2. **The first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided.**

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 3 December 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 13 NOVEMBER 1974 [1]

Mr President,
Members of the Court,

On 21 June 1974 you gave a preliminary ruling requested of you by the Conseil d'État of Belgium. The questions put to you concerned the interpretation of Articles 52 and 55 of the Treaty establishing the European Economic Community. One of the questions you were asked was whether the provisions of Article 52 of the Treaty were, since the end of the transitional period, directly applicable to the profession of *avocat* despite the absence of directives as prescribed by Articles 54 (2) and 57 (1).

The right of establishment, as it is defined in Chapter 2 of Title III of the Treaty of Rome, was therefore the matter in issue in that previous case.

The preliminary questions referred to you by the Centrale Raad van Beroep, the Netherlands court of last instance in social security matters, raise, in the field of the provision of services dealt with in Chapter 3 (Articles 59 to 66) of the Treaty, problems similar to those which you decided in the *Reyners* Judgment which I have just recalled.

I will therefore have occasion to refer to the general purport of that decision, in so far at least as Chapter 3 of the Treaty is inspired by principles similar to those governing freedom of establishment under Chapter 2.

However, I must first of all set out the facts giving rise to the main action.

1 — Translated from the French.

On 5 July 1972 Mr Van Binsbergen, a resident of Beesel, in the Netherlands area of Limburg, authorized Mr Kortmann, at that time habitually resident in Zeist, also in the Netherlands, to represent him in a dispute relating to unemployment insurance with the Trade Association of the Engineering Industry of the Netherlands.

That authority had been conferred, it seems, on the basis of Article 46 of the Dutch Law on procedure before the Centrale Raad van Beroep of Utrecht.

This provision gives parties the power to appear either in person, or through a legal representative. In the latter case, the legal representative must, if required to do so, give evidence of his power to act in that capacity by presenting a written authorization, except, however, in the case of *advocaten,* who are not subject to this obligation.

Article 47 of the Law provides that the parties may be assisted by an adviser who may represent them when they appear before the social security court.

During the course of the proceedings Mr Kortmann moved to the town of Neeroeteren in Belgium, and it was from this new residence that he made an application to the Centrale Raad van Beroep requesting that a copy of the documents in this client's file be sent to him at his new address, so that he could study the case and prepare the oral pleadings which he proposed to address to the Netherlands court.

On 3 November 1973 the registry of the court informed him that his request could not be granted on the ground that Article 48 of the Law on procedure before the Centrale Raad van Beroep provides that: 'Only persons established in the Netherlands may act as legal representatives or advisers.'

Mr Kortmann, now habitually resident in Belgium, is therefore precluded by this provision from representing his client, as legal representative or adviser, before the Centrale Raad van Beroep.

Before that court, on 8 December, he denied that the Netherlands law in question applied to him. He recalled that only a few weeks earlier he had addressed the court without concealing, from that moment on, his change of habitual residence. He considered that the decision taken in respect of him was contrary to the provisions of Articles 59 and 60 of the Treaty of Rome, which relate to freedom to provide services and which, in his opinion, are directly applicable and in consequence confer rights on him.

Accordingly, he maintains that the condition of habitual or actual residence within the Netherlands, to which the national law subjects the right of legal advisers to represent or assist a party before the Centrale Raad van Beroep, is contrary to those provisions of the Treaty.

When requested by the registrar of the court to specify the nature of his occupation, Mr Kortmann declared (as emerges from the file and also from his statements before this Court) that his profession is that of legal adviser, that his activities in this capacity are not subject, in the Netherlands, to any rules or regulations, and do not depend on the possession of any diploma or on membership of any organization or professional body. He added that he has a 'practice' consisting of clients involved in disputes relating to Netherlands social or administrative law and that he draws up applications and speaks in defence of his clients in contentious proceedings before the Conseil d'État of the Netherlands, before the Centrale Raad van Beroep and a number of departmental appeal committees.

He states that appeals to the Conseil d'État represent threequarters of his work. Since he has been established in Belgium, very near the Netherlands' border in fact, he deals with the files at his habitual residence, where he also draws up the statements of case, and only goes to Netherlands for the purpose of pleading, which, it must be added, occurred 36 times in 1973.

What is more, he is a property manager,

a writer of articles in legal reviews and he has a secretariat. He therefore asked the Netherlands court to regard him as pursuing, at least temporarily, his activity or a part of it in the Netherlands, within the meaning of the third paragraph of Article 60 of the Treaty. On the basis of this information on the file sent by the Centrale Raad van Beroep, I am tempted to call Mr Kortmann a sort of flying Dutchman since he 'sails', in the exercise of his profession, between Belgium and the Netherlands.

The fact remains that the Centrale Raad van Beroep has decided, taking into account the arguments of Mr Kortmann, to stay the proceedings and to request this Court to give a ruling on whether Articles 59 and 60 of the Treaty establishing the European Economic Community have direct effect and whether, in consequence, they create individual rights which the national courts are under a duty to protect; if the answer is affirmative, the court asks what interpretation must be put upon those provisions, in particular the last paragraph of Article 60.

The Centrale Raad expressly retains the task, taking into account the interpretation which will be given to it, of examining the applicability of Article 90 of the 'beroepswet', the second paragraph of which provides that any person not having an habitual residence in the Netherlands or in a State which has accepted reciprocity in this matter is obliged to have an address for service in the Netherlands.

In my view logic requires that I should examine first the problem of the interpretation of Articles 59 and 60 of the Treaty, since only in the light of this examination will I subsequently be able to come to a decision on the direct affect of those provisions.

The activities of those who are self-employed, including clearly the professions, may be pursued either by nationals of a Member State *established* within the territory of another Member State, which implies that they have, permanently or at least for a long time, fixed their habitual or actual residence in that State, or by way of the provision of services.

In the first case, these activities are governed by the rules of the Treaty relating to freedom of establishment (Articles 52 to 58), which was the position in *Reyners*.

In the second case, Article 59 *et seq.* relating to freedom to provide services apply.

The Centrale Raad van Beroep is right in placing its questions in the context of the provision of services.

However, it is necessary to distinguish in this connexion between two different situations:

— Let us first imagine one or more services, of a more or less occasional nature, provided by a person who has fixed his habitual residence for professional purposes in Member State A, but where the person or persons receiving the service are established in Member State B. What I mean by this is that the person providing the service is not in such a case necessarily forced by the requirements of his activity physically to cross the frontier between two States.

This, in fact, is the position with regard to at least part of Mr Kortmann's activity as legal adviser.

We may assume that he draws up, at his habitual residence in Belgium, the statements of case which he sends by post to the registries of the Netherlands courts and tribunals seized of cases with which he is dealing, without it being necessary for him, at that stage, to go there in person.

— But a different situation must also be envisaged:

It is that provided for in the last paragraph of Article 60 of the Treaty, which reads:

'Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a

service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

While drawing a necessary distinction between establishment, one of the essential characteristics of which is a degree of permanence, and the provision of services, this provision clearly envisages the case where such a service requires that the person providing it should *temporarily* pursue his activity in the country where it is provided, in other words, that occasionally he be physically present in the territory of that country.

That is the case with Mr Kortmann in so far, as he has stated himself, as he travels regularly and fairly frequently to the Netherlands for the purpose of pleading before certain courts and tribunals, and probably also for the purpose of making contact with his clients there.

However, in the first as in the second case, it is clear that, in order to attain the objective set out in the very words of Title III of the Treaty, namely: 'free movement of persons . . .', the rules laid down both by Article 59 and by the last paragraph of Article 60 are intended to bring about *equality of treatment* between the nationals of one Member State and the nationals of the other States of the Common Market. These provisions thereby ensure, in the particular field of the provision of services, the implementation of the general rules laid down in Article 7 of the Treaty, which forms an integral part of the 'principles' of the Community and provides that for the purposes of application of the Treaty and without prejudice to any special provisions contained therein, 'any discrimination on grounds of nationality shall be prohibited'.

This precept likewise dominates the application of Article 48 on freedom of movement for employed persons. As the Court held in its Judgment in *Reyners* (Case 2/74, Judgment of 21 June 1974), it also lies behind the provisions of Article 52 on freedom of establishment.

Consequently, it is less a question of ensuring total freedom to provide services within the whole territory of the Common Market than of succeeding, at the end of the transitional period, in proscribing any discrimination, that is, any inequality of treatment between nationals of a particular State and Community nationals.

In my opinion it serves no purpose to dwell on this idea which the Court developed in *Reyners* and has, moreover, had occasion to re-affirm in many of its judgments.

On the other hand, it is essential to the Court's solution of this preliminary reference that I should explain the distinction which must be drawn between the rules relating to the right of establishment and those governing the freedom to provide services.

It must in fact be emphasized that a professional man who is a national of a Member State *'established'* in the territory of another Member State, within the meaning of Article 52, is, by the very fact of that establishment, subject to the law of the host country, the government of which may impose on him, in relation to his right to take up and pursue his activities, the same conditions as those required of its own nationals and subject him, in consequence, to the same supervision.

This means that a person resident abroad, who is privileged because he is a Community national, must undoubtedly enjoy the same treatment as nationals but cannot avoid the provisions of national law even if this law is, in the future, to be harmonized with the laws of the other States of the Community.

On the other hand, the person providing services is not, by definition, a resident; he is not 'established'. His habitual and principal residence is fixed in the territory of Member State A, which we shall assume for the purpose of this example to be Belgium. Relying on Articles 59 and 60, he can claim — as I

will explain later — an individual right to offer his professional services to persons habitually residing in Member State B; let us say, in this case, the Netherlands.

He might even (this hypothesis is undoubtedly a little theoretical but it is impossible to discount it completely) never, for that matter, be present in the Netherlands. Even if he has to go there quite often, once the service has been completed he crosses the frontier again and is subject to Netherlands law only in so far as the activities which he pursues temporarily in the Netherlands are themselves regulated, which, as we have been told, is not the case for the activities of an independant legal adviser.

Consequently, a fundamental aspect of the difference between, *on the one hand,* mere occasional provision of services, even temporary activities and, *on the other hand,* establishment, is that the person providing services falls outside the competence and control of the national authorities of the country where the services are provided.

It is easy to see that there are risks in such a situation, both with regard to professional ethics and with regard to the possibility of attributing liability of a professional, civil or even criminal nature, to the person providing the services. Nor is it without significance from the point of view of taxation.

Hence, it is easy to imagine the consequences which it may entail, in particular as regards credit, payment and insurance, not to mention the matter of legal advice.

That is why, as well as ensuring respect for the principle of nondiscrimination, it is necessary to reconcile its requirements with those relating to the protection of individuals in receipt of services and to take account of the necessary methods of control which the national authorities can employ for this purpose.

In the light of the above remarks I can now examine whether the obligation imposed by Article 48 of the Netherlands 'beroepswet' on legal representatives or advisers appearing before social security courts and tribunals, that they must be established (gevestigd) in the Netherlands, constitutes discrimination as prohibited by Article 49 or the third paragraph of Article 60 of the Treaty.

Unlike the *Reyners* case, we are not concerned with a provision relating to nationality, but with a condition as to residence, applicable without distinction on grounds of nationality.

In fact, Mr Kortmann, a Netherlands national, is complaining that he is suffering discrimination in comparison with his fellow countrymen solely because he himself resides in Belgium.

Although the prohibition of all discrimination is easy to apply when the difference in treatment derives expressly or directly from a provision relating to nationality, the problem is more difficult in the case of disguised discrimination.

It is a problem which the Court has already met, at least in relation to Article 48 of the Treaty.

The Court has had occasion to declare, in *Sotgiu* (Case 152/73, Judgment of 12 February 1974, [1974] ECR 164) that there can be such covert discrimination when, without imposing any condition as to nationality, the law or internal regulations subject the grant of benefits or advantages connected with the post to criteria relating to origin, place of birth or actual residence within the national territory, in such a way that in fact the benefit is reserved for nationals and cannot, with certain exceptions, be enjoyed by nationals of other Member States.

The Court stated in that case that 'The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68 [relating to the employment of migrant workers], forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead *in fact* to the same result'.

The case cited was concerned with discrimination on the basis of family residence, but it merely confirmed a precedent set, in particular, by the Judgment of 13 December 1972 (Case 44/72, *Marsmann,* Recueil 1972, p. 1248).

Although argument in this case revolves around Articles 59 and 60, I believe that the same interpretation must be adopted, in so far as the condition imposed by the Netherlands law relating to legal representatives or advisers before social security courts and tribunals is connected with residence *in the Kingdom of the Netherlands.*

My belief is based on the fact that such a requirement has the inescapable effect — even if it is not its object — of preventing an adviser from offering his services to individuals before the Netherlands courts when he himself is established in a neighbouring State.

It is therefore contrary to the freedom to provide services within the Common Market.

Even if one could assume that the intention of the Netherlands legislature was not to create discrimination but to guarantee that independent advisers, who are not subject, as we know, to rules of professional conduct or ethics and who are not even required to possess a degree, must, at the very least, reside within the territory over which power is exercised by the national authorities, there is no justification, given such a motive, for the position created by the law as it stands.

I am therefore led to the opinion that the inequality of treatment resulting *objectively* from its application is contrary to Article 59 and the first paragraph of Article 60 of the Treaty.

Would the position be otherwise if the condition of residence was linked to the seat or the area of jurisdiction of a court or tribunal, so that it would appear to be justified by requirements dictated by the proper functioning of that court?

It is a fact that in several Member States the law requires that lawyers should fix their residence for professional purposes, that is to say their chambers, within the area of jurisdiction of the courts of first instance or of appeal before which they are authorized to plead.

This is the case, for instance, in the Federal Republic of Germany (Article 27 of the Bundesrechtsanwaltsordnung).

This is also the case in France, but in a different form: with certain exceptions, only *avocats* who are members of the Bar of a particular *tribunal de grande instance* are entitled to *represent* parties before that court; that is what is called *'la territorialité de la postulation'*, inherited from the old profession of *avoué.* The same applies in the *Cours d'appel* where *avoués* have survived the recent reform of the legal profession.

These systems are justified by the need for courts and tribunals to have available, at their seat or within their territorial jurisdiction, persons living nearby whose functions are to assist the administration of justice, who are known to the judges and who are in a position to deal promptly with proceedings in close liaison with them. It must be added that this is a corporate monopoly to which people in the profession remain, for obvious reasons, very attached.

However, it should be noted that although, in France, territoriality remains the rule for the right to act for a client and to draw up written pleadings *(postulation),* oral pleading is not subject to this condition.

In addition, where the lawyers do not have a monopoly, in other words, most frequently, before social security courts and tribunals, there is clearly no question of territoriality.

In this case we are not concerned with a lawyer but with an independent legal adviser entrusted with the task of assisting his clients before a tribunal the rules of procedure of which do not require that representation be effected by a lawyer.

That is why the observations submitted to this Court by the agent of the

Government of the Federal Republic of Germany, however interesting they may be, do not appear to me to have made a decisive contribution to the solution of the problem referred to this Court.

I might add that if the Netherlands Government considered it necessary to require advisers established outside the Netherlands to fulfil certain conditions intended to satisfy the practical necessities relating to the proper functioning of the administration of justice, it could, in my opinion, have recourse to the system of choosing an address for service at the chambers of a lawyer or at the office of an adviser habitually resident within the territorial jurisdiction of the court or tribunal in question.

Such a requirement, which would facilitate the transmission of documents and the course of the procedure, and which would at the same time be a guarantee for individuals themselves, would not be contrary to the principle of free movement of services; it would introduce no illegal discrimination.

Is this not, moreover, the system adopted by our own Rules of Procedure in that, while lawyers entitled to practise before a court of a Member State have the right to act for parties before this Court, Article 38 (2) of the Rules requires that 'For the purpose of the proceedings, the application shall state an address for service in the place where the Court has its seat. It shall also give the name of a person who is authorized and has expressed willingness to accept service'?

Article 90 of the Beroepswet imposes an obligation to choose an address for service; not, it is true, on advisers, but on parties themselves who reside outside the Netherlands and who intend to bring un action before a Netherlands social court or tribunal.

It is certainly not for me to say whether that provision could, if necessary, be applied to an independent adviser established in Belgium. That is a question of interpretation of national law and is a matter, should it arise, for the Centrale Raad van Beroep to resolve.

I am now in a position to deal with the question whether Articles 59 and 60 of the Treaty have direct effect.

Apart from the criteria evolved by an already extensive case-law, considerable help in resolving this problem is afforded by your Judgment in *Reyners* of 21 June 1974.

On the basis of these cases, which are very enlightening in themselves, I have even less hesitation in affirming to the Court the direct applicability of Article 59 and of the third paragraph of Article 60 since Mr Advocate-General Warner has supported this view, clearly and emphatically, in a very recent case.

Moreover, all these concordant elements enable me to be brief.

I would recall that the case-law of this Court requires that for a Community provision to have direct effect it must satisfy the criteria of clarity and precision.

Article 59 clearly satisfies these conditions since it prohibits Member States from setting up against Community nationals, who provide services in one State while established in another, any law, regulation or administrative practice impeding the provision of services within their territory. They are prohibited in that way from subjecting services to conditions other than those which would govern them if they were provided by persons established within their own territory.

The third paragraph of Article 60 imposes, in a similar manner, an unequivocal obligation.

Secondly, the Community provision in question must be unconditional and complete. Neither Article 59 nor the third paragraph of Article 60 contains any condition, save for the period of time before implementation, to which its direct applicability is subject. Although certain exceptions to freedom to provide services are created by Articles 55 and

56, which are applicable in the field which concerns us, they are, as the Court is aware, very clearly defined, to be strictly interpreted and can no more prevent the direct effect of Articles 59 and 60 than, as the Court decided, they could prevent that of Article 52.

Lastly, although it is true that, for the direct effect of a Community provision to be recognized, its implementation must not be subject to the adoption of subsequent measures, whether of a national or of a Community nature, the fact that Article 53 of the Treaty has provided, and in a similar way as for the right of establishment, for the Council to draw up a general programme for the abolition of restrictions on freedom to provide services, is not such as to alter the fact that the Articles of the Treaty we are speaking of are rules of a directly applicable nature.

Moreover, the situation was further clarified by the adoption, in December 1961, of this programme, which fixed, in principle, the timetable for the abolition of the different restrictions according to category of activity, as well as the actual conditions of abolition.

The fact remains that by conferring upon the Council the power to issue directives for the purpose of liberalizing a particular type of service, the second paragraph of Article 63 subjected the axiomatic obligation contained in Article 59 to the adoption of Community measures.

But, My Lords, we are here faced with a legal situation which is identical to that which we met in the *Reyners* case.

As is the case with Article 52 — and in similar terms — Article 59 prescribes the progressive abolition of restrictions or discrimination during the transitional period. While giving the Council the powers to carry out this liberalization by means of directives, it none the less imposes, in the most categorical manner possible, an obligation to achieve a particular result, which had to be fulfilled by the end of the said transitional period. This achievement would most certainly have been facilitated by, but was not to be made dependent on, the issuing of directives.

The progressive fulfilment of that obligation was not achieved. Let us take note of this fact. But, as the Court said in the *Reyners* case, the fact that the Council has delayed doing so 'leaves the obligation itself intact beyond the end of the period provided for its fulfilment'.

As the Court also stated in that case 'This interpretation is in accordance with Article 8 (7) of the Treaty, according to which the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented'.

Hence, as regards at least the actual application of the principle of equality of treatment, the directives provided for by the chapter relating to freedom to provide services have become superfluous. They are certainly still of interest, but only in so far as they have the object of facilitating the actual provision of such services.

It has been sufficient, My Lords, for me to recall the main points of your decision in *Reyners* to arrive at the conclusion that Article 59 and the third paragraph of Article 60 have, like Article 52, direct effect as from the expiry of the transitional period.

Adopting the order of the questions put by the Netherlands court, I therefore advise the Court to rule that:

1. Since the end of the transitional period Article 59 and the third paragraph of Article 60 of the Treaty of the European Economic Community have

been directly applicable provisions, despite the possible absence, in a particular field, of the directives provided for in the second paragraph of Article 63.

2. Article 59 and the third paragraph of Article 60 have the aim of abolishing all restrictions on freedom to provide services, in particular those which are imposed by a Member State on the sole ground that the person providing those services resides or is established within the territory of another Member State. Accordingly, a condition of residence within the national territory of the first State required, even apart from any condition of nationality, of legal representatives and legal advisers in order that they may assist individuals before certain national courts or tribunals, constitutes a restriction prohibited by the aforementionned provisions of the Treaty.