OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 21 OCTOBER 1981

My Lords,

Alfred John Webb resides in the United Kingdom and is the manager of an English company, International Engineering Services Bureau (UK) Limited. In February 1978 the company was engaged in the business of supplying technical personnel for fixed periods to businesses in the Netherlands. The staff so supplied remained employees of the English company and the latter was remunerated by the businesses for which their staff worked. At the material time International Engineering Services Bureau (UK) Limited held a licence issued in the United Kingdom under the Employment Agencies Act 1973. Neither the company nor Mr Webb held a Dutch licence.

There was in force in the Netherlands the *Wet op het ter Beschikkingstellen van Arbeidskrachten,* or Law on the Provision of Manpower of 31 July 1965 (Stb. 379 as amended by the Law of 30 June 1967, Stb. 377). Article 1 of that Law defined the provision of manpower as the supply of labour to another, for reward, other than in pursuance of an agreement concluded with that other for the performance of work usually carried out in his undertaking. Article 2 (1) (a) provides for the creation of a system of licences. An *algemene maatregel van bestuur,* or Royal Decree, dated 10 September 1970, Stb. 410, made in accordance with Article 2 (1) (a) of the Law of 31 July 1965, prohibited the supply of manpower by any person other than the holder of a licence issued by the Minister for Social Affairs. Article 6 of the Law of 31 July 1965 provided that such licences may be refused only if there is reasonable cause to believe that the provision of manpower by the applicant might harm good labour relations or if the interests of the labour force were insufficiently safeguarded.

On 27 April 1978 Mr Webb was convicted before the Economische Politierechter or commercial judge at the Arrondissementsrechtbank at Amsterdam on three counts of being concerned in the provision of labour to Dutch companies, for reward, without holding a licence issued by the Minister for Social Affairs. That Court imposed fines, with periods of imprisonment in default. His conviction and sentence were upheld by the Gerechtshof of Amsterdam whence he appealed to the Hoge Raad. Before that court (as before the Gerechtshof) he relied on Articles 59 to 62 of the EEC Treaty. He contended in particular that a person who holds a licence, issued in one Member State, for the provision of labour there, may not be required to meet the conditions for the

award of a licence in another Member State, where he supplies labour, if his licence was issued in the first Member State on conditions comparable to those imposed in the State where the labour was provided, and if the first Member State exercises proper control over the carrying out of the activities.

In the light of this argument, the Hoge Raad posed three questions to the Court under Article 177 of the EEC Treaty. By the first, it asks:

"1. Does 'services' in Article 60 of the Treaty include the service of providing manpower within the opening words of the first paragraph of ... Article 1 and subparagraph (b) of the *Wet op het ter Beschikkingstellen van Arbeidskrachten?*"

By Article 60 of the EEC Treaty the term "services" in the Treaty means those services which are normally provided for remuneration and are not governed by the provisions relating to the freedom of movement for goods, capital and persons. The International Standard Industrial Classification of all Economic Activities (ISIC) issued by the Statistical Office of the United Nations, (Statistical Papers Series) M No 4 Rev. 1, New York, 1958 includes employment agencies within Group 839 under the heading "Business services not elsewhere classified". That classification was adopted in the general programme for the abolition of restrictions on freedom to provide services, (OJ Special Edition Second Series, IX p. 3). It "forms an integral part of the Community measures at issue": see Joined Cases 110 and 111/78 *Ministère Public and Others* v *Van Wesemael* [1979] ECR 35 at p. 50. Council Directive 67/43 of 12 January 1967 concerning the attainment of freedom of establishment to provide services in respect of specified activities (OJ Special Edition 1967, p. 3), sets out in Article 3 (2) (a) a list of business services not elsewhere classified falling within ISIC Group 839, to which the Directive applies. The first activity in the list is that of "private employment agencies". In *Van Wesemael* at p. 49 the Court, in a case involving an employment agency for entertainers, stated that "the activity at issue in these proceedings consists in the provisions of services".

It seems to me clear that "services" in Article 60 of the Treaty includes the services of providing manpower as defined in the legislation referred to in the Hoge Raad's first question.

It was, however, submitted on behalf of the French Government that, notwithstanding the considerations referred to above, private employment agencies constitute services of an exceptional nature. I do not doubt that employment agencies, particularly those dealing with temporary labour, present certain characteristics which distinguish them from most of the other services listed in the ISIC, since their activities may have an important bearing on issues of national, regional or sectoral labour policy, on the function and operation of State employment services and on labour relations. These characteristics account for the maintenance, in all Member States of the Community, with the exception of Luxembourg and Greece, of legislation controlling the activities of such agencies or actually prohibiting them, as is the case in Italy. They also

account for the terms of the Fee Charging Employment Agencies Convention (Revised) 1949, ILO Convention No 96, which has been ratified by seven of the Member States of the Community which has been referred to by the French Government. The exceptional characteristics of private employment agencies do not, in my view, affect the answer to be given to the Hoge Raad's first question. They do, however, affect the answer to be given to that court's remaining questions.

In the light of the submissions made by the Member States intervening in this reference, and by the Commission, it seems to me convenient to deal with the second and third questions together. By these the Hoge Raad asks:

"2. If Question 1 is answered in the affirmative, does Article 59 of the Treaty always or only under certain circumstances preclude a Member State in which the provision of that service is made dependent on the possession of a licence — that requirement being imposed in order that such a licence may be refused if there is reasonable cause to fear that the provision of manpower by the applicant might harm good relations in the labour market or that the interests of the workforce are insufficiently safeguarded — from compelling a person providing the services who is established in another Member State to fulfil that condition?

3. To what extent is the answer to Question 2 affected if a foreigner providing the service possesses a licence to provide that service in the State in which he is established?"

During the course of the hearing, it was contended on behalf of the German Government that the aim of Articles 59 to 66 of the EEC Treaty is not to remove all restrictions on freedom to supply services but simply to ensure that foreigners and nationals are treated in the same way. A similar argument was advanced on behalf of the Danish Government, whose counsel contended that Article 59 of the EEC Treaty applies, or at any rate produces direct effects, only in relation to national rules which entail discrimination between providers of services on grounds of their nationality or place of establishment. If it were correct, this argument would provide a straightforward answer to the Hoge Raad's second and third questions; for the Law of 31 July 1965 does not appear to impose any restriction on the nationality of holders of licences as such. Nor, as was explained at the hearing, does it require the licensees to be established in the Netherlands but only requires them to maintain an administrative office or address in that country where documents may be examined. It is true that the principle of non-discrimination is mentioned expressly in the third paragraph of Article 60 of the EEC Treaty and in Article 65. The Court has repeatedly referred to such a principle in its decisions on the subject, notably in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299 at p. 1309, Case 39/75 *Coenen* v *Sociaal-Economische Raad* [1975] ECR 1547 at p. 1555, Case 15/78 *Société Générale Alsacienne de Banque* v *Koestler*

[1978] ECR 1971 at p. 1980, Joined Cases 110 and 111/78 *Van Wesemael* at p. 52 and Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833 at p. 856. Furthermore, the general programme for the abolition of restrictions on freedom to provide services envisages the abolition of "measures which ... prohibit or hinder the person providing services ... by treating him differently from nationals of the State concerned."

In my opinion, however, the scope of Article 59 is not to be so limited. An examination of Articles 59 to 66 of the EEC Treaty discloses that while discrimination on grounds of nationality or place of establishment constitutes, in the absence of justification on such grounds as public policy, conclusive evidence of "restriction" such as is envisaged by Article 59, it is not an essential or the exclusive element of such a restriction. This much is implied in Article 65, which provides that "as long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence ...".

This conclusion is, to my mind, reinforced by the wording of the Court's judgments in *Van Binsbergen* and in *Coenen,* loc.cit., where it stated that the restrictions to be abolished pursuant to Articles 59 to 60 include "all requirements imposed on that person providing the service by reason *in particular* of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct the activities of the person providing the service"* (emphasis added). It is further reinforced by the judgment in *Van Wesemael* at pp. 52-55 in which the Court ruled that "when the pursuit of the activity of fee-charging employment agencies for entertainers is made subject in the State in which the service is provided to the issue of a licence, that State may not impose on the persons providing the service who are established in another Member State any obligations ... to satisfy that requirement ... when the person providing the services holds in the Member State in which he is established a licence issued under conditions comparable to those required by the State in which the service is provided and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the Member State in which the service is provided." The comparability of the conditions for the issue of a licence in the State in which the provider of services is established and the State in which the services are supplied and an examination of the adequacy of supervision would be irrelevant if the only proper consideration were the presence or absence of discrimination, on grounds of nationality or place of establishment, in the relevant national rule.

Counsel for the Danish Government further submitted that in *Debauve,* this Court rejected the argument, advanced in that case by Mr Advocate General Warner and in this case by the Commission, that Article 59 embraces

not only those restrictions which entail discrimination but also others which may obstruct the activities of the supplier of the services. This submission seems to me to involve placing too broad an interpretation on the Court's words in *Debauve.* In that case the company claimed the right to supply a service (consisting in the transmission by cable of television programmes containing advertisements) in a Member State in which that service was prohibited, on the ground that it was lawful to provide that service in the State in which the supplier was established and from which the advertisements were transmitted. It was in this context that the Court ruled that the prohibition in force in the State in which the programmes were received was unaffected by Articles 59 and 60 of the EEC Treaty, so long as it was applied without distinction on grounds of nationality or place of establishment. In the present case, however, there is claimed the right to supply a service in one Member State, where the activity is subject to a licence, on the ground that the supplier of the service holds a licence issued in the State in which he is resident. It involves, in effect, the assertion that there should be a mutual recognition of statutory licences, just as there is to be a system of mutual recognition of qualifications under Articles 57 and 66 of the EEC Treaty; or in other words, that an agency wishing to have a Community-wide business should not be subjected to similar administrative regulation and control in a plurality of States. Such an argument cannot be dismissed on the basis of the Court's ruling in *Debauve,* which was not concerned with the duplication of administrative controls.

Counsel for the Danish Government cited in support of his submission several of this Court's judgments in cases concerned with freedom of establishment. As Mr Advocate General Mayras pointed out, however, in *Van Binsbergen* at pp. 1316-7, there is a fundamental difference between establishment and the supply of services. This consists in the fact that a professional man established in a Member State other than his own is, by the fact of his establishment, subject to the law of his host country, which may impose on him the same conditions and supervision as is imposed on its own subjects, whereas the supplier of services remains subject to the control of the State in which he is established and may himself avoid control by the national authorities of the country where the services are provided. Furthermore, an obligation to obtain a licence, on equal terms with nationals or residents of the State concerned, may constitute a greater obstacle to the supply of services than to establishment, as for example when the cost of the procedure makes it uneconomic for a person or company established in another Member State to supply, other than on a regular basis, the needs of clients in the State imposing that obligation. I do not consider that the cases on establishment conclude the present questions.

Accordingly in my opinion the abolition of the restrictions on the freedom to supply services within the Community entails more than the abolition of discrimination on the grounds of nationality or place of establishment and extends to the removal of all obstacles to the freedom to supply services across the Community's internal borders, save to the extent that they are preserved by Articles 55 to 58 and 66.

On the other hand it is clear from the Court's previous decisions that Article 59 properly construed does not impose an absolute bar on the rights of the Member State to impose conditions on those wishing to provide services in its territory and who are already established in another Member State. Such conditions may be imposed by the requirements that a licence shall be obtained subject to the qualifications which the Court has already indicated. That there should be a narrowly-defined limit on the power of the Member State to impose such conditions, and to require that a licence be obtained, is self-evident since otherwise the freedom to provide services within the Community could become illusory.

The decisions previously referred seem to me to lay down that a Member State may require a person established in another Member State to obtain a licence before services are provided within the first-mentioned State if, but only if, two requirements are satisfied. In the first place the conditions for the grant of the licence must be the same, *mutatis mutandis,* as those in force for the grant of a licence to persons established or resident in the Member State who wish to provide such services. In the second place the conditions for the grant of a licence must be conditions which "have for their purpose the application of professional rules justified by the general good" and which are "objectively justified by the need to ensure observance of the professional rules of conduct" *(Van Wesemael* cited above, p. 52), or which are objectively necessary to protect those affected by the supply of the services. To the extent that these objectives are already achieved by conditions imposed on the provider of the services, and by adequate supervision, in the Member State in which he is established, to impose conditions on him by way of a licence in another Member State is neither necessary nor objectively justified.

In considering whether the imposition of conditions and the grant of a licence are necessary and objectively justified so as to be compatible with the Treaty (and not to be regarded as obstacles to the supply of services between Member States) it is right to look at what is necessary in the Member State concerned, since what is necessary in one Member State (which lays down its own conditions for the supply of services) may not be appropriate or justified, or even relevant, to the needs of another Member State. The submissions of the Member States in the present case reveal the economic, social and political factors involved in the supply of temporary services, and the different problems which arise in present circumstances in the various Member States. Of particular

relevance are the explanations given by the Government of the Netherlands as to why the system in force in that country was adopted.

It is in this context that it becomes relevant, to consider the special characteristics of the service of supplying temporary labour, to which the agent for the French Government drew attention. As is demonstrated in the report by Professor Blanpain and M. Drubigny, *Le travail temporaire dans les pays de la CEE*, Commission Study No 79/52, April 1980, there are very considerable divergencies between national laws on this issue. There appears to be a total ban on such activities in Italy, under Law No 1369 of 23 October 1960 whereas in Luxembourg and Greece there is no specific legislation; in France a temperorary employment agency is required to be registered with the authorities and to obtain a surety bond as a form of guarantee of the remuneration of the workers whereas in the remaining six States the activity is subject to a licence (or "agréation" in Belgium). According to that report, the conditions for the issue of licences vary widely: in some cases they are issued automatically, or issued when objective conditions are fulfilled; in others, there is an element of discretion on the part of the administrative authority. There are, furthermore, significant differences between the national rules affecting the consequences of issuing a licence. In some Member States, the use of temporary labour is permitted only in certain sectors of the economy (as in the case of Denmark, which permits its use in commerce and in office work) whereas in other Member States, or parts of such States, the use of temporary labour is prohibited in certain sectors (such as in the building trade in Belgium and in parts of the Netherlands).

It is for the national court to decide whether the conditions sought to be imposed, over and above those imposed in the State of establishment, and the requirment of a licence, are objectively justified within the meaning of the *Van Wesemael* case.

The fact that a licence has been obtained from the State in which the person wishing to supply services in another Member State is established (the subject-matter of the third question) is, it seems to me, but one facet of the general problem. That licence is the vehicle by which conditions are imposed, and control exercised, by the Member State in which the person is established. The relevant question is then whether such conditions and control adequately safeguard what is objectively necessary in the conditions obtaining in the second Member State. The test remains one of necessity and not convenience or desirability. On the one hand the mere fact that the person holds a licence issued in one Member State authorizing him to provide services in that Member State (or even in another Member State on the same conditions as in the State in which the licence is issued) is not conclusive. Otherwise such a ruling could produce an element of discrimination against locally-established agencies in the way to which counsel for the Danish Government referred. On the other hand if the conditions which it is

justifiably wished to impose by a licence in the State in which services are to be provided are sufficiently covered in a licence granted by the State of establishment (and capable of adequate supervision and enforcement) then it is not justified to require that a further licence be obtained in the State in which services are to be provided. If the conditions imposed by the two licences are "the same" or if the licences are "comparable", to use the term used in the *Van Wesemael* case, then the requirement of a second licence is not justified. Being exempted from the need to obtain such a second licence does not produce discrimination against locally-established agencies.

Whether the conditions are the same or comparable will depend on an examination of all the circumstances. The national judge must ask of each individual or company wishing to supply services, whether he or it is able to demonstrate, by producing a licence issued in another Member State, that he meets each of the conditions imposed in the State in which the services are to be supplied for the issue of any licence required for the supply of labour in the relevant sector or region of that State at the material time.

In the present case, the grounds on which a licence may be refused are set out explicitly in the Hoge Raad's second question. The Dutch licensing authorities may refuse the licence if the provision of manpower by the applicant could harm good relations in the labour market or if the interests of the workforce are insufficiently safeguarded. Those seem as a matter of law to be objectives capable of falling within the "general good" to which the Court referred in the *Van Wesemael* case. The national judge must consequently determine as a question of fact whether the issuance of a licence to Mr Webb or to his company in the United Kingdom demonstrates that the applicant meets the conditions set by Dutch law, and whether those conditions are in fact made necessary by the demands of the "general good". Subject to any rules of evidence, it will be for him to assess the different considerations involved in the grant of a licence in the United Kingdom such as the suitability of the applicant, the persons to be involved in the activities of the agency and the suitability of the agency premises, and to consider the effect of the observation made by the Government of the United Kingdom that considerations of the kind set out in the Law of 31 July 1965 "would not allow the United Kingdom licensing authority, namely the Secretary of State, to depart from the requirement to license since it would not fall within one of [the] grounds for refusal listed in Section 2 (3) of the Employment Agencies Act 1973".

Before the Hoge Raad, Mr Webb challenged the view taken by the Gerechtshof that licences in the United Kingdom must be granted or refused, or granted on conditions, according to the

requirements of the labour market in that country, so that such licences are in no sense necessarily issued on conditions comparable to those which may be decisive in the Netherlands. Mr Webb maintained that the freedom to supply services means in a case such as this that there may no longer be any assumption of a national market. Leaving aside the question whether the grant of licences in the United Kingdom is based on the requirements of the labour market in that country, it seems to me that his argument amounts to an assertion that a Member State may not subject the issue of a licence to conditions relating to a national labour market, since there is now a Community-wide market in labour and in services. The argument appears to have even more wide-ranging implications, since it will be difficult to find any justification for the maintenance of Member States' power to prohibit the supply of temporary labour, wholly or in particular areas or sectors, in the light of local conditions, if those States could not take the lesser step of restricting that activity by licence, in the light of the same conditions. A national measure which is not discriminatory may be described as an obstacle to that freedom when it constitutes a particular hindrance to the supply of services between Member States (as in the case of a duty to obtain a licence, which subjects a supplier of services to costs or inconvenience when he provides services in a Member State other than his own, and when the licence duplicates one already held by the same supplier in another Member State). A mere difference between national laws governing the circumstances in which services of a particular kind may be supplied, having its origin in differences between the labour markets in all or part of those states, does not necessarily constitute a hindrance of that kind.

For these reasons I am of the opinion that the questions posed by the Hoge Raad should be answered as follows:

1. The term "services" in Article 60 of the EEC Treaty includes the service of providing labour to another, for reward, other than in pursuance of an agreement concluded with that other for the performance of work usually carried on in that other's undertaking.

2. Article 59 of the EEC Treaty does not preclude a Member State ("that State") from maintaining a rule whereby services of the kind described in the foregoing paragraph may be supplied by a person established in another Member State only if he holds a licence issued by the competent

authorities of that State (which licence may be refused if there is reasonable cause to fear that the provision of manpower by the applicant could harm good relations in the labour market or that the interests of the workforce are insufficiently safeguarded) provided (a) that an identical requirement is imposed on persons established in that State, and (b) that a person established in another Member State is relieved of the obligation to obtain such a licence whenever he is able to demonstrate, by producing a licence issued in the Member State in which he is established or otherwise, that he meets each of the requirements that otherwise would be imposed in the State in which the services are to be supplied and that these requirements are adequately capable of enforcement.