EC nationals enjoy a right of residence that derives directly from the Treaty of Rome.

However, the Court of Justice has acknowledged the right of Member States to be informed of the movement of workers when it concerns them. In several judgements¹⁸ the Court has recognised the requirement for workers to take steps to inform the appropriate authorities of the host State of their presence. However, such requirements may not result in any restriction on the free movement of workers. The penalties for failure to comply with the requirement must also be in proportion to the gravity of the offence, which means that States cannot treat nationals of EC Member States in the same way as non-EC aliens. In general, however, most States do not seem to have the means for obtaining precise information on the movements of workers providing services. This represents a major obstacle to the work of authorities responsible for ensuring that labour legislation is applied.

Uncertainty as to the maintenance of the working permit requirement for non-EC employees of an undertaking benefiting from the freedom to provide services

Nationals of non-EC States do not enjoy the freedom of movement accorded to workers by Community law. In most cases they are required to obtain a work permit in order to take up salaried employment within an EC Member State. However, when such workers are employed by Community undertakings exercising their right freely to provide services, the possibility for States to require a work permit could be regarded as a barrier to the provision of services and as such contrary to Community law.

The Court of Justice, asked to rule on this point in the Van der Elst case, should render a judgement, probably before the end of 1994, setting out the conditions for the employment in a Member State of third country nationals providing a service on behalf of a Community undertaking. Although most Member States, notably Germany, the Netherlands, France, Belgium, Luxembourg and the United Kingdom, and the European Commission are in favour of maintaining the principle of a work permit for nationals of non-EC States, the confrontation of the fundamental principles of the free movement of workers and the freedom to provide services could cause the Court to take an opposite view and reiterate

the arguments set out in the *Rush Portuguesa* judgement of 27 March 1990. In this judgement the Court held that the work permits for Portuguese nationals required in France during the transition period following Portugal's accession to the European Union constituted a restriction on the freedom to provide services. The restriction could not be justified insofar as the Court held that the employees of a service provider did not have access to the labour market of the State in which the service was provided.

Without going so far as to call into question the principle of work permits, the Luxembourg Court may also require such permits to be issued automatically when the foreign workers in question are part of the service provider's permanent staff. This is the approach favoured by the United Kingdom and the Commission. In this case, work permits are the sole means for ensuring that the employees concerned have not been hired specifically in order to provide the service and that the conditions of employment in force in the host country are respected, if that country so requires. If this solution is adopted, the question will arise of which employees can be regarded as the service provider's permanent staff. Will workers holding temporary residence and work permits be included?

The freedom to provide services is thus likely to lead to a certain freedom of movement within the European Union for employees who are not EC nationals. In this context, the policies of each Member State regarding the entry and employment of third country nationals have an effect on the employment of such persons in other Member States. These interactions may encourage an alignment of Member States' policies on the admission of third country workers.

However, while waiting for the verdict of the Court of Justice, States continue to require work permits and to apply penalties in the event of failure to comply. In Germany, this requirement is an absolutely vital instrument for controlling the employment of nationals of Eastern and Central European countries for the purpose of providing services. In Luxembourg, the growing presence of German service providers employing Croat or Polish workers is another argument in favour of preserving work permits. However, it should be emphasised that in some sectors where the work involved is of very short duration it is possible for work permits not to be required. For example, no permit is required in the Netherlands for services provided in the international transport sector or for the installation of machinery (when the workers employed are those of the enterprise selling the machinery in question).

Specific provisions of agreements with certain Central and Eastern European countries

The agreements mentioned earlier between the European Union, its Member States and certain Central and Eastern European countries provide for the gradual implementation of the freedom to provide services while maintaining the work permit requirement for employees of the States concerned. However, for a certain number of employees, work permits may not be refused on the grounds that the local labour market situation does not justify the use of foreign labour. Such employees are identified in the agreements as being members of the company's key staff and who have been employed by the company for at least one year.

The entry into force on 1 February 1994 of the agreements with Poland and Hungary, while not apparently imposing the immediate implementation of the freedom to provide services, raises questions concerning the notion of key staff. As the definition contained in the agreements is singularly unclear, it is likely not only that States will interpret the notion differently, that is to say more or less restrictively, but also that the authorities in each State responsible for issuing work permits will find themselves faced with delicate questions of judgement.

The bilateral agreements between Germany and a certain number of Central and Eastern European States, on which the European agreements are superimposed, authorise contracts for the provision of manpower to be concluded between companies of the States party to the agreements, on condition that temporary work permits are obtained for the employees concerned, and within the limits of the annual quotas for workers from each State able to benefit from the agreements.

The disruption of national labour law as a result of the freedom to provide services

The freedom to provide services does not affect national labour law only because it might call the principle of work permits into question. The fact that barriers to the freedom to provide services are contrary to Community law and the resulting movements of workers make it difficult to apply domestic labour laws and may be a significant source of fraud.

Inapplicability of national welfare legislation

In social security matters, EC Regulation 1408/71 provides that employees posted to another country in order to provide a service may remain subject to the laws of their State of origin provided they obtain a certificate of posting. The social security laws of the State where the service is provided do not therefore apply. In view of the differences in the amount of social charges imposed in each country, this system leads to differences between the cost of local labour and that of the labour brought in by the service provider.

The conjunction of the principles of Community law and of the Rome Convention, discussed in Part One, probably excludes the application *in toto* of national labour law to the employees of a service provider. However, the vagueness of Community case law and of the Rome Convention has led States to interpret these principles individually and differently. The application of national labour law thus differs widely from one Member State to another.

In Belgium, foreign service providers are required to comply with most rules of labour law, such as minimum wages, working hours, weekly rest periods, public holidays and the keeping of records. Following recent legislative clarifications French law, while not quite as strict as Belgian law, is likely to require service providers to comply with essential rules governing employment contracts deriving not only from laws and regulations but also from across-the-board collective labour agreements. The Netherlands, unlike France and Belgium, considers that for the most part domestic labour law does not have to be applied when work is carried out in the context of the provision of services.

The application of domestic labour law does not depend solely on how States interpret EC and international law. National laws may not be applicable to service providers because of the way in which they are framed. The sources of labour law may also constitute an obstacle to the application of national rules. In Germany, for example, collective labour agreements, which frequently do not extend to all employees and all national undertakings, are the principal source of labour law. Many provisions of German labour law, of contractual origin, cannot therefore be applied to the employees of undertakings established in another country.

Whatever the theoretical possibilities for the application of national labour law, one difficulty is common to all States: ensuring that undertakings established in another country comply with their obligations in social matters, especially when employees of these undertakings are posted for very short periods. Wage provisions are a good example of this difficulty. In most countries, inspectors have no means of finding out the amount of the wages paid to employees in their State of origin.

Fraudulent practices resulting from misuse of the freedom to provide services

The freedom to provide services, intended in the spirit of Community law as the possibility, in an economic context, for a Community undertaking to extend its market to all Union Member States, has on occasion proved to be a means for evading social provisions. Various types of fraud have been identified in the different Member States.

One abuse of the freedom to provide services is the use of "false" self-employed workers. Such workers, who are EC nationals, carry on their activity on behalf of an undertaking established in an EC Member State on the basis of a service agreement and are presented as self-employed workers. However, when the conditions under which they perform the work are studied more closely they prove, under the law of certain Member States including Germany, Belgium and France, to have employee status. In this situation, frequently encountered in the agricultural and construction sectors in the Netherlands and in the construction sector in Germany, the use of workers from other Member States, described as self-employed workers, allows national undertakings to disregard the provisions of national labour law.

In a certain number of cases, it is apparent that "false" self-employed workers who were EC nationals had been made available to undertakings in another State through persons domiciled in a third State. The purpose of this device is to evade the regulations governing temporary work in force in certain countries. In States whose regulations prohibit temporary work in the construction industry, for example, notably the Netherlands and Germany, false self-employed workers who are nationals of another EC Member State has often been found on construction sites.

Where temporary work is concerned, the freedom to provide services makes it possible to exploit discrepancies between national laws. A temporary employment firm carrying on its business in a State where that business is regulated, such as Belgium, the Netherlands, Germany or France, may find it worthwhile to create an agency in a State where temporary employment is not regulated, such as Luxembourg, and then intervene as a service provider in its country of origin.

Beyond the exploitation of differences in national legislation, the freedom to provide services may also be a means for certain undertakings to evade all regulation by having no establishment in any State. Such undertakings, invoking the freedom to provide services and claiming a fictional establishment in a State other than the State in which the service is provided, are subject to only some of the social regulations of the latter State.

Where in addition to labour law social security law is concerned, a certain number of States have found that Community regulations which allow employees on postings to remain within the social security system of their State of origin can be a significant source of social security fraud. In the Netherlands, the loss of revenue to Dutch social security organisations as a result of falsified E 101 certificates has been estimated at 30/50 million florins. In frontier zones, the employees of service providers have also been found to enjoy unemployment benefits or pensions.

The possibility of evading the social legislation of the State where a service is provided, whether as a result of fraudulent behaviour or the simple inapplicability of national labour law to service providers and their employees, may be a source of unfair competition to the detriment of national undertakings and employees residing in a State offering a high degree of social protection. In order to combat social dumping and ensure the protection of home country workers, a number of initiatives have been taken at both national and Community level to introduce new legal instruments and more effective methods of control.

National and Community initiatives

Reactions of national authorities

The social dumping and fraud that can result from the freedom to provide services have induced States to maintain or introduce certain controls on the activity of foreign service providers. In a certain number of countries, controls carried out in employees' places of work have been reinforced by greater co-ordination of the action of different authorities. In Luxembourg, for example, a working party to combat social dumping has been set up to prepare concerted action by the labour inspectorate, the police, the social security authorities, the employment ministry and the tax authorities. This type of co-ordinated action also exists in the Netherlands and France. In Germany, the customs authorities have been given new powers to carry out inspections in companies with officials from the labour bureau.

Requiring employees to carry documents attesting to compliance with certain aspects of the regulations for the entire duration of their posting may also result in more effective controls. Under the terms of a German law of 6 October 1989, for example, all employees in certain economic sectors, such as the construction, transport and cleaning industries, are required to be in possession of a social security card bearing their photograph (foreign employees who are not EC nationals are required to carry their work permits in place of a social security card, while those who are EC nationals have to carry their certificate of posting). In Belgium, since the introduction of the law of 6 July 1989, foreign employers using employees on postings in the construction industry are required to apply to the social security authorities for an individual card for such employees. The employees must be in possession of the card at their place of work.

A certain number of countries also impose a declaration obligation on service providers so that controls in the workplace can be carried out and so that prior checks can be made to ensure that foreign companies are not in breach of the law. In Luxembourg, for example, a certificate must be obtained from the *Ministère des Classes Moyennes* before a service can be provided. Various items of information concerning the company and its employees are collected when the certificate is issued.

The Belgian authorities require foreign companies wishing to carry on an activity in the construction sector in Belgium to file a declaration with the registrar of the commercial court of the place where the service is to be provided. Companies are required to state the type of activity envisaged, the place where the service is to be provided and the names of the employees involved. A copy of this declaration is sent to the social inspectorate. Further, in order to verify compliance with social security obligations, any person for whom or on whose premises the employees of a third company remaining part of the social security system of another State are working is required to inform the social inspectorate in writing of the names of those who do not have a certificate of secondment. In France, the decree implementing Article L 341-5 of the Labour Code resulting from the five-year employment law of 20 December 1993 is to contain provisions requiring service providers to declare the exercise of an activity in France to the labour inspectorate. The declaration would mention the presence of employees on secondment.

These declarations taken together enable national governments to be informed of the presence of foreign undertakings and to carry out such controls as are deemed necessary. However, it appears extremely difficult to verify whether a company is validly established in another country, whether certificates attesting that employees remain part of another State's social security are valid and whether employees are treated in accordance with the social standards in force.

For that reason, national governments have sometimes found it useful to exchange information and to cooperate in the fight against fraudulent practice. Since the early 1980s, the German and Netherlands governments have maintained constant relations to combat fraud resulting from cross-border movements. Similarly, the German and French labour inspectorates have undertaken regular exchanges of information in recent years with the aim not only of familiarising themselves with each other's regulations but also of resolving practical problems. Communicating the results of controls carried out in one State to the authorities of a neighbouring State has helped in particular to combat the fraud whereby workers claim unemployment benefit in one State while at the same time working in another. This method has equally made it possible to identify various systems of organised fraud on both sides of the border. Recent contacts between the French and Belgian labour authorities should lead to the establishment of similar relations.

Initiatives to encourage co-operation between the Netherlands and German governments on the one hand and the British government on the other have not had any real success to date. Nevertheless, they have allowed the governments involved to obtain information concerning certain UK nationals working in Germany and the Netherlands. However these informal methods of co-operation, strongly encouraged by the German government, are not entirely satisfactory. The authorities have few financial or legal resources to put co-operation initiatives into effect and there is reasonable doubt as to the value of the information passed on by the controlling authorities.

The uncertain outlook for Community action

Action at Community level consists mainly in a draft directive on the posting of workers in the context of the provision of services. The proposal aims to determine the mandatory rules of the labour law of the country where the service is provided which must be respected in the case of employees on postings. Posting, within the meaning of the directive proposal, covers three types of situation: the dispatch of workers by an undertaking to the territory of a Member State in order to perform a service agreement, the provision of manpower for temporary work, and the provision of manpower to one of the undertaking's establishments or to another undertaking situated in another State.

The proposal states that the employer must ensure that the workers on posting benefit from the working and employment conditions in force for work of the same type in the place where the work is carried out on a temporary basis, whether they are defined by laws or regulations, collective labour agreements or arbitration awards applicable to the entire profession or sector concerned. In particular, the proposal covers working hours, rest periods, Saturday, Sunday and night work, shift work, paid leave, public holidays and minimum wages.

However, the proposal rules out the application of host country rules on paid leave and minimum wages for postings of less than one month, an option which has been the subject of much criticism. The French labour authorities consider that the one-month period introduces a major and practically uncontrollable risk of fraud. The German authorities (*Bundesanstalt für Arbeit*) consider that minimum wage rules should apply immediately: the bilateral agreements between Germany and the countries of Eastern and Central Europe contain a requirement of this nature which the German authorities believe should not be called into question by a Community directive. The difficulty of reconciling the French and German viewpoint on the issue with that of Portugal and the UK makes any rapid adoption of the directive highly unlikely.

This is all the more regrettable in that certain amendments introduced by the European Parliament have given the proposed directive new interest. One of these amendments states that Member

States should ensure that co-operation is established between public authorities in order to implement the directive. To this end, liaison bureaux would be set up to answer requests for information about the working conditions applicable to workers on posting or the cross-border provision of manpower. Information about abuses and illegal cross-border activities would also be transmitted. The measure would thus introduce free-of-charge reciprocal administrative assistance. The European Commission has accepted the Parliamentary amendment, emphasising that it forms part of a wider plan to strengthen co-operation between administrations, presented in a communication from the Commission to the Council and the European Parliament¹⁹.

In the context of the co-operation between national governments which it is seeking to promote, it is not impossible that the Commission will participate in identifying specific needs which co-operation initiatives should address and in determining the basic principles which should govern relations between administrations. If that were the case, the Commission could also play a part in drawing up uniform documents for the exchange of information or defining a computerised system for data transfer.

Conclusion

The national instruments available to EC Member States in order to combat social dumping and fraud resulting from exercise of the freedom to provide services often prove to be ineffective. Likewise, with the exception of the proposed directive on the posting of workers in the context of the provision of services, Community action in helping to resolve the problems arising from the transnational provision of services remains highly hypothetical. For that reason, in view of the inadequacy of national and Community solutions, methods of co-operation between national administrations have been tried out.

The informal nature of the co-operation between national administrations gives it the flexibility necessary for rapid action by supervisory authorities in situations where workers and companies enjoy considerable mobility. However, only a limited number of countries are involved in such co-operation, which comes up against the lack of legal instruments enabling administrations to adapt to the increasingly international activity of economic agents.

In the fight against fraud connected with the freedom to provide services, one of the priorities of EC Member States must be to determine the forms which broader and stronger co-operation between administrations might take, whether the issue be approached on a Community or intergovernmental basis. The prospect of such initiatives makes it necessary to identify the relevant national administrations concerned, to compare national legislation and to seek an alignment of legal and policy options affecting the movement of EC and non-EC workers for the purposes of providing services on a transnational basis.

NOTES

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1. Com. 85/310 final, 14 June 1985.
 2. Judgement of 3 December 1974, Van Binsbergen, Case 33/74.
 3. Cf. Claude J. Berr, "*Perplexités juridiques à propos du marché commun des services*", *Revue du marché*
 4. Cf. Van Binsbergen judgement, prec.
 5. Cf. esp. the "insurance" judgement of 4 December 1986, Case 205/84 and the judgement of 5 October 1988, Steymann, Case 196/87.
 6. Council, 15 January 1962, OJ No. 2, p. 32.
 7. Judgement of 17 November 1992, Case C 274/89.
 8. Cases 62 and 63/81.
 9. Case C 113/89.
 10. See esp. the "insurance" judgements of 4 December 1986 in Cases 220/83, 252/83, 205/84 and 206/84 and the "tourist guide" judgements of 26 February 1991 in Cases C 154/89, C 180/89 and C 198/89.
 11. Case 299/80.
 12. Judgement of 16 December 1992, Case C 211/91.
 13. Judgement of 3 December 1974, Van Binsbergen, prec.
 14. Esp. the judgement of 3 February 1993, Case C 148/91.
 15. Cf. concerning river transport the judgement of 31 March 1993, Cases C 184/91 and C 221/91.
 16. Protocols signed on 19 December 1988, OJ No. L 48 of 20 February 1989.
 17. Decision No. 148 of 25 June 1992, OJ No. L 22/124 of 30 January 1993.
 18. Cf. esp. the judgements of 7 July 1976, Watson, Case 118/75 and of 12 December 1989, Messner, Case 265/88.
 19. COM(94) 29 final, 16 February 1994.