On those grounds,

THE COURT

in answer to the questions referred to it by the Oberlandesgericht Köln by an order of 23 January 1978, hereby rules:

Articles 59 and 60 of the EEC Treaty do not affect the application of legislative provisions whereby a Member State bars the recovery by legal action of certain debts, such as debts arising out of a wagering contract and similar debts, provided always that such provisions are not applied in a discriminatory manner, either in law or in fact, compared with the way in which similar debts contracted within the territory of the Member State in question are treated.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 24 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 21 SEPTEMBER 1978 [1]

Mr President,
Members of the Court,

The defendant in the main action, out of which this refence for a preliminary ruling has arisen, was from 1968 Director of Administration in the German-French Military Scientific Research Institute in Saint-Louis (Haut-Rhin) where he resided from 1 July 1968 to 28 July 1973.

While the defendant was resident in France the plaintiff carried out stock exchange time-bargains on his behalf by passing on the defendant's relevant

1 — Translated from the German

buying and selling orders to its stockbrokers on the Paris Stock Exchange. On settling day the shares which had been bought or sold were not in fact taken up or transferred and neither was the whole of the purchase price paid nor was the whole of the selling price collected; on the contrary only the difference between the agreed share prices and the actual share prices on settling day was accounted for. The gains and losses arising out of these transactions were credited or debited to an account kept for him by the plaintiff. The plaintiff granted the defendant credit by way of overdraft in connexion with the time-bargains and the keeping of the said account.

The plaintiff in the action which it brought on 22 May 1975 before the Landgericht (Regional Court) Bonn claimed payment of the differences due to it by the defendant on 31 January 1975 in this account amounting to FF 852 620.39. In its judgment of 13 January 1977 that court decided that the sum of FF 473 937.47 attributable to the time-bargains was not actionable, because such a claim is barred by the plea that the contract was an agreement to pay differences (Differenzeinwand) which is found in Article 52 *et seq.* of the Börsengesetz (Law relating to stock exchanges and commodity markets) and in Articles 762 and 764 of the Bürgerliches Gesetzbuch (Civil Code).

The Oberlandesgericht Köln (Higher Regional Court, Cologne) on appeal by the plaintiff upheld in substance by its default judgment of 11 August 1977 the judgment of the Landgericht (Regional Court) Bonn on the grounds that the plea that the contract was an agreement to pay differences (Differenzeinwand) under the German law applicable to stock exchange time-bargains according to Article 30 of the Introductory Law to the Bürgerliches Gesetzbuch (Civil Law) (ordre public) [public policy] is valid even if, as in the present case, French law, which does not recognize such a plea, applies. After the defendant had appealed against this default judgment the Oberlandesgericht Köln by its order of 23 January 1978 stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

1. Properly interpreted, do Articles 59 and 60 of the EEC Treaty exclude the objection under German law that a contract is an agreement to pay differences (Differenzeinwand — Articles 764 and 762 of the Bürgerliches Gesetzbuch (Civil Code); Articles 61, 58 and 50 of the Börsengesetz (Law relating to stock exchanges and commodity markets; Bundesgerichtshof, Neue Juristische Wochenschrift 75, 1 600; 72, 382) in a case where a French bank is claiming, from a customer of German nationality, the repayment on the basis of French law of credit for time-bargains (agreements to pay differences) carried out on the Paris stock exchange in accordance with an agreement?
2. Is is relevant for the answer to Question 1 whether under German law the German customer had capacity in accordance with Article 53 of the Börsengesetz to enter into time-bargains?

My opinion on these two questions is as follows:

I — The first question which in my view must be considered is whether in this case there is a service within the meaning of Article 59 *et seq.* of the EEC Treaty and what such a service consists of.

The Commission has in particular during the oral procedure expressed serious doubts whether the conditions exist at all for the application of Article 59. This question must therefore be examined more closely, because on the one hand the plaintiff has provided more than one service for the defendant

and on the other hand in this case the "decisive factor" is not apparent.

1. Since services are provided by banks as a general rule in conjunction with movements of capital when banking transactions are carried out, the relationship of the provisions of the EEC Treaty on the free movement of services to those relating to the free movement of capital has from the beginning entailed special demarcation difficulties. Consequently the distinction between "ordinary" banking services and banking services connected with movements of capital was developed of which only the former are regarded as being services within the meaning of Articles 59 and 60 of the EEC Treaty and subject to the provisions of the chapter on services, whereas banking services connected with movements of capital according to Article 61 (2) of the EEC Treaty are only to be liberalized in step with the progressive liberalization of movement of capital. The question whether the banking services are ordinary or "connected" or simply movement of capital is in principle determined by deciding whether or not the parties have entered into a contract for the movement of capital. There is *only* movement of capital if the main purpose of the contract is such a movement of capital as is mentioned in the directives on Article 67 of the EEC Treaty; this is the case for example with "... short-term and medium-term credits in respect of commercial transactions in which a resident is participating" (cf. List A of Annex I to the First Directive of 11 May 1960, Official Journal, English Special Edition 1959-1962, p. 51). The banking services connected therewith (transfers, the collection of interest, etc.) are not regarded as *separate* service so that the liberalization of *these* capital movements is only to be effected in accordance with Article 67 of the Treaty.

On the other hand transactions which are not associated with movements of capital, for example contracts of deposit, market surveys and similar services, are *ordinary* banking services.

Finally *"connected"* banking services within the meaning of Article 61 (2) of the Treaty are assumed to be those in which the movement of capital is *necessary* or *normal* in order to complete the transaction. An *exhaustive* enumeration of the "connected" banking services which are to be liberalized is found in Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions (Official Journal 1973, L 194, p. 1). It is clear that this enumeration only covers ancillary activities which are merely incidental to the main purpose of movement of capital.

On the question whether Article 59 *et seq.* of the EEC Treaty apply at all to the plaintiff's operations in this case the determinative factor therefore is whether and in certain circumstances which of, its operations may be regarded as ordinary banking services provided for the defendant. In my view carrying out time-bargains and keeping an account relating thereto are *ordinary banking services* to which Articles 59 and 60 of the EEC Treaty apply. The overdraft credit granted in connexion therewith is accordingly a short-term credit which within the meaning of List A of Annex I to the First Directive of 1960 on capital movements is connected with these services. There is no ground at all for the assertion that the carrying out of time-bargains is a necessary or even a normal element in the granting of an overdraft credit. It is precisely such a dependence on another transaction which is the determinative characteristic of a "connected" banking service within the meaning of Article 61 (2) of the Treaty.

List B of Annex I to the First Directive of 1960 on capital movements cannot lead to any other conclusion either in so far as it refers to "securities dealt in on a stock exchange (excluding units of unit trusts)". The "receipt of orders to buy and sell" according to the Directive of 1973 does form part of the banking services connected with this kind of capital movement. However it must be borne in mind in this context that the defendant's transactions were not operations in securities within the meaning of the said directive; operations in securities within the meaning of this directive according to the definition in List B of Annex I to the First Directive of 1960 on capital movements relate only to the *acquisition* of domestic or foreign securities dealt in on a stock exchange and also the repatriation or the use of the proceeds of liquidation thereof. However there is no doubt that the transactions entered into by the plaintiff did not result in such operations in securities; the securities were merely a means of exchange for the realization of speculative gains, without any holdings ever being in fact "acquired" or any holdings bought in this way being "liquidated". Therefore the time-bargains carried out by the plaintiff cannot be regarded as banking services connected with movements of capital within the meaning of Article 61 (2) of the Treaty.

2. However in my view it is also above all the "decisive factor" which must be considered as the necessary constituent element for Article 59 *et seq.* to apply. As I have said the carrying out of stock exchange time-bargains by the plaintiff is an ordinary banking service coupled with a credit. The ordinary banking service itself might be regarded as a completed French domestic transaction which is not decisive, if the defendant — which must in this case be assumed — throughout the entire duration of the time-bargains was presumed to have been resident in France. It might be otherwise where the charges for this ordinary banking service, namely the commission and costs, have not yet been paid. On this point the view can be taken that the defendant's change of residence before the final settlement of the liabilities arising out of the ordinary banking services causes the necessary decisive factor to materialize. It is my opinion that this point need not be decided. For the main action is primarily only concerned with the repayment of the short-term credit which was granted, that is with a capital movement, which falls within Article 67 and not Article 59 *et seq.* of the Treaty; however, since the relationship between bank and borrower has to be determined in another Member State, the defendant refers to the original banking service and infers from it that the plaintiff's claim is not actionable. Going to the heart of the matter in this way proves that the carrying out of the time-bargains as an ordinary banking service can *not* be regarded as a completed French domestic transaction. So even if it is assumed that the defendant was only resident in France and gave all the orders in that country the *extension* of the original ordinary banking services is sufficient for the business relationship of the parties to be subject to Articles 59 and 60 of the Treaty.

II — In this case the limiting factor, the compatibility of which with Article 59 *et seq.* of the EEC Treaty has to be considered, is that a valid civil claim in favour of the plaintiff under French law cannot be enforced in the Federal Republic of Germany, because, although the German courts also acknowledge that it is in principle governed by French law, they apply specific legal rules of substantive German law concerning claims of the kind at issue in this case which are not actionable or concerning German

"ordre public" [public policy] (Article 30 of EGBGB — Einführungsgesetz zum Bürgerlichen Gesetzbuch [Law introducing the Civil Code]).

The first question of the court making the reference is whether the objection that the claim is not actionable, the so-called objection that a contract is an agreement to pay differences, in a case of this kind infringes Articles 59 and 60 of the EEC Treaty.

On the question whether the application and interpretation of German law by the court making the reference is to be regarded as a restriction of the freedom to provide services which is forbidden under Article 59 *et seq.* of the EEC Treaty the General Programme for the abolition of restrictions on freedom to provide services of 18 December 1961 (Official Journal, English Special Edition, Second Series, January 1974, p. 3) which, as far as concerns cases of freedom to provide services in respect of self-employed activities of banks, which are relevant to these proceedings, has been implemented by means of Council Directive No 73/183/EEC of 28 June 1973 (Official Journal 1973, L 194, p. 1) is primarily determinative.

In the case of ordinary banking services (cf. the first paragraph of Article 2 of the directive) the first paragraph of Article 1 of the directive mentions the restrictions referred to in Title III of the General Programme which Member States were under an obligation to abolish.

1. The system of and the aims sought to be attained by the General Programme can best be seen in the wording of the first paragraph of Title III A, Titles B and C and the first paragraph of Title D of the programme. Title III A forbids "Any measure which ... prohibits or hinders the person providing the services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned". This is immediately afterwards defined in specific terms. The third paragraph of Title A goes on to say: "The like shall apply to provisions and practices which, *in respect of foreign nationals only*, exclude ... the power to exercise rights normally attaching to the provision of services ..."

According to Title III B "Any prohibition of, or hindrance to, the movement of the item to be supplied in the course of the service or of the materials comprising such item or of the tools, machinery, equipment and other means to be employed in the provision of the service" is unlawful.

Title III C and D forbid such restrictions as relate to the transfer of the funds needed to perform the service or payments for services, where the provision of such services is limited only by restrictions in respect of the payments therefor.

These provisions make it clear that in the first place restrictions of the freedom to provide services in so far as the rights of aliens are concerned, that is to say those provisions which treat *foreign nationals* differently from nationals of the State concerned, or else — in accordance with the provisions of B to D — restrictions arising out of foreign trade laws, and especially out of foreign exchange control regulations must be abolished.

Such restrictions are clearly not at issue in this case because the fact that the plaintiff is a *foreign* legal person is wholly irrelevant.

2. Again, the last paragraph of Title III A contains a residual provision to this effect. "Furthermore any requirements imposed ... in respect of the provision of services are also to be regarded as restrictions where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by

foreign nationals". It is doubtful whether the retriction in this case constitutes any *actual* discrimination against foreign nationals as mentioned in this paragraph. My view is that in the provisions of German law relating to stock exchanges and commodity markets no requirement is to be found which is imposed in respect of the provision of services and which hinders foreign nationals exclusively or principally. In so far as transactions on foreign stock and commodity exchanges are open as a result of the German provisions to the objection that they are agreements to pay differences, numerically it is foreign nationals who are of course mainly affected. However the provision in Title III A cannot be understood as stipulating that foreign transactions carried out by foreign nationals and domestic transactions carried out by nationals of the State concerned are to be treated on the same footing. On the contrary the fact that that provision was inserted in Title III shows that the restrictions which are unlawful must refer to *domestic transactions* carried out by foreign nationals. This provision does not lay down that the principle of equality of treatment *must* be generally applied.

3. The recitals in the preamble to and the provisions of Council Directive No 63/340/EEC of 31 May 1963 (Official Journal, English Special Edition 1963-1964, p. 31) on the abolition of all prohibitions on or obstacles to payments for services where the only restrictions on exchange of services are those governing such payments, to which the Commission also referred, show that it is only concerned with certain restrictions under public law — especially those connected with the law relating to foreign trade and foreign exchange control legislation — in respect of payments for services, but not with questions concerning the validity or enforceability under civil law of claims arising under contracts for the provision of services. There is in fact no "parallel" such as the one which according to its submissions the Commission has been "forced" to find.

4. The Commission clearly does not seek to apply the provisions of the General Programme and the said directive directly, but is using these provisions merely as circumstantial evidence in order to substantiate its view that the restrictions arising out of German law are incompatible with Article 59 of the EEC Treaty directly on the basis of this provision of the Treaty.

The difference in treatment brought about by German jurisprudence is not in fact a restriction prohibited by Article 59 *et seq.* of the EEC Treaty, because these provisions simply aim — at the most — at the treatment of nationals. But it is not the treatment of nationals which is at issue in this case. A German bank would find that in a similar situation it was open to the objection that the contract was an agreement to pay differences in the same way as a French bank. Conversely the speculator in the case of valid domestic time-bargains could *not* rely on the objection that the contract was an agreement to pay differences even if he had effected these transactions through the branch in his own State of a foreign bank.

Article 59 *et seq.* of the EEC Treaty do not require, as is very clearly shown by the third paragraph of Article 60 and the General Programme of 1961, that there be made available to foreign nationals the provision of such services as are not supplied to nationals. It does not follow from the *specific prohibition* of discrimination in Article 59 *et seq.*, which put in concrete form the prohibition of discrimination in Article 7 of the EEC Treaty, that foreign nationals who provide services *must* be accorded preferential treatment which would in its turn culminate in discrimi-

nation against nationals who provide services.

This view is in keeping with the opinion which prevails among all the academic writers.

Groeben-Boeckh-Thiesing states in the Kommentar zum EWG Vertrag [Commentary on the EEC Treaty] (Note I (2) (b) on Article 59) that the unrestricted free movement of services, that is to say, the opportunity to offer services in the same form at home and abroad — and this is what the plaintiff is in fact claiming in this case — cannot be achieved by liberalization but only through approximation of laws. Ipsen states in his book on European Community Law (on page 645): "The 'freedoms' have been created for the purpose of removing *discrimination* and not those restrictions which also *apply to nationals* of the Member States. Liberalization in a Member State does not therefore eliminate restrictions on freedom which domestic law *itself* imposes on *its* nationals. And as long as such restrictions are in existence they are *also* permitted to restrict the nationals of the other Member States without thereby discriminating against them." Maestripieri also in fact takes the same view (La libre circulation des personnes et des services dans la CEE, 1972, p. 47-53).

III — The question whether the application of the German law relating to stock exchanges and commodity markets by means of German private international law may infringe Treaty provisions other than those of Article 59 *et seq.* might now be raised. Since following the rejection of the preconditions for the application of Article 59 *et seq.* Article 7 can no longer be invoked there only remains the residual provision in the second paragraph of Article 5 of the EEC Treaty which provides that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

On this point the question to be determined in the final analysis is whether the particular discrimination which of necessity derives from the different legal systems of the Member States including the differing systems of private international law impedes the proper functioning of the Common Market in such a way that the relevant restrictions ought straightaway to be regarded as prohibited. This however is not the case. The Treaty proceeds on the basis that the legal systems of the Member States are different and provides for the approximation of laws in Article 100 *et seq.* with a view to removing the resultant disturbances of the proper functioning of the Common Market. In this case the "disturbance" is due, on the one hand, to the differing regulations of the Member States for running stock exchanges and, on the other hand, to the fact that the Federal Republic of Germany unilaterally extends its stock exchange regulations by means of private international law to foreign matters. This "disturbance" can therefore only be removed in the first place by harmonizing stock exchange regulations and in the second place by establishing a uniform system of private international law.

However I should like to draw attention to the fact that when the national courts apply their national law and the private international law of their State they must do so in a way which is in keeping with attainment of the objectives of the Treaty. Thus a strained and consequently unsuitable interpretation of the principle of "ordre public" ["public policy"] for example might in fact constitute an infringement of the EEC Treaty, from which all the institutions of the Member States, including consequently their courts, according to the basic rule in Article 5 must abstain. This must be taken into consideration by the Oberlandesgericht Köln when it makes its decision.

IV — To sum up it must be recorded that the application of German Stock Exchange regulations and the German Civil Code by means of German private international law to a case such as the present one does not *in itself* infringe the prohibition of discrimination in Articles 59 and 60 of the EEC Treaty. Subject to the limits which I have drawn for the interpretation of the German provisions this also applies to Article 5 of the EEC Treaty.

Furthermore the question to what extent the capacity to carry out stock exchange time-bargains under Article 53 of the German Law relating to stock exchanges and commodity markets might be material is a question of interpretation of the substantive applicable German law which is a matter for the German court to determine.

I therefore submit that the questions referred by the court be answered as follows:

"Articles 59 and 60 of the EEC Treaty do not themselves preclude the application to this case of German Stock Exchange regulations and the German Civil Code by means of German private international law."