Judgment of the Court of 23 November 1999

Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96). - References for a preliminary ruling: Tribunal correctionnel de Huy – Belgium

Freedom to provide services - Temporary deployment of workers for the purposes of performing a contract – Restrictions

Joined cases C-369/96 and C-376/96

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In Joined Cases C-369/96 and C-376/96,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Correctionnel de Huy (Belgium) for a preliminary ruling in the criminal proceedings pending before that court against

Jean-Claude Arblade,

Arblade & Fils SARL, as the party civilly liable (C-369/96),

and

Bernard Leloup,

Serge Leloup,

Sofrage SARL, as the party civilly liable (C-376/96),

on the interpretation of Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), R. Schintgen (Presidents of Chambers), J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- J.-C. Arblade and Arblade & Fils SARL (C-369/96) and B. and S. Leloup and Sofrage SARL (C-376/96), by D. Ketchedjian and E. Jakhian, respectively of the Paris and Brussels Bars,

- the Belgian Government (C-369/96 and C-376/96), by J. Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Development Aid, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar,

- the German Government (C-369/96 and C-376/96), by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Oberregierungsrat in that Ministry, acting as Agents,

- the Austrian Government (C-369/96 and C-376/96), by M. Potacs, of the Federal Ministry of Foreign Affairs, acting as Agent,

- the Finnish Government (C-369/96), by T. Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities (C-369/96 and C-376/96), by A. Caeiro, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of J.-C. Arblade and Arblade & Fils SARL and B. and S. Leloup and Sofrage SARL, represented by D. Ketchedjian, of the Belgian Government, represented by B. van de Walle de Ghelcke, assisted by J.-C. Heirman, social inspector, acting as an expert, of the German Government, represented by E. Röder, of the Netherlands Government, represented by J.S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, of the Finnish Government, represented by T. Pynnä, of the United Kingdom Government, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by D. Wyatt QC, and of the Commission, represented by A. Caeiro and M. Patakia, at the hearing on 19 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 June 1998,

gives the following

Judgment

Grounds

1 By two judgments of 29 October 1996, received at the Court on 25 November 1996 (C-369/96) and 26 November 1996 (C-376/96) respectively, the Tribunal Correctionnel de Huy (Huy Criminal Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), in each of those cases, two questions on the interpretation of Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC).

2 Those questions were raised in the course of two prosecutions brought against, first, Jean-Claude Arblade, in his capacity as manager of the French company Arblade & Fils SARL, and Arblade & Fils SARL itself, as the civilly liable party (hereinafter together referred to as `Arblade') (C-369/96), and, second, Serge and Bernard Leloup, in their capacity as managers of the French company Sofrage SARL, and Sofrage SARL itself, as the civilly liable party (hereinafter together referred to as `Leloup') (C-376/96), for failure to comply with various social obligations provided for by Belgian legislation, an offence punishable by penalties under Belgian public-order legislation.

The national legislation

3 The obligations concerning the drawing-up, keeping and retention of social and labour documents, minimum remuneration in the construction industry and the systems of `timbres-intempéries' (bad weather stamps) and `timbres-fidélité' (loyalty stamps), and the monitoring of compliance with those obligations, are imposed by the following legislation:

- the Law of 8 April 1965 introducing labour regulations (Moniteur belge of 5 May 1965),

- the Law of 16 November 1972 concerning the Labour Inspectorate (Moniteur belge of 8 December 1972),

- Royal Decree No 5 of 23 October 1978 concerning the keeping of social documents (Moniteur belge of 2 December 1978),

- the Royal Decree of 8 August 1980 concerning the keeping of social documents (Moniteur belge of 27 August 1980, as rectified in Moniteur belge of 10 and 16 June 1981),

- the Collective Labour Agreement of 28 April 1988, concluded under the aegis of the Construction Sector Joint Committee, concerning the award of `timbres-fidélité' and `timbres-intempéries' (`the CLA of 28 April 1988') and rendered compulsory by the Royal Decree of 15 June 1988 (Moniteur belge of 7 July 1988, p. 9897),

- the Royal Decree of 8 March 1990 concerning the keeping of individual records for workers (Moniteur belge of 27 March 1990), and

- the Collective Labour Agreement of 28 March 1991 concluded under the aegis of the Construction Sector Joint Committee, concerning working conditions (`the CLA of 28 March 1991') and rendered compulsory by the Royal Decree of 22 June 1992 (Moniteur belge of 14 March 1992, p. 17968).

4 Various aspects of that legislation are relevant for the purposes of the present judgment.

5 First, a system has been organised for monitoring compliance with the legislation relating to the keeping of social documents, hygiene and medical care in the workplace, employment protection, labour rules and employment relationships, safety in the workplace, social security and social assistance. Employers are under an obligation not to hinder such surveillance (Royal Decree No 5 of 23 October 1978 and the Law of 16 November 1972).

6 Second, in view of the compulsory effect given to the CLA of 28 March 1991 by royal decree, construction undertakings carrying out work in Belgium are required, whether or not they are established in that State, to pay their workers the minimum remuneration fixed by that agreement.

7 Third, under the CLA of 28 April 1988, which has been given compulsory effect by royal decree, such undertakings are required to pay, in relation to their workers, contributions to the `timbres-intempéries' and `timbres-fidélité' schemes.

8 In that connection, the employer is required to issue to each worker an `individual record' (Article 4(3) of Royal Decree No 5 of 23 October 1978). That record, which may be provisional or definitive, must contain the information listed in the Royal Decree of 8 March 1990. It must be validated by the Construction Workers' Subsistence Protection Fund, which will do so only if the employer has paid, in particular, all the contributions due in respect of `timbres-intempéries' and `timbres-fidélité', together with the sum of BEF 250 for each record submitted.

9 Fourth, the employer is required to draw up labour regulations which are binding on him vis-à-vis his workers and to keep a copy of those regulations in each place where he employs workers (Law of 8 April 1965).

10 Fifth, the employer is required to keep a `staff register' in respect of all his workers (Article 3(1) of the Royal Decree of 8 August 1980); this must contain various items of compulsory information (Articles 4 to 7 of that decree).

11 In addition, an employer who employs workers in more than one workplace must keep a `special staff register' in each of those places apart from the place in which he keeps the `staff register' (Article 10 of the Royal Decree of 8 August 1980). In certain circumstances, employers who employ workers to carry out construction works are exempt from the obligation to keep the special register in each workplace, provided that they maintain, in respect of each employee working there, an `individual document' containing the same information as that contained in the special register (Article 11 of that decree).

12 The employer is also required to draw up, in relation to each worker, an `individual account' (Article 3(2) of the Royal Decree of 8 August 1980). That document must contain various items of compulsory information concerning, in particular, the worker's remuneration (Articles 13 to 21 of the Royal Decree of 8 August 1980).

13 Sixth, the staff register and the individual accounts must be kept either at one of the workplaces, or at the address in Belgium at which the employer is registered in the records of a body responsible for the collection of social security contributions, or at the place of residence or registered office of the employer in Belgium, or, in the absence thereof, at the place of residence in Belgium of a natural person who, as the employer's agent or servant, keeps the staff register and the individual accounts. In addition, the employer is required to give advance notice, by registered letter, to the Chief District Inspector of the Social Law Inspectorate of the Ministry of Employment and Labour for the district in which those documents are to be kept (Articles 8, 9 and 18 of the Royal Decree of 8 August 1980).

14 According to the information supplied to the Court by the Belgian Government at the hearing, an employer established in another Member State who employs workers in Belgium is required in any event to appoint an agent or servant to keep the relevant documents either at one of the workplaces or at his place of residence in Belgium.

15 Seventh, the employer is required to retain, for a period of five years, the social documents comprising the staff register and the individual accounts, in the form of originals or copies thereof, either at the address in Belgium at which he is registered in the records of a body responsible for the collection of social security contributions, or at the seat of the approved employers' social secretariat to which he is affiliated, or at the place of residence or registered office of the employer in Belgium, or, in the absence thereof, at the place of residence in Belgium of a natural person who, as the employer's agent or servant, keeps the staff register and the individual accounts. However, if the employer ceases to employ workers in Belgium, he is required to keep those documents at his place of residence or registered office in Belgium or, failing that, at the place of residence of a natural person in Belgium. The employer is required to give advance notice to the Chief District Inspector of the Social Law Inspectorate of the Ministry of Employment and Labour for the district in which the documents are to be kept (Articles 22 to 25 of the Royal Decree of 8 August 1980).

16 The abovementioned obligations concerning the retention of social documents become applicable only where an employer established in another Member State ceases to employ workers in Belgium.

17 Eighth, criminal penalties for infringement of the aforesaid provisions are laid down in Article 11 of Royal Decree No 5 of 23 October 1978, Article 25(1) of the Law of 8 April 1965, Article 15(2) of the Law of 16 November 1972, Articles 56 and 57 of the Law of 5 December 1968 on agreements and joint committees and Article 16(1) of the Law of 7 January 1958, as amended by the Law of 18 December 1968 concerning subsistence protection funds.

18 Lastly, all legislation providing for the protection of workers constitutes public-order legislation within the meaning of the first paragraph of Article 3 of the Belgian Civil Code, to which all persons within the territory of Belgium are therefore subject.

The main proceedings

19 Arblade and Leloup carried out works in connection with the construction of a complex of silos, with a capacity of 40 000 tonnes, for the storage of white crystallised sugar on the site belonging to Sucrerie Tirlemontoise at Wanze in Belgium.

20 To that end, Arblade deployed a total of 17 workers on that site from 1 January to 31 May 1992 and from 26 April to 15 October 1993. Leloup likewise deployed nine workers from 1 January to 31 December 1991, from 1 March to 31 July 1992 and from 1 March to 31 October 1993.

21 In the course of checks carried out on the site in 1993, the representatives of the Belgian Social Law Inspectorate requested Arblade and Leloup to produce various social documents provided for under the Belgian legislation.

22 Arblade and Leloup considered that they were not obliged to produce the documents requested. They maintained, first, that they had complied with all the French legislation and, second, that the Belgian legislation and rules in issue were contrary to Articles 59 and 60 of the Treaty. Leloup did produce, on 2 December 1993, the staff register kept pursuant to French law.

23 Arblade and Leloup were prosecuted before the Tribunal Correctionnel de Huy for non-compliance with the abovementioned obligations imposed by the Belgian legislation.

24 The Tribunal Correctionnel de Huy considered that an interpretation of Community law was needed in the two cases; it therefore decided to stay proceedings and, in Case C-369/96, to refer the following questions to the Court:

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

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

(b) to pay to its workers the minimum remuneration fixed by collective labour agreement;

(c) to keep a special staff register;

(d) to issue an individual record for each worker;

(e) to appoint an agent or servant responsible for keeping the individual accounts of employees;

(f) to pay "timbres-intempéries" and "timbres-fidélité" contributions for each worker,

where that undertaking is already subject to requirements which, while not identical, are at least comparable as regards their objective, in respect of the same workers and for the same periods of activity, in the State in which it is established?

2. Can Articles 59 and 60 of the Treaty of 25 March 1957 establishing the European Community render inoperative the first paragraph of Article 3 of the Civil Code relating to Belgian public-order legislation?'

25 Similarly, in Case C-376/96, the national court decided to stay proceedings and to refer the following questions to the Court:

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

(a) to appoint an agent or servant responsible for keeping the individual accounts of employees who provide services there;

(b) not to obstruct inspections organised pursuant to the legislation of that State relating to the keeping of social documents;

(c) not to obstruct inspections organised pursuant to the legislation of that State concerning the Social Inspectorate;

(d) to draw up an individual account for each worker;

(e) to keep a special staff register;

(f) to draw up working regulations;

(g) to keep social documents (staff register and individual account) at the Belgian residence of a natural person who is to keep those documents in his capacity as agent or servant of the undertaking concerned;

(h) to issue an individual record for each worker,

where that undertaking is already subject to requirements which, while not identical, are at least comparable as regards their objective, in respect of the same workers and for the same periods of activity, in the State in which it is established?

2. Can Articles 59 and 60 of the Treaty of 25 March 1957 establishing the European Community render inoperative the first paragraph of Article 3 of the Civil Code relating to Belgian public-order legislation?'

26 By order of the President of the Court of 6 June 1997 the two cases were joined for the purposes of the oral procedure and the judgment.

27 By its questions, which may appropriately be considered together, the national court is asking, in essence, whether Articles 59 and 60 of the Treaty preclude a Member State from imposing, inter alia by means of public-order legislation, obligations on an undertaking established in another Member State and temporarily carrying out works in the first State which require it:

- to pay its workers the minimum remuneration applicable to their activities fixed by the collective labour agreement in force in the host Member State, to pay in relation to each worker employers' contributions in respect of "timbres-intempéries" and "timbres-fidélité", and to issue each worker with an individual record;

- to draw up labour regulations, a special staff register and, in respect of each worker deployed, an individual account;

- to arrange for the social documents (staff register and individual accounts) relating to the workers deployed in the host Member State where the works are carried out to be kept and retained at the residence, in that host Member State, of a natural person who is to keep those documents as its agent or servant,

in circumstances where that undertaking is already subject, in the Member State in which it is established, to requirements which are comparable as regards their objective and which relate to the same workers and the same periods of activity.

Preliminary observations

28 The Belgian Government submits that Articles 59 and 60 of the Treaty should be interpreted in the light of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), inasmuch as that directive gives concrete expression to, and codifies, the current state of Community law relating to mandatory rules for the provision of minimum protection.

29 Directive 96/71 was not in force at the time when the matters in the main proceedings took place. However, Community law does not prevent the national court from taking account, in accordance with a principle of its criminal law, of the more favourable provisions of Directive 96/71 for the purposes of the application of national law, even though Community law imposes no obligation to that effect (see Case C-230/97 Awoyemi [1998] ECR I-6781, paragraph 38).

30 As regards the second question referred in each of the two cases, concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political,

social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

31 The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of Community law would be undermined. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.

The questions referred

32 It is common ground, first, that Arblade and Leloup, who are established in France, moved, within the meaning of Articles 59 and 60 of the Treaty, to another Member State, namely Belgium, in order to carry on activities of a temporary nature there and, second, that their activities are not wholly or principally directed towards the latter State with a view to avoiding the rules which would apply to them if they were established within its territory.

33 It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 Säger [1991] ECR I-4221, paragraph 12, Case C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803, paragraph 14, Case C-272/94 Guiot [1996] ECR I-1905, paragraph 10, Case C-3/95 Reisebüro Broede v Sandker [1996] ECR I-6511, paragraph 25, and Case C-222/95 Parodi v Banque H. Albert de Bary [1997] ECR I-3899, paragraph 18).

34 Even if there is no harmonisation in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (see, in particular, Case 279/80 Webb [1981] ECR 3305, paragraph 17, Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 17, Case C-198/89 Commission v Greece [1991] ECR I-727, paragraph 18, Säger, cited above, paragraph 15, Vander Elst, cited above, paragraph 16, and Guiot, cited above, paragraph 11).

35 The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see, in particular, Säger, paragraph 15, Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano [1995] ECR I-4165, paragraph 37, and Guiot, cited above, paragraphs 11 and 13).

36 The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (see Webb, cited above, paragraph 19, Joined Cases 62/81 and 63/81 Seco v EVI [1982] ECR 223, paragraph 14, and Case C-113/89 Rush Portuguesa [1990] ECR I-1417, paragraph 18), and in particular the social protection of workers in the construction industry (Guiot, paragraph 16).

37 By contrast, considerations of a purely administrative nature cannot justify derogation by a Member State from the rules of Community law, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, in particular, Case C-18/95 Terhoeve [1999] ECR I-345, paragraph 45).

38 However, overriding reasons relating to the public interest which justify the substantive provisions of a set of rules may also justify the control measures needed to ensure compliance with them (see, to that effect, Rush Portuguesa, cited above, paragraph 18).

39 It is therefore necessary to consider, in turn, whether the requirements imposed by national rules such as those at issue in the main proceedings have a restrictive effect on freedom to provide services, and, if so, whether, in the sector under consideration, such restrictions on freedom to provide services are justified by overriding reasons relating to the public interest. If they are, it is necessary, in addition, to establish whether that interest is already protected by the rules of the Member State in which the service provider is established and whether the same result can be achieved by less restrictive rules (see, in particular, Säger, paragraph 15, Kraus, cited above, paragraph 32, Gebhard, cited above, paragraph 37, Guiot, cited above, paragraph 13, and Reisebüro Broede, cited above, paragraph 28).

40 It is appropriate in that context to examine the various obligations mentioned in the questions referred, in the following order:

- payment of the minimum remuneration,

- payment of contributions to the `timbres-intempéries' and `timbres-fidélité' schemes and the drawing-up of individual records,

- the keeping of social documents, and

- the retention of social documents.

Payment of the minimum remuneration

41 As regards the obligation on an employer providing services to pay his workers the minimum remuneration fixed by a collective labour agreement applying in the host Member State to the activities carried on, it must be recalled that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established, and, moreover, that Community law does not prohibit Member States from enforcing those rules by appropriate means (Seco, cited above, paragraph 14, Rush Portuguesa, paragraph 18, and Guiot, paragraph 12).

42 It follows that the provisions of a Member State's legislation or collective labour agreements which guarantee minimum wages may in principle be applied to employers providing services within the territory of that State, regardless of the country in which the employer is established.

43 However, in order for infringement of the provisions in question to justify the criminal prosecution of an employer established in another Member State, those provisions must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply. It is for the competent authority - in the present case, the Belgian Social Law Inspectorate -, when laying an information before the criminal courts, to state unequivocally the obligations with which the employer is accused of having failed to comply.

44 Thus, it is for the national court to determine, in the light of those considerations, which of the relevant provisions of its national law are applicable to an employer established in another Member State and, where appropriate, the amount of the minimum wage prescribed by them.

45 The Belgian and Austrian Governments consider that the advantages guaranteed to workers by the `timbres-intempéries' and `timbres-fidélité' schemes, as provided for by the CLA of 28 April 1988, constitute part of the minimum annual income of a construction worker within the meaning of the Belgian legislation.

46 However, it is apparent from the documents before the Court, first, that it was only Arblade that was prosecuted for failure to pay its workers the minimum wage provided for by the CLA of 28 March 1991 and, second, that Article 4(1) of the CLA of 28 April 1988 fixes the contribution payable in respect of `timbres-intempéries' and `timbres-fidélité' on the basis of 100% of the worker's gross remuneration. Since the amount due under the `timbres-intempéries' and `timbres-fidélité' schemes is calculated by reference to the gross minimum wage, it cannot form an integral part of that wage.

47 In those circumstances, it would appear - though this is a point for the national court to confirm - that the advantages guaranteed to workers by the `timbres-intempéries' and `timbres-fidélité' schemes cannot constitute an element to be taken into account when determining the minimum wage which Arblade is accused of having failed to pay.

Payment of the contribution to the `timbres-intempéries' and `timbres-fidélité' schemes and the drawing-up of individual records

48 As regards the obligation to pay employers' contributions to the Belgian `timbres-intempéries' and `timbres-fidélité' schemes, it is apparent from the judgment of the national court, and in particular from the wording of the first question referred in each of the two cases, that Arblade and Leloup are already subject, in the Member State in which they are established, to obligations which, while not identical, are at least comparable as regards their objective, and which relate to the same workers and the same periods of activity.

49 The Belgian Government submits that the referring court has not determined the existence of such obligations in the Member State of establishment. However, the Court is bound to accept the national court's finding that the undertaking providing the services is already subject, in the Member State in which it is established, to obligations which, because of their objective, are comparable.

50 National rules which require an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to the fund of the Member State in which he is established, constitute a restriction on freedom to provide services. Such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services in the host Member State.

51 It must be acknowledged that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services. However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established (see, to that effect, Guiot, paragraphs 16 and 17).

52 Moreover, an obligation requiring a provider of services to pay employers' contributions to the host Member State's fund cannot be justified where those contributions confer no social advantage on the workers in question (Seco, paragraph 15).

53 It is therefore for the national court to establish, first, whether the contributions payable in the host Member State give rise to any social advantage for the workers concerned and, second, whether, in the Member State of establishment, those workers enjoy, by virtue of the contributions already paid by the employer in that State,

protection which is essentially similar to that afforded by the rules of the Member State in which the services are provided.

54 Only if the employer's contributions to the host Member State's fund confer on workers an advantage capable of providing them with real additional protection which they would not otherwise enjoy will it be possible to justify the payment of the contributions in question, and, even then, those contributions will be justifiable only if they are payable by all providers of services operating within the national territory in the industry concerned.

55 Lastly, it is clear that the obligation under the Belgian legislation to issue an individual record to each worker is inextricably linked to the obligation to pay the `timbres-intempéries' and `timbres-fidélité' contributions provided for in the CLA of 28 April 1988. If an undertaking is already subject, in the Member State in which it is established, to obligations which are essentially similar, by reason of their objective, to those imposed under the `timbres-intempéries' and `timbres-fidélité' schemes, and which relate to the same workers and the same periods of activity, that undertaking is only obliged to issue its workers with the equivalent documents which it is required to issue pursuant to the legislation of the Member State in which it is established. If the system applying in the latter State did not provide for the issue of documents to employees, the undertaking in question would be required only to justify to the authorities of the host Member State that it is up to date with the payment of the contributions required under the rules of the Member State of establishment, by producing the documents prescribed for that purpose by those rules.

The principle of keeping social and labour documents

56 As regards the obligation to draw up labour regulations and to keep a special staff register and an individual account for each worker, it is likewise apparent from the judgment of the national court, and in particular from the wording of the first question referred in each of the two cases, that Arblade and Leloup are already subject, in the Member State in which they are established, to obligations which, while not identical, are at least comparable as regards their objective, and which relate to the same workers and the same periods of activity.

57 As stated in paragraph 49 of this judgment, and despite the objections raised by the Belgian Government, the Court is bound to base its ruling on the facts as stated by the national court.

58 An obligation of the kind imposed by the Belgian legislation, requiring certain additional documents to be drawn up and kept in the host Member State, gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State.

59 Consequently, the imposition of such an obligation constitutes a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

60 Such a restriction is justifiable only if it is necessary in order to safeguard, effectively and by appropriate means, the overriding public interest which the social protection of workers represents.

61 The effective protection of workers in the construction industry, particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71.

62 Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules.

63 The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State concerning, in particular, the employer, the worker, working conditions and remuneration may differ to such an extent that the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment.

64 On the other hand, the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents, one of which conforms to the rules of the Member State of establishment and the other to those of the host Member State, if the information provided, as a whole, by the documents required under the rules of the Member State of establishment is adequate to enable the controls needed in the host Member State to be carried out.

65 Consequently, the authorities and, if need be, the courts of the host Member State must verify in turn, before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State, that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State.

66 Where the authorities or courts of the host Member State find, as has the court making the reference in the two cases, that, as regards the keeping of social or labour documents such as labour regulations, a special staff register and an individual account for each employee, the employer is subject, in the Member State in which it is established, to obligations which are comparable as regards their objective, and which relate to the same workers and the same periods of activity, the production of the social and labour documents kept by the employer in accordance with the rules of the Member State of establishment must be regarded as sufficient to

ensure the social protection of workers; consequently, the employer concerned should not be required to draw up documents in accordance with the rules of the host Member State.

67 In the context of the kind of verification referred to in paragraph 65 of this judgment, it is necessary to have regard to the Community directives providing for coordination or a minimum degree of harmonisation in respect of the information necessary for the protection of workers.

68 First, Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32) is designed, according to the second recital in its preamble, to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. That directive lists certain essential elements of the contract or employment relationship, including, where appropriate, those rendered necessary on account of the worker concerned being deployed in another country, which the employer is required to bring to the notice of the worker. According to Article 7, that directive does not affect Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to employees or to encourage or permit the application of agreements which are more favourable to employees.

69 Second, Article 10 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) provides, in particular, that workers are to receive certain information concerning risks to their safety and health.

70 In the context of such verification, the national authorities of the host Member State may additionally, in so far as they are not themselves in possession of it, require the provider of services to communicate the information held by him concerning the obligations to which he is subject in the Member State in which he is established.

The detailed rules regarding the keeping and retention of social documents

71 The provisions of Belgian law laying down the detailed rules regarding the keeping and retention of documents by an employer established in another Member State are made up of three parts. First, where the employer employs workers to work in Belgium, social documents must be kept either at one of the workplaces or at the residential address in Belgium of a natural person who is to keep those documents as the employer's agent or servant.

72 Second, where the employer ceases to employ workers in Belgium, the originals or copies of the social documents must be retained for five years at the address in Belgium of the agent or servant in question.

73 Finally, the national authorities must be notified in advance of the identity of the agent or servant, whether that person is designated to keep the documents or to retain them.

74 For the reasons set out in paragraphs 61 to 63 of this judgment, the need for effective control by the authorities of the host Member State may justify the imposition on an employer established in another Member State who provides services in the host Member State of the obligation to keep certain documents available for inspection by the national authorities on site or, at least, in an accessible and clearly identified place in the territory of the host Member State.

75 It is for the national court to establish, having regard to the principle of proportionality, which documents are covered by such an obligation.

76 Where, as in the present case, there is an obligation to keep available and retain certain documents at the address of a natural person residing in the host Member State, who is to keep them as the agent or servant of the employer by whom he has been designated, even after the employer has ceased to employ workers in that State, it is not sufficient, for the purposes of justifying such a restriction of freedom to provide services, that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task. It must also be shown that those authorities cannot carry out their supervisory task effectively unless the undertaking has, in that Member State, an agent or servant designated to retain the documents in question (see, to that effect, Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 54).

77 In any event, the obligations to retain social documents within the territory of the host Member State for a period of five years and to retain them at the address of a natural person, as opposed to a legal person, cannot be justified.

78 Monitoring of compliance with rules concerning the social protection of workers in the construction industry can be achieved by less restrictive measures. As the Advocate General observes in point 88 of his Opinion, where an employer established in another Member State ceases to employ workers in Belgium, the originals or copies of the social documents comprising the staff register and the individual accounts, or of the equivalent documents which the undertaking is required to draw up under the legislation of the Member State of establishment, may be sent to the national authorities, who may check them and, if necessary, retain them.

79 For the rest, it should be noted that the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.

80 The answers to be given to the questions referred must therefore be as follows:

(1) Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do

not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.

(2) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to pay, in respect of each worker deployed, employers' contributions to schemes such as the Belgian `timbres-intempéries' and `timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.

(3) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to draw up social or labour documents such as labour regulations, a special staff register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.

That is the position where, as regards the keeping of social and labour documents, the undertaking is already subject, in the Member State in which it is established, to obligations which are comparable, as regards their objective of safeguarding the interests of workers, to those imposed by the legislation of the host Member State, and which relate to the same workers and the same periods of activity.

(4) Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

(5) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to retain, for a period of five years after the undertaking in question has ceased to employ workers in the first Member State, social documents such as a staff register and individual accounts, at the address within that Member State of a natural person who holds those documents as an agent or servant.

Decision on costs

Costs

81 The costs incurred by the Belgian, German, Netherlands, Austrian, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Correctionnel de Huy by two judgments of 29 October 1996, hereby rules:

1. Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC) do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.

2. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to pay, in respect of each worker deployed, employers' contributions to schemes such as the Belgian `timbres-intempéries' and `timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.

3. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to draw up social or labour documents such as labour regulations, a special staff

register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.

That is the position where, as regards the keeping of social and labour documents, the undertaking is already subject, in the Member State in which it is established, to obligations which are comparable, as regards their objective of safeguarding the interests of workers, to those imposed by the legislation of the host Member State, and which relate to the same workers and the same periods of activity.

4. Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

5. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to retain, for a period of five years after the undertaking in question has ceased to employ workers in the first Member State, social documents such as a staff register and individual accounts, at the address within that Member State of a natural person who holds those documents as an agent or servant.