OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 March 1992 *

My Lords,

1. In the present case, the Conseil d'État of Luxembourg has requested a preliminary ruling on three questions concerning the freedom to practise as an auditor of company accounts:

(1) (a) Do Article 52 et seq., or any other provisions of the Treaty and the implementing rules, permit the competent authorities of a Member State to deem it incompatible with the exercise by a natural person in that Member State of the profession of auditor for that person to be established as an auditor in another Member State?

and if not,

(b) May a Member State impose, on a person authorized to carry on the profession of an auditor in another Member State in which that person also has a business establishment, requirements with regard to a permanent infrastructure for the performance of his work, minimum conditions with regard to actual presence in that Member State and the conditions necessary for ensuring compliance with the rules of professional conduct?

(2) Do Article 52 et seq. of the EEC Treaty, or any other provisions of the Treaty and the implementing rules, permit the competent authorities of a Member State to grant authorizations to act as auditors only to employees of a person so authorized under its national legislation, to the exclusion of employees of a person authorized under the legislation of another Member State?

2. The Institut des Réviseurs d'Entreprises, which is the professional body which regulates the auditing profession in Luxembourg, is a party to the main proceedings, and has in addition submitted written observations to the Court.

3. The questions referred by the Conseil d'Etat arise in the context of an action brought by Mr Claus Ramrath against the Luxembourg Minister of Justice ('the Minister'), challenging the validity of a decision to withdraw Mr Ramrath's authorization to practise as an auditor in Luxembourg. That authorization had originally been given on 11 February 1985, when Mr Ramrath was

* Original language: English.

employed by the Société civile Treuarbeit, a firm established, and authorized to audit, in Luxembourg (hereafter 'Treuarbeit Luxembourg'). However on 1 February 1988 Mr Ramrath informed the Institut des Réviseurs that he was now employed by Treuarbeit AG, a firm established in Düsseldorf (hereafter 'Treuarbeit Düsseldorf'). On 8 August 1988, the Minister informed Mr Ramrath that, in consequence, his authorization was to be withdrawn, and invited him to state his views. On 28 September 1988, Treuarbeit Luxembourg wrote to the Minister, stating that it employed Mr Ramrath as regards his duties in Luxembourg. Notwithstanding that statement, Mr Ramrath's authorization to practise was definitively withdrawn on 19 May 1989.

4. The Minister gave two reasons for withdrawing Mr Ramrath's authorization. The first reason was that Mr Ramrath did not have a professional establishment in Luxembourg, contrary to the requirement laid down by Article 3(1)(c) of the Law of 28 June 1984 on the organization of the profession of company auditor. The second reason was that, by virtue of Mr Ramrath's employment by Treuarbeit Düsseldorf, he lacked the professional independence required by Article 6 of the same law, which prohibits, in particular, an auditor from taking any salaried employment with a person not authorized to practise in Luxembourg. Thus, Mr Ramrath's authorization was withdrawn, not on the ground that he was established in another Member State, but on the grounds that he (1) had no place of professional establishment in Luxembourg, and (2) was employed by a firm which was not itself authorized to practise in Luxembourg, namely Treuarbeit Düsseldorf.

5. Neither the Minister nor the Institut des Réviseurs has sought to contest that it would be contrary to Community law to withdraw authorization to practise on the sole ground that the auditor in question was established as an auditor in another Member State. As the Court stated in Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, at paragraph 19 of the judgment:

'That freedom of establishment is not confined to the right to create a single establishment within the Community is confirmed by the very words of Article 52 of the Treaty, according to which the progressive abolition of the restrictions on freedom of establishment applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State. That rule must be regarded as a specific statement of a general principle, applicable equally to the liberal professions, according to which the right of establishment includes freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community.'

Furthermore, as the Court made clear in Case 96/85 *Commission* v *France* [1986] ECR 1475, the freedom of a professional to practise in more than one Member State

extends, by virtue of Article 48 of the Treaty, to the right to practise as an employee.

6. It seems to me, therefore, that there can be no doubt that the first of the three questions referred by the Conseil d'Etat is to be answered in the negative. The question therefore arises what restrictions a Member State may none the less impose on the practice of the profession of auditor on its territory. May a Member State impose requirements relating, in particular, to permanent infrastructure and minimum presence? May it require that an auditor be employed only by a person authorized to practise under its own national legislation? In what follows, I shall discuss each of those questions in turn. Although the questions referred to the Court make specific mention only of Article 52 of the Treaty, it is clear that the freedom to practise a profession may be guaranteed, according to the circumstances, by Articles 48 and 59 of the Treaty, as well as by Article 52.

The requirement of minimum presence

7. The Institut des Réviseurs suggests in its written observations, and argued at the hearing, that the stable presence of an auditor within the Member State where the auditing work is carried out is necessary for the proper supervision of the profession. It is argued, in particular, that the need to conserve documents and records, and to enforce rules of professional confidence, require the person responsible for the auditing work to have a permanent place of establishment within the regulating Member State. Thus, as the Minister explains in his written observations, Article 3(1)(c) was inserted into the Law of 28 June 1984 in order that the fiscal and regulatory authorities, in exercising their supervisory powers, might have recourse to a body with a stable presence in Luxembourg. In what follows, I shall proceed on the assumption that such requirements are justified, an assumption that has not been challenged in these proceedings. I will first consider the force of the arguments concerning minimum presence as they arise if, as Treuarbeit Luxembourg informed the Minister, Mr Ramrath was employed by that firm while he was providing services in Luxembourg. Since, however, the accuracy of that statement is disputed by the Minister, it is necessary to consider other hypotheses also.

8. In the first place, it is clear that a person who provides auditing services in the course of his salaried employment with a firm established in Luxembourg provides those services on behalf of his employer, even where that employment is merely temporary. It seems to me, therefore, that any national requirements relating to the preservation and confidentiality of documents and records can be adequately enforced against the employer in Luxembourg. Similarly, any requirement to maintain contact with clients or with the competent national authorities can be met by the employer himself, or by other members of his staff, and can be enforced against the employer in case of default. Finally, any necessary rules of professional conduct can be enforced also against the employee, who will be present in Luxembourg whilst providing services there.

9. Furthermore, it is not suggested, either by the Minister or by the Institut des Réviseurs, that there is any requirement of Luxembourg law which prevents auditors permanently established in Luxembourg from taking on temporary staff. Accordingly, I do not see how a requirement could be justified which had the effect of preventing such an employer from taking on, as a temporary employee, an auditor qualified to practise in Luxembourg but principally employed by a firm established in another Member State. It seems to me, therefore, that such a requirement would not be consistent with the right to free movement provided by Article 48 of the Treaty, which protects the right to take up temporary employment in another Member State.

10. In certain circumstances, moreover, that requirement would constitute a restriction on the freedom of firms established in one Member State to set up branches, subsidiaries or agencies in another Member State, guaranteed by Article 52 of the Treaty, since the temporary transfer of staff between offices in different Member States may be necessary for the efficient functioning of the organization. It was not clear from the Order for Reference whether Treuarbeit Luxembourg is indeed a branch, agency or subsidiary of Treuarbeit Düsseldorf. At the hearing, the Minister pointed out that Treuarbeit Luxembourg, as a company with its own distinct legal personality, could not be regarded a 'branch' of the German company, which is moreover apparently itself a branch of a company which has its registered offices in Berlin and Frankfurt. It is clear however that that would not prevent Treuarbeit Luxembourg from being a subsidiary or agency of the German company, as opposed to a branch. In any event, the rights of establishment of Treuarbeit Düsseldorf are not directly at issue in the present proceedings.

11. From the reply given by the Minister to a written question put by the Court, it appears that the Minister disputes the statement by Treuarbeit Luxembourg, according to which Mr Ramrath provides services in Luxembourg as an employee of that firm. The precise circumstances in which Mr Ramrath provides such services is of course a question of fact which can only be decided by the national court. On the other hand, it is equally clear that it is a matter of Community law what criteria are to be applied in deciding whether those circumstances are to be classified as an employment relationship: see Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 11 of the judgment. Furthermore, as will be seen, Mr Ramrath may in any case be able to rely upon the freedom to provide services, under Article 59 of the Treaty, even if he were unable to rely, in respect of his appointment with the Luxembourg firm, on the freedom of movement for workers provided by Article 48.

12. In his reply to the Court's question, the Minister suggests that the placing of Mr Ramrath at the disposal of Treuarbeit Luxembourg by Treuarbeit Düsseldorf, for the purpose of providing particular services in Luxembourg, does not in itself amount to the employment of Mr Ramrath by the Luxembourg firm. That may be so; but the decisive question, in my view, is not whether Mr Ramrath works as a salaried employee in

Luxembourg, but only whether he can rely upon either of the two freedoms guaranteed, respectively, by Article 48 and Article 59 of the Treaty. For those two articles, together where appropriate with Article 52, must be regarded as covering between them all possible situations in which a person is providing professional services across Member State frontiers. What matters therefore is whether the requirements of Luxembourg law which are designed to regulate the activity of auditing can be met in the case of an auditor who is temporarily placed at the disposal of a firm established in Luxembourg. As I have already indicated, it seems to me to be sufficient, for the purpose of satisfying those requirements, if the services provided by Mr Ramrath to clients in Luxembourg are provided by him on behalf of a firm which is itself established there, for in such circumstances any of the relevant supervisory requirements can be adequately enforced: see paragraph 8 above. Accordingly, it does not seem to me to make any difference whether or not Mr Ramrath is employed by the Luxembourg firm, as long as that firm can be held responsible for his activities.

13. Where auditing services are provided by Mr Ramrath on behalf of Treuarbeit Luxembourg, it may be appropriate to regard that provision as a supply of services made by the firm to its clients, rather than as a supply made by Mr Ramrath himself, even where he is not an employee of that firm. In that case, however, it seems to me that there will also be a provision of services by Mr Ramrath to the firm. If it were to be objected that, in providing those services, Mr Ramrath is in reality acting on behalf of his employer, Treuarbeit Düsseldorf, so that the provision of services is made by the German firm to the Luxembourg firm and not by Mr Ramrath himself, the reply would be that in that case he can rely upon Article 48, which guarantees his right to provide services in Luxembourg in the course of performing his contractual duties to his German employer, as indeed Treuarbeit Düsseldorf could rely upon Article 59.

14. However the situation may be analysed, therefore, it is clear that Mr Ramrath's right to exercise his profession in Luxembourg is protected by the Treaty. Any legitimate requirement, imposed by Luxembourg law, for a place of professional establishment in Luxembourg, can be satisfied, in my view, as long as there is a firm of auditors, established in Luxembourg, which takes responsibility for the conduct and results of Mr Ramrath's auditing activities.

15. In my view, therefore, a Member State is not permitted to impose requirements relating to permanent infrastructure or continuity of presence, or enforce rules of professional conduct, which would have the effect of preventing an auditor who would otherwise be qualified to practise in Luxembourg, either from taking up temporary employment with a person or firm established in Luxembourg, or from providing services there on behalf of such a person or firm, even where the auditor has no other base in Luxembourg.

Employment by a non-authorized person

16. It will be recalled that the second reason given by the Minister for withdrawing Mr Ramrath's authorization to practise was that Mr Ramrath was employed by a person not authorized as an auditor under Luxembourg law, contrary to Article 6 of the Law of 28 June 1984. Both the Minister and the Institut des Réviseurs argue that the requirement laid down by Article 6 is necessary in order to ensure the professional independence of auditors in Luxembourg.

17. The requirement of professional independence laid down by Article 6 of the Luxembourg legislation appears to be intended to implement Article 24 of the Eighth Council Directive of 10 April 1984 based on Article 54(3)(g) of the Treaty, on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20). Member States were required to implement the Eighth Directive by 1 January 1988, and by provisions which would apply at the latest from 1 January 1990. Articles 23 and 24 of the directive provide, respectively, that:

'Member States shall prescribe that persons approved for the statutory auditing of the documents referred to in Article 1(1) shall carry out such audits with professional integrity.'

'Member States shall prescribe that such persons shall not carry out statutory audits which they have required if such persons are not independent in accordance with the law of the Member State which requires the audit.'

It is clear that Luxembourg was entitled to implement Article 24 by forbidding an auditor to be employed by any person or firm which is not itself an auditor. It is however less clear that it is permissible to exclude, equally, employment with a person or firm authorized as an auditor under the law of another Member State. Such a Member State must be presumed, as from 1 January 1990, to have brought into force provisions implementing the Eighth Directive, including the obligations laid down by Articles 23 and 24, and may have already done so before that date. Article 3 of the directive provides, furthermore, that:

'The authorities of a Member State shall grant approval only to persons of good repute who are not carrying on any activity which is incompatible, under the law of that Member State, with the statutory auditing of the documents referred to in Article 1(1).'

18. It is true that definitions of what activities are incompatible with statutory auditing, and of what constitutes professional independence (although not perhaps professional integrity) may vary as between Member States, as the reference to national law in Articles 3 and 24 of the directive suggests. If therefore it were shown that the particular circumstances of an auditor's employment with a person or firm authorized in another Member State were such as to offend against the requirements of professional independence which are enforced in Luxembourg, or against other legitimate requirements, that might be a reason for requiring such employment to cease. Similarly, such an employment might preclude the auditor in

question from carrying out particular audits, by virtue of a connection between the audited company and his employer. It would be for the national court to decide whether such an infringement of standards had occurred in any individual case. On the other hand, it does not seem to me that a Member State is permitted to assume, without proof, that its standards have been infringed by the mere fact of employment by an auditor authorized in another Member State. It is rather for the Member State to show that the auditor's ability to carry out audits on its territory with the requisite independence and integrity has been impaired.

19. It is true that, in order to ensure compliance with the relevant rules of professional conduct and independence, it may not always be sufficient merely to compare the regulations governing the matter in the two Member States concerned. Thus, even if German rules governing professional independence of auditors contain requirements identical to those laid down in Luxembourg, it may still be necessary for the Luxembourg authorities to examine whether the condition of professional independence is satisfied in any particular case. In the case of an audit performed by Mr Ramrath, the Luxembourg authorities are, in particular, entitled to require that there be no connection between the audited company and Treuarbeit Düsseldorf such as to impair his independence, and if such requirements are to be enforced it may be necessary for the regulatory authorities in the two countries to cooperate and to exchange information. However, it does not seem to me excessively onerous to require the Luxembourg authorities to engage, if necessary, in such a procedure of cooperation. The cooperation between the regulatory authorities of different Member States will frequently be necessary if the free movement of the professions is to be secured. In any case, however, it is clear that the mere possibility of a conflict of interest resulting from employment in another Member State is not sufficient to justify a prohibition on practice in Luxembourg. In my view, therefore, it is manifestly disproportionate for Luxembourg to lay down an absolute and *a priori* prohibition against employment with a firm of auditors established in another Member State.

Conclusion

20. I am accordingly of the opinion that the questions referred by the Conseil d'Etat should be answered as follows:

(1) Articles 48, 52 and 59 of the Treaty preclude the competent authorities of a Member State from refusing a Community national authorization to act as an

auditor on the ground that he is established as an auditor in another Member State, or (subject to the answer given under (3) below) on the ground that he is employed there.

(2) Articles 48 and 59 of the Treaty preclude a Member State from imposing requirements relating to a permanent infrastructure and minimum conditions of actual presence in that Member State, or from enforcing rules of professional conduct, which have the effect of preventing a Community national otherwise qualified to do so, who is established or employed as an auditor in another Member State, from either (i) taking up temporary employment with a person or firm established as an auditor in the first Member State, or (ii) temporarily providing services on behalf of such a person or firm.

(3) Articles 48, 52 and 59 of the Treaty preclude the competent authorities of a Member State from preventing a Community national from acting as an auditor, on the ground that he is employed by a person or firm authorized so to act under the law of another Member State, unless it has been shown that such employment is inconsistent, in the circumstances of the case, with his professional integrity or independence.