JUDGMENT OF THE COURT
1 December 1998 *

In Case C-410/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Grande Instance, Metz, France, for a preliminary ruling in the criminal proceedings before that court against

André Ambry

on the interpretation of Articles 59 and 73b of the EC Treaty, of 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 (OJ 1973 L 194, p. 1) and of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn, J.-P. Puissochet, G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, C. Gulmann, H. Ragnemalm (Rapporteur), M. Wathelet, R. Schintgen and K. M. Ioannou, Judges,

* Language of the case: French.

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Ambry, by Michel Walter and Christine Gury, of the Metz Bar,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate, Ministry of Foreign Affairs, and Régine Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents,

— the Spanish Government, by Santiago Ortiz Vaamonde, Abogado del Estado, acting as Agent, and

— the Commission of the European Communities, by Dimitrios Gouloussis, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Ambry, of the French Government and of the Commission at the hearing on 28 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1998,

gives the following

Judgment

1 By judgment of 19 December 1996, received at the Court on 24 December 1996, the Tribunal de Grande Instance (Regional Court), Metz, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 59 and 73b of the EC Treaty, of 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 (OJ 1973 L 194, p. 1) and of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1).

2 That question was raised in criminal proceedings brought against Mr Ambry, the manager of a company, who was charged with having assisted or engaged in an activity relating to the organisation and sale of travel and holidays without having obtained the licence required by Article 4 of French Law No 92/645 of 13 July 1992 laying down the conditions for the exercise of activities relating to the organisation and sale of travel or holidays (JORF, p. 9457).

The Community legislation

3 Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59) provides:

'The organiser and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.'

4 Article 8 of that directive provides further:

'Member States may adopt or [retain] more stringent provisions in the field covered by this Directive to protect the consumer.'

5 Article 18 of Directive 89/646 provides:

'1. The Member States shall provide that the activities listed in the Annex may be carried on within their territories, in accordance with Articles 19 to 21, either by the establishment of a branch or by way of the provision of services, by any credit institution authorised and supervised by the competent authorities of another Member State, in accordance with this Directive, provided that such activities are covered by the authorisation.

2. The Member States shall also provide that the activities listed in the Annex may be carried on within their territories, in accordance with Articles 19 to 21, either by the establishment of a branch or by way of the provision of services, by any financial institution from another Member State, whether a subsidiary of a credit institution or the jointly-owned subsidiary of two or more credit institutions, the memorandum and articles of association of which permit the carrying on of those activities and which fulfils each of the following conditions:

...'

6 The institutions mentioned in paragraph 2 must thus meet certain conditions which are listed in detail in that paragraph.

7 Guarantees and commitments are listed under point 6 of the Annex to which Article 18 refers.

8 Article 4 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1) lays down the conditions for engaging in insurance activities. It replaced Article 6 of First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3) by the following provision:

'The taking up of the business of direct insurance shall be subject to prior official authorisation.

Such authorisation shall be sought from the competent authorities of the home Member State by:

(a) any undertaking which establishes its head office within the territory of that State;

...'

9 Article 5 of Directive 92/49 also amended Article 7 of Directive 73/239 as follows:

'1. Authorisation shall be valid for the entire Community. It shall permit an undertaking to carry on business there, under either the right of establishment or the freedom to provide services.

...'

The national legislation

10 Article 4 of Law No 92/645 provides that the organisation or sale of individual or group travel or holidays may be undertaken for profit only by a natural or legal person registered for business purposes and holding a licence to operate as a travel agent. That article also sets out the conditions for the issue of that licence, which include, under (c):

'providing, in regard to their customers, sufficient evidence of a financial security, specifically designated for the refund of money received in respect of the services listed in Article 1 and for the provision of substitute services, provided under a bond entered into by a collective guarantee body, a credit institution or an insurance company, such security to cover the costs of any repatriation and, in such a case, to be available for immediate payment in France'.

11 The detailed rules for the implementation of that Law are laid down by Decree No 94/490 of 15 June 1994 (JORF, p. 8746).

12 Article 12 of that decree provides:

'The security required by Article 4(c) of the Law of 13 July 1992 shall be provided under a written bond entered into:

1. Either by a collective guarantee body having legal personality, by means of a guarantee fund created for that purpose;

2. Or by a credit institution or insurance company authorised to give a financial security.

The financial security must be specifically designated for the refund of capital sums received by the travel agent under the contracts he has entered into on behalf of his clients for present or future services and must cover the repatriation of travellers, in particular in the case of default on payments resulting in the commencement of bankruptcy proceedings.

...'

13 Article 14 of Decree No 94/490 provides:

'A financial security may be provided by a credit institution or insurance company only if that institution or company has its registered office in the territory of a Member State of the European Community or has a branch in France. In all cases, the financial security must be available for immediate payment in order to ensure the repatriation of customers in accordance with the conditions laid down in Article 16 below. If the credit institution or insurance company is situated in a Member State of the European Community other than France, an agreement to that effect must be concluded between that body and a credit institution or insurance company situated in France. A certificate attesting to the agreement and drawn up by the French credit institution or insurance company shall be sent to the Préfet [chief administrative officer of the *département*] by the travel agent concerned.

The Préfet must be informed, without delay and subject to the same conditions, of any amendments to that agreement and, where applicable, of the signature of any new agreement concerning the same subject-matter.

...'

14 The detailed rules governing the manner in which the financial security may be called on are laid down by Article 16 of Decree No 94/490, according to which:

'The security shall be payable automatically on presentation of evidence by the creditor to the guarantee body that the claim is conclusively established and due and that the agency backed by the security is in default, and the guarantor may not limit its liability in the event of a plurality of guarantors or first require a sale of the assets of the principal debtor.

The default by the agent backed by the security may be constituted by the filing of a bankruptcy petition, or by a writ served by a court officer or by registered mail with acknowledgement of receipt and subsequent refusal or failure to pay within 45 days of service.

In the event of court proceedings the creditor must inform the guarantor of the issue of proceedings by registered mail with acknowledgment of receipt.

If the guarantor disputes either the existence of the conditions giving rise to the right to payment or the amount of the claim, the creditor may bring proceedings directly in the court having jurisdiction.

By way of derogation from the foregoing provisions, a decision to call on the security, as a matter of urgency, in order to repatriate the clients of a travel agency may be taken by the Préfet who shall require the guarantor to release, immediately and as a matter of priority, the funds necessary to cover the expenses involved in repatriation. However, if the security is provided by a collective guarantee body as referred to in Article 13 above, that body shall use every possible means to make the security available for immediate payment in cases of urgency duly confirmed by the Préfet.'

The main proceedings

15 Mr Ambry is charged, as manager of the company A Tours, before the Tribunal de Grande Instance, Metz, with having assisted or engaged in an activity relating to the organisation and the sale of travel or holidays without having the licence required by Law No 92/645 to carry out such activities.

16 Mr Ambry applied to the Préfet for the Moselle for a licence, which was refused on the ground that the compulsory security required for him to carry on business as a travel agent did not meet the requirements of Article 14 of Decree No 94/490 since it was provided by an Italian finance company, Compagnia Cauzioni SpA, whose registered office was in Rome and which had not concluded an agreement with a credit institution or insurance company established in France.

17 In the proceedings before the Tribunal de Grande Instance, Mr Ambry questioned the compatibility with Community law of the requirements laid down by Article 14 of Decree No 94/490 in the situation where security is granted to a travel agent by a credit institution or an insurance company established in another Member State of the European Union. He argued that those requirements constituted an obstacle to the free movement of capital and the freedom to provide services in the area of provision of financial security as laid down in the Treaty and the above-mentioned directives, and that the refusal to grant him a licence thus contravened Community law.

The question referred for a preliminary ruling

18 Since it considered that an interpretation of various provisions of Community law was necessary in order to determine whether the charges against Mr Ambry were well founded, the Tribunal de Grande Instance, Metz, stayed proceedings in order to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Article 14 of Decree No 94/490 of 15 June 1994, adopted pursuant to Article 31 of Law No 92/645 of 13 July 1992, to be regarded as not in conformity with Directive 73/183, with the Coordination Directive of 15 December 1989, with Article 59 of the Treaty establishing the European Communities and with Article 73b of the Maastricht Treaty, insofar as they require that, where a

financial security is arranged in a Member State of the European Community other than France, an agreement must be concluded between the credit institution or insurance company situated in that other Member State and a credit institution or an insurance company situated in France?'

19 As a preliminary point, it must be borne in mind that the Court has no jurisdiction, in the context of the application of Article 177 of the Treaty, to decide whether national rules are compatible with Community law, although it may provide the national court with an interpretation of all the relevant aspects of Community law, in order to enable that court to assess the compatibility of those rules with the Community provisions in question.

20 It must next be pointed out that, since the freedom of credit institutions to provide services is governed directly by Directive 89/646, it is unnecessary to refer to the more general provisions of Directive 73/183. On the other hand, in so far as the referring court questions whether the the obligation imposed by the French rules on insurance companies situated in other Member States to conclude an agreement with an insurance company established in France is compatible with the rules on freedom to provide services, an interpretation of Directive 92/49 on freedom to provide insurance services is called for in connection with that obligation.

21 The question referred for a preliminary ruling must therefore be understood to be seeking to ascertain whether it is contrary to Article 59 of the Treaty, to Directives 89/646 and 92/49 or to Article 73b of the Treaty for national rules such as those in issue in the main proceedings to require, with a view to implementing Article 7 of Directive 90/314, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an additional agreement with a credit institution or insurance company situated in France.

Interpretation of the rules on freedom to provide services

22 Article 7 of Directive 90/314 requires Member States to provide for security for the refund of money paid over, or for the repatriation of consumers, in the event of the insolvency of the operator from whom they bought the travel. That provision must be interpreted as prescribing a result whereby package travellers enjoy rights guaranteeing their repatriation and the refund of money that they have paid over, the aim being that of consumer protection (see Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* v *Federal Republic of Germany* [1996] ECR I-4845, paragraphs 35 and 42).

23 It is also clear from Article 8 of that directive that, like the other protective rules contained therein, the obligation to make provision for such security constitutes a minimum obligation.

24 There is therefore nothing to prevent Member States from providing that the security in question must not only exist but must also be immediately available for payment if required for the repatriation of travellers, provided that they do so in conformity with the Treaty, and in particular with Article 59.

25 It must therefore be considered whether it is contrary to the principle of freedom to provide services set out in Article 59 of the Treaty — which was implemented in the banking sector by Directive 89/646 and in the insurance sector by Directive 92/49 — for a national rule to require the security provided for by Article 7 of Directive 90/314, in order to ensure that it can be immediately available for payment if required for the repatriation of a traveller, to be backed by an agreement between the guarantor and a financial institution situated in France if it is arranged in another Member State.

26 Under the contested legislation the obligation to conclude an agreement with an institution situated in France applies to credit institutions and insurance companies situated in other Member States where a travel agent situated in France arranges the provision of security with such an establishment. It was stated by the French Government at the hearing that this agreement is in addition to the initial security provided by the credit institution or the insurance company to the travel operator. The agreement must be concluded between the initial guarantor and a credit institution or insurance company situated in the Member State of the travel agent, and that body must undertake in turn to guarantee that the funds will be available for immediate payment.

27 Thus, where the security required by Article 7 of Directive 90/314 is arranged with a financial institution situated in France, only one contract is required, whereas, if it is arranged with a financial institution situated in another Member State, it must be backed by a supplementary agreement in the form of a further guarantee provided by a financial institution situated in France.

28 That requirement has the effect, first and foremost, of restricting and discouraging financial institutions established in other Member States, inasmuch as it prevents them from offering the security required directly to the travel organiser on the same basis as a guarantor situated in France.

29 It is also likely to discourage the travel operator from approaching a financial institution situated in another Member State, since the fact that such an institution must enter into a further guarantee agreement is liable to give rise to additional costs which would normally be passed on to the travel operator.

30 Consequently, rules such as those in issue in the main proceedings, which require financial institutions situated in another Member State to conclude an additional

agreement, must be held to constitute a restriction on the freedom to provide services laid down by Article 59 of the Treaty and by Directives 89/646 and 92/49.

31 It must, however, be considered whether such a restriction can be justified as being necessary for the protection of consumers.

32 The French Government submits that the practical difficulties involved in making funds immediately available where a financial institution is established in another Member State justify the requirement of an additional agreement for such institutions. In particular, it is made necessary by the length of time required for cross-border transfers of funds and by the fact that it is difficult or even impossible, in the event of a dispute or of the guarantor's reluctance to release funds, to make use of certain administrative procedures or seek interim injunctions in other Member States.

33 In that regard, it must be pointed out that the need for the funds to be made immediately available as required by the rules in issue is relevant only to the repatriation of travellers and not to the other matters covered by the security provided for by Article 7 of Directive 90/314.

34 The requirement that an additional agreement be entered into applies, however, to all securities provided by credit institutions or insurance companies situated in other Member States.

35 Consequently, in so far as the requirement of an additional agreement concluded with a financial institution situated in France applies also in cases other than repatriation, it is not commensurate with the objective pursued.

36 As to the part of the security intended to guarantee the repatriation of the traveller, in respect of which the requirement that funds must be available for immediate payment is justified, it should be noted that at the hearing Mr Ambry argued that transfers of funds between European banks could be made very quickly — within 24 to 48 hours by the international transfer system — which the French Government accepted, although it added that the time taken was variable and could be considerably longer.

37 It appears that the requirement that funds must be available for immediate payment can normally be met adequately even where the guarantor is established in another Member State. In any event, the contested rules do not even offer a travel agent the opportunity to prove that he can make the funds covered by the security as rapidly available as those rules require.

38 Finally, as regards the argument that it is impossible to ensure, in the other Member States, the same degree of effectiveness as is provided by certain administrative measures or judicial decisions within France, it must be borne in mind that, even if some administrative measures cannot be enforced in the same way against undertakings situated in other Member States, it is always possible to make use of the urgent legal procedures which exist in all the Member States of the Community. The effectiveness of the decisions taken on such procedures will depend on the substance of the guarantee agreement concluded between the financial institution situated in another Member State and the travel agent.

39 It must therefore be concluded that it is contrary to Article 59 of the Treaty and to Directives 89/646 and 92/49 for national rules such as those in issue in the main proceedings to require, with a view to implementing Article 7 of Directive 90/314, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France.

40 In view of the foregoing, it is not necessary to examine whether such rules are also contrary to Article 73b of the Treaty.

Costs

41 The costs incurred by the French and Spanish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal de Grande Instance, Metz, by judgment of 19 December 1996, hereby rules:

It is contrary to Article 59 of the EC Treaty and to Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC and Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance

and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) for national rules to require, with a view to implementing Article 7 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France.

Rodríguez Iglesias Kapteyn Puissochet

Hirsch Mancini

Moitinho de Almeida Gulmann Ragnemalm

Wathelet Schintgen Ioannou

Delivered in open court in Luxembourg on 1 December 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President