OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 27 June 1996 *

1. This preliminary reference raises the issue of the compatibility with the freedom to provide services guaranteed by the Treaty of certain German rules which, *inter alia*, prohibit the provision of judicial debt-recovery services in Germany by debt-collecting undertakings on a professional basis, without engaging the assistance of a lawyer.

I — Factual and legal context

2. According to Article 828 of the Zivilprozeßordnung (Code of Civil Procedure, hereinafter 'the ZPO') of 30 January 1877, as reproduced in the version of 12 September 1950, [1] the grant of an order designed compulsorily to attach a debt (i. e. an attachment order) is a judicial function which, in Germany, falls within the competence of the Amtsgericht (Local Court). According to Article 78 of the ZPO, the use of the services of a 'Rechtsanwalt' (lawyer) is only compulsory before the 'Landgerichte' (Regional Courts) and all superior courts. Article 79 of the ZPO, which applies to the Amtsgericht, refers to 'Parteiprozeß' and provides that:

'In so far as the representation by lawyers is not prescribed, the parties may conduct the case themselves or have it conducted by any person having capacity to conduct legal proceedings, acting as agent.'

The cases where 'representation by lawyers is not prescribed' include applications for 'ein Pfändungs-und Überweisungsbeschluß' ('a seizure and transfer order') under Article 828. [2]

3. The Rechtsberatungsgesetz (Law on Legal Advice, hereinafter 'the RBerG') of 17 December 1935 [3] provides at Article 1(1)(1) that:

* Original language: English.

1 — BGBl., p. 455.

2 — The type of order at issue would appear to correspond to an 'attachment order' in common law jurisdictions or a 'saisie arrêt' in some civil law systems. For convenience, it will hereinafter be referred to as an 'attachment order'.

3 — BGBl., p. 1478.

'Only persons who have been given the corresponding authorization by the competent authority may, by way of business — ... for remuneration or without charge — engage in conduct of legal proceedings for others, including the provision of legal advice and the collection of debts of others or debts assigned for purposes of collection. Each authorization shall be granted for one field:

...

5. to debt-collecting undertakings for the extra-judicial collection of debts (debt collectors),

...

It may be exercised only under the occupational designation corresponding to the authorization.'

Article 1(1)(2) of the RBerG provides that a licence may be issued only if the applicant possesses the necessary reliability, personal aptitude and expertise and if the demand is not already satisfied by an adequate number of existing practitioners. [4] Under Article 1(3) the professional activities of, *inter alia*, lawyers are unaffected by the Law.

4. The combined effect of these provisions is that undertakings may be authorized to provide extra-judicial debt-collection services in Germany. [5] Where the judicial enforcement of a debt is sought, however, the services of a lawyer must be retained. [6]

5. On 29 December 1992, Reisebüro Broede (hereinafter 'Broede'), the creditor in the main proceedings, which is an unincorporated travel agency established in Cologne, obtained an enforceable decision against the debtor in the main proceedings, Gerd Sandker (hereinafter 'the debtor'). On 8 May 1994, in order to enforce that decision, Broede engaged INC Consulting SARL (hereinafter 'INC') and authorized it to adopt all the appropriate recovery measures necessary to ensure the full settlement of the debt. INC is a company based in Verneuil en

4 — The last requirement is applicable only to practitioners who are not Community nationals or nationals of an EEA State.

5 — At the hearing the agent representing Germany explained that the expression 'on a professional basis' usually signified a service carried out on a recurring basis but that according to the case-law of the Bundesgerichtshof (Federal Court of Justice), the mere acceptance of fees would suffice to render professional the provision of a service.

6 — The agent representing Germany informed the Court at the hearing that the judicial enforcement of debts in Germany by debt-collecting undertakings 'was frankly prohibited'. Reference was made, in particular, to Article 3 of the Bundesrechtsanwaltordnung (Federal regulation concerning lawyers, hereinafter 'the BRAO') which provides that lawyers are the independent, professional legal advisers every person has a right to have represent him in all legal matters and especially in court proceedings.

Halatte, France. [7] According to the order for reference, INC provides debt-collection and corporate consultancy services and, at least in the present case, has conferred a full power of attorney on its managing director, Ms Margarita Ramthun, to secure enforcement and to take all related measures on its behalf in respect of Broede. Ms Ramthun was at the material time (and continues to be) resident in Overath, Germany. At the hearing, Ms Ramthun informed the Court that, while INC provided debt-collection services in Germany only to Broede, it provided them in France [8] for a number of both French and foreign clients.

6. On 6 June 1994 Ms Ramthun applied to the Amtsgericht, Hagen for an attachment order against the debtor. The Amtsgericht dismissed that application by decision of 23 August 1994 on the ground that Ms Ramthun lacked the requisite right of audience, since, under German law, undertakings engaged in debt collection were prohibited from acting themselves as representatives in judicial proceedings. This rule, it held, applied equally to foreign debt-collecting undertakings. On 31 August 1994 Ms Ramthun appealed to the Ninth Civil Chamber of the Landgericht, Dortmund (hereinafter the 'national court') against this decision.

7. According to the national court, the appeal before it turns essentially on whether Article 1(1) of the RBerG can be applied to INC. That court states that, under that provision, activities such as those engaged in by INC on a professional basis may only be effected by persons 'to whom a licence has been issued for that purpose by the competent authority, in which connection a licence for debt-collecting undertakings under Article 1(1)(1), second sentence, point (5), of the Rechtsberatungsgesetz covers only the extra-judicial recovery of debts'. The 'crucial issue' of Community law identified by the national court is whether that provision either discriminates unlawfully on grounds of nationality or constitutes a restriction on the freedom to provide services guaranteed by Articles 59 and 60 of the Treaty. It takes the view that no unlawful discrimination should be assumed in the present case since the application of the impugned national provision to foreign debt-collection undertakings 'appears to be justified on compelling grounds of public interest (protection of creditors and debtors and the general interest in the smooth operation of the judicial system) [and] that the public interest does not appear to have been taken into account by provisions of the State of establishment [i. e. France] and also cannot be safeguarded by less drastic rules'. However, as a court of final appeal in the proceedings commenced by Broede under Article 568(2) of the ZPO, the national court decided to refer the following questions to the Court:

'Does Article 59 of the EEC Treaty preclude a national rule which prohibits an undertaking established in another Member State

7 — INC is registered at the registry of the Tribunal du Commerce (Commerce Court) of Senlis, France under number 391 100 021 (93B185).

8 — The Court is informed that in France there is no specific legal regulation of the activities of debt-collecting undertakings.

from securing judicial recovery of debts of others on the ground that this activity is reserved under the national rule for persons to whom a special official licence has been issued for that purpose?

If the answer is in the affirmative: Is this also the case where national law alone is to be applied in the recovery proceedings on the ground that the parties to the enforcement proceedings are resident within the State and the enforceable decision was also obtained within the State?'

II — Observations submitted to the Court

8. Written observations were submitted on behalf of Broede, and by the debtor, the Federal Republic of Germany and the Commission. Oral observations were presented by the debtor, Germany and the Commission.

III — Consideration of the questions referred

9. The essential issue raised by the first question referred by the national court concerns the compatibility with Community law of the denial in Germany of a right of audience before German courts to debt-collecting undertakings in judicial proceedings necessary to secure the enforcement of debts on behalf of their clients. The second question assumes an affirmative answer to the first and asks whether it remains affirmative in circumstances where both parties to the national proceedings are resident in the same Member State and where the enforceable decision, which is the subject-matter of the enforcement proceedings, was obtained in that same State.

10. It is appropriate, in my view, firstly, to consider whether the manifestly close connection between Ms Ramthun and Germany in the present case excludes, for the purposes of the application of Community law, any genuine inter-State element. Secondly, it is necessary to consider whether the factual situation involved in the present reference is concerned with Treaty rules on the freedom of establishment rather than the freedom to provide services. These two issues have been raised expressly by the Commission and by Germany. Thirdly, I shall address the substantive issues raised by the questions referred.

A — *The applicability of Community law*

11. The constant case-law of the Court requires for the applicability of the Treaty rules on the free movement of persons a sufficient nexus between the factual circumstances and the claimed Community-law right, i. e. some inter-State element. Thus, for example, in *Regina* v *Saunders* the Court

stated, in the context of the freedom of movement of workers, that the relevant Treaty rules 'cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law'. [9] This requirement applies *mutatis mutandis* to the Treaty rules on the freedom to provide services, which can only apply if the services in question 'are transfrontier in nature'. [10] As Advocate General Jacobs stated in *Alpine Investments*, '[A] cross-border element clearly exists where the provider and the recipient of services are established in different Member States'. [11] If, in the present case, the factual situation is, as it appears to be from the order for reference, that Broede is 'represented by' [12] INC in the national debt-collection proceedings and that INC is not acting gratuitously, then there can be no doubt that the provision of a 'transfrontier' service for the purposes of Article 59 of the Treaty is at issue.

12. The Commission in its written and oral observations, supported on this point by Germany at the hearing, expressed reservations concerning the genuineness of the Community element in this case. In particular, the Commission questioned whether the reality underlying this case was that Ms Ramthun, a German national resident in Germany, was in fact representing Broede as one of *her own* clients, albeit under the guise of acting on behalf of INC. In this respect, at the hearing the agent for Germany pointed out that in German law a managing director of a limited company possesses automatically the right to represent the company in legal proceedings. He stated that INC, in expressly giving Ms Ramthun a mandate to act on its behalf, either acted upon an erroneous interpretation of German law or effectively granted a sub-mandate to Ms Ramthun. In my opinion, however, it is not for this Court to resolve such doubts. The Court has consistently stated that the division of jurisdiction in references under Article 177 of the Treaty requires it to '[limit] itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are so interpreted'. [13] Thus, it is for the national court to make all appropriate findings of fact and to apply the interpretation given by the Court of the relevant Community-law provisions. If the national court were to find that Ms Ramthun was in reality acting on her own behalf and not on behalf of INC in the present case, there would then be no inter-State element linking the case with the field of application of the Treaty and the national court would be entitled to determine the appeal before it exclusively on the basis of German law. But that is not the basis upon which the national court has referred the case. The Court should not question the bona fides of parties which has not been questioned by the national court, except in the very clearest of cases. The Court must, in my view, answer

9 — Case 175/78 [1979] ECR 1129, paragraph 11 of the judgment.

10 — See Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, paragraph 13 of the judgment.

11 — Case C-384/93 [1995] ECR I-1141, paragraph 27 of the Opinion.

12 — The German original refers to 'vertreten durch'.

13 — See, for example, Joined Cases 28/62, 29/62 and 30/62 *Da Costa and Others* v *Nederlandse Belastingadministratie* [1963] ECR 31.

the questions referred by the national court on the assumption that a genuine question of the application of Community law arises.

B — *The relevant Treaty rules*

13. The Commission, again supported by Germany at the hearing, also expresses doubts as to whether the issues raised by the reference concern in reality the Treaty rules governing the freedom of establishment rather than the freedom to provide services, as assumed by the national court. The Commission, referring in particular to *Van Binsbergen*, [14] contends that, if the activities of Ms Ramthun in Germany on behalf of INC constitute, in reality, the permanent presence in Germany of that undertaking, the relevant national authorities would be entitled, in order to prevent Article 59 being used to evade the application of professional rules justified by the general good, to apply such rules to INC.

14. It is well established that in order 'to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question. However, it is for the national court to decide whether or not the rule of Community law, as interpreted by the Court of Justice pursuant to Article 177, is applicable in the case brought before it'. [15] The circumstances of the main proceedings have led the Commission and Germany to suggest that the ostensible French establishment of INC may be little more than a vehicle through which INC seeks to evade the requirements of the RBerG. At the hearing the agent for the Commission stated that the Commission would leave it to the 'wisdom of the Court' to decide whether there was any basis for these suspicions. Such a decision can only be made in the light of appropriate findings of fact, which are exclusively within the jurisdiction of the national court to make, and the Court may thus only provide the criteria of interpretation for the national court. [16]

15. The provisions of the chapters of the Treaty on the right of establishment and on services are 'mutually exclusive' and the latter can only apply if the provisions relating to the right of establishment do not apply, i. e. Articles 59 and 60 are residual to the provisions governing the right of establishment. [17] If the national court were to find that INC was using the private residence of Ms Ramthun in Germany in order 'to participate, on a stable and continuous basis, in the economic life of a Member State other than [its] State of origin and to profit therefrom', then it should classify the circumstances of the present case as falling within the 'very broad' Treaty concept of establishment. [18] The only information before the Court is that on six occasions between

14 — Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, hereinafter '*Van Binsbergen*'.

15 — Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207, paragraph 9 of the judgment.

16 — See, for example, Case C-150/88 *Parfümerie-Fabrik 4711* v *Provide* [1989] ECR 3891, paragraph 12 of the judgment.

17 — See, for example, Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, hereinafter '*Gebhard*', paragraphs 20 and 23 of the judgment.

18 — See *Gebhard*, paragraph 25 of the judgment.

2 February 1994 and 8 May 1994, INC undertook debt-collection work in Germany on behalf of Broede and that, according to Ms Ramthun, it has other foreign clients some of whom are German. It is for the national court to determine whether the provision of such services by INC in Germany is sufficiently intermittent to be regarded as being carried out on a temporary basis. The national court must however apply the criteria which have been provided by the Court. It should have regard, in particular, to the statement of the Court in *Gebhard* that '... the temporary nature of activities [...] has to be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity'. [19]

16. It is clear, therefore, that the fact that the provision of a service under Article 59 of the Treaty must be 'temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purpose of performing the services in question'. [20] The Court is informed by Ms Ramthun that the majority of the clients of INC are French and that it has an office in France. I do not think that the evidence available in the order for reference suggests that the case should be considered other than under Article 59.

17. The essential question is whether a prohibition such as that contained in German law constitutes an unjustified restriction on the freedom to provide debt-collection services.

C — *The freedom to provide transfrontier debt-collection services*

(i) *The relevant restrictions*

18. There can be little doubt, as accepted in the present case by both the national court and Germany, that Article 1(1) of the RBerG constitutes a prima facie restriction on the freedom to provide services contrary to Article 59. The Court has consistently confirmed that '[A]rticle 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services'. [21] In this case, it is clear, particularly from the observations presented at the hearing by Germany, that there are effectively two separate restrictions contained in the RBerG curtailing the freedom of debt-collecting undertakings to provide their services on a professional basis in Germany: firstly, the requirement to be authorized by

19 — *Gebhard*, paragraph 27 of the judgment; see also the detailed discussion of this issue in the Opinion of Advocate General Léger, paragraphs 32 to 38 in particular.

20 — Ibid.

21 — See, for example, Case C-272/94 *Guiot, Climatec* [1996] ECR I-1905.

the competent regional authorities to carry-out extra-judicial debt-collecting activities; secondly, the prohibition on seeking the judicial enforcement of debts unless the services of a lawyer are retained. [22] The uncontested fact that these restrictions are non-discriminatory is not, however, conclusive.

19. In its judgment in *Säger*, for example, the Court stated that legislation of one Member State which subjects the provision of certain services 'by an undertaking established in another Member State [...] to the issue of an administrative licence for which the possession of certain professional qualifications is required constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty'. [23] As it happens, the Court was concerned in *Säger* with a reservation to lawyers and authorized patent agents contained in the same article of the RBerG of the provision on a professional basis of certain routine patent monitoring services. It seems to me that the restrictions at issue in the present case come within the terms of the prohibition contained in Article 59. However, as these restrictions apply equally both to German and foreign debt-collection undertakings, it is necessary to examine whether they can nevertheless be justified.

(ii) *The justification*

20. There was general agreement at the hearing that the national court was mistaken in the formulation of its first question when it referred to the need for special official licences for the provision of judicial debt-collection services; this, of course, is the requirement imposed by the RBerG on persons seeking to provide extra-judicial services, whereas the provision of judicial services is entirely reserved to lawyers and undertakings like INC cannot be licensed to provide those services. The provision of such a professional judicial debt-collection service is permitted neither by the ZPO nor the RBerG and the issue whether the relevant German authorities could legitimately require undertakings such as INC to obtain a licence to provide extra-judicial debt-collection services does not therefore arise. [24] In my opinion, the only issue of Community law that in fact arises is whether the prohibition in Germany of the provision of judicial debt-collection services by anyone who is not a lawyer can be justified 'by an imperative reason of public interest'. [25]

(a) Observations submitted to the Court

21. Broede's written observations state that a Member State cannot, without undermining the effectiveness of the Treaty provisions on the freedom to provide services, subject the

22 — It was pointed out by Germany at the hearing that the lawyer need not necessarily be a Rechtsanwalt, but could be a lawyer qualified in another Member State providing his or her services in Germany in accordance with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter 'the 1977 Directive'); OJ 1977 L 78, p. 17.

23 — Case C-76/90 [1991] ECR I-4221, paragraph 14 of the judgment.

24 — I express no opinion therefore on whether, for example, the application to a debt-collecting undertaking established in another Member State of the criteria set out in Article 1(1)(2) of the RBerG would be justified.

25 — See *Alpine Investments*, cited in footnote 11 above, paragraph 44 of the judgment.

provision of services on its territory by an undertaking established in another Member State to all of the conditions required of undertakings established in that State. It submits that neither imperative requirements concerned with the protection of consumers nor the proper functioning of the judicial system justify the restrictions contained in Article 1(1) of the RBerG. It contends that such objectives could equally be pursued by less restrictive means. As regards the interests of the creditor, Broede contends that, rather than requiring a foreign service-provider to obtain a licence, the relevant German authorities should accept a certificate of integrity or solvency issued by the relevant authorities of the Member State where that service-provider is established. Secondly, it maintains that the proper functioning of the legal system in the host Member State could be assured if the host authorities were merely to require the foreign undertaking providing debt-collection services to elect a domicile for the purposes of official legal correspondence.

22. The Commission also takes the view that the national law constitutes an unjustifiable restriction on the freedom to provide services. It submits that, in the circumstances of the present case, the restrictions must be objectively necessary to guarantee respect for professional rules and to protect the recipient of the services without going beyond what is strictly required. According to the Commission, this is a question of Community law and the Court should not feel constrained by the views expressed by the national court.

23. The Commission submits that, as in German law the application for an attachment order does not, by reason of Article 79 of ZPO, require the use of the services of a lawyer, and that, as creditors can therefore make such applications either personally or through the intermediary of *non-professional* advisers whom they have mandated, calling in aid, if necessary, the services of the registry of the court, there can be no justification for prohibiting experienced debt-collecting undertakings from acting on behalf of creditors. Moreover, the Commission contends that the interests of the proper administration of the legal system do not justify the prohibition since, if such court officials are obliged to deal with requests for assistance from creditors who may be completely ignorant of the relevant law and legal procedures, they will more easily be in a position to deal with enquiries from professional debt-collecting undertakings. In its view, a general prohibition such as that contained in the RBerG is disproportionate to the objective pursued.

24. When asked by the Court at the hearing why such an opportunity ought to be available to French undertakings providing debt-collection services in Germany when competing German undertakings would be obliged to retain the services of a lawyer, the Commission referred to the supposed underlying contradiction in the German law whereby, apart from lawyers, any person, acting on a non-professional basis, could represent the creditor. According to the Commission, the real motivation underlying the national law was the protection of the

monopoly of lawyers; the fact that lawyers were subject to ethical requirements and owed a duty to the courts which they served could not mean that the protection of the consumer or of the legal system required the outright exclusion of the provision of judicial debt-collection services by non-German debt-collecting undertakings. The Commission accepted that the discrimination against German debt-collecting undertakings which would result from the non-application of the RBerG prohibition to the occasional provision in Germany of such services by undertakings authorized to provide them in another Member State, would, in the absence of harmonized Community rules, have to be accepted, but that it would not justify a refusal of freedom to provide services to foreign debt collectors.

25. Germany submits, on lines similar to those advanced by the debtor, that the restrictions contained in the RBerG are justified by the mandatory requirements of protecting the debtors and creditors, and by the public interest in the smooth administration of justice. It refers in particular to *Säger* where, in its view, the Court expressly recognized the validity of national legislation which is intended to protect recipients of services against the harm which can be caused by legal advice given to them by unqualified persons. [26] According to Germany, the complexity of the procedures involved in the judicial enforcement of debts, the variety of the available enforcement methods and their often widely differing consequences for both creditors and debtors, coupled with the need to ensure respect for the monopoly of the State concerning the use of force, justify the restrictions.

26. Article 79 of the ZPO is not incompatible with this policy. It is concerned not with the provision of legal advice to third parties but, merely, with civil procedure. In the interests of assisting parties who may not have the financial means to engage a lawyer, it recognizes that in certain cases before lower courts such a party may represent himself, since in such circumstances only the interest of that party and not a third party is at stake. To assist further such impecunious or cost-conscious litigants, the ZPO also permits them to seek the assistance of family members or friends who, through previous experience or otherwise, may be better able to present a case than the litigant. According to Germany, such a facility should only be regarded as an extension of the right of a litigant to represent himself and, thus, not as akin to professional representation by a third party; it is the latter activity which is regulated by the RBerG. The cases where a party represents himself are exceptional, which, Germany submits, is in accordance with the overall objective of both the RBerG and the

26 — While not expressly citing it, Germany had presumably in mind in particular paragraph 16 of the judgment. See, further, paragraph 28 below.

ZPO, [27] i. e. that the representatives of litigants in legal proceedings should as often as possible be lawyers.

(b) Analysis

27. The Court has consistently held that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'. [28]

28. In *Reyners* the Court confirmed that the practice of a profession, such as that of a lawyer, remains governed by the law of the various Member States. [29] The case-law of the Court recognizes that 'in the absence of specific Community rules in the matter each Member State is free to regulate the exercise of the legal profession in its territory'. [30] The Court has also recognized 'the special nature of the legal profession'. [31] This flows essentially from the fact that lawyers are subject to obligations not only to their clients but also to the administration of justice in the legal system where they are established and, in the case of a transfrontier provision of services, to the host legal system. This latter obligation is reflected in the 1977 Directive, which requires lawyers providing services temporally in another Member State to '...observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes'. [32] In this respect, the Court, speaking in *Säger* of advisery legal services, stated that the public interest in the protection of the recipients of such services 'against the harm which they could suffer as a result of the legal advice given to them by persons who did not possess the necessary professional or personal qualifications ... justifies a restriction of the freedom to provide services'. [33]

29. In the interests of the consumers of legal services, of third parties affected by the provision of such services and of the integrity of national legal systems, I have no doubt that Member States are in principle entitled, on a

27 — Germany cites Article 157 of the ZPO which (at paragraph 1) precludes persons who represent others on a professional basis from oral procedures and (at paragraph 2) which permits a court to withdraw the right of audience from parties, their representatives or advisers who are not members of a Bar, when they are not capable of pleading in a satisfactory fashion.

28 — See *Gebhard*, paragraph 37 of the judgment.

29 — Case 2/74 *Reyners* v *Belgium* [1974] ECR 631, paragraph 48 of the grounds of judgment. A draft directive to govern the right of establishment of lawyers is currently under discussion at a political level in the Community; see COM(94) 572 final of 21 December 1994.

30 — Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, paragraph 17 of the judgment.

31 — Ibid., paragraph 20.

32 — Loc. cit., footnote 22 above, Article 4(2) of the 1977 Directive.

33 — See paragraphs 16 and 17 of the judgment.

non-discriminatory basis, to restrict the right to represent third parties, on a professional basis, before their courts to persons who are both appropriately qualified and personally suitable. What is at issue in the present case, therefore, is whether the monopoly in favour of lawyers represents an appropriate means of achieving the legitimate national policy of protecting debtors and creditors involved in debt-collection proceedings and the integrity of the national legal system itself and, in particular, whether it could be achieved by other less restrictive means.

30. As Advocate General Jacobs stated in his Opinion in *Säger*, '[t]he justification required will depend on the nature of the services and the nature of the restriction.' [34] He referred to the RBerG as having a dual purpose; i. e. protecting 'members of the public against the damage that they might incur as a result of receiving legal advice from unqualified persons' and protecting 'lawyers against unfair competition from unqualified persons not subject to the constraints of a regulated profession'. [35] In this case, where the issue of a right of audience for non-lawyers is at issue, the need to protect the proper functioning of the legal system should also be added to the concern forcefully articulated by Advocate General Jacobs when he stated that '[t]he public must be protected against unqualified laymen who masquerade as lawyers, just as they must be protected against charlatans who pass themselves off as doctors'. [36] When interests of such fundamental importance are at stake, I am of the opinion that great caution ought to be exercised before the proportionality of indistinctly applicable national measures should be questioned on the basis of Article 59 of the Treaty. In the present case, unlike in *Säger*, it is not the provision of essentially routine, quasi-legal services of 'a straightforward nature' [37] that is at issue. Furthermore, in contrast to *Säger*, the services in question may often be provided 'to the ordinary, unlearned man-in-the-street', [38] since it should not be assumed either that trade creditors will be conversant with the law or that all clients of debt-collecting undertakings will be persons whose debts arose in the course of trade.

31. I am satisfied that the prohibition of debt-collecting undertakings from seeking the judicial enforcement of debts on behalf of their clients represents a justified, appropriate and proportionate measure which pursues the imperative public interest grounds of protecting both creditors and debtors and ensuring the smooth operation of the legal system itself. Broede and the Commission focus their contentions regarding the disproportionate nature of the RBerG prohibition

34 — See paragraph 28 of the Opinion.
35 — Ibid., paragraph 31.
36 — Ibid., paragraph 32.
37 — See paragraph 18 of the judgment.
38 — See the Opinion of Advocate General Jacobs, paragraph 35.

essentially on the interests of creditors and the legal system. According to Broede, for example, measures ensuring the protection of the financial interests of creditors in the event of the debt collector obtaining payment from the debtor before paying the creditor would suffice. I do not find this argument convincing. Such a measure would, at most, protect creditors from financially unscrupulous debt collectors. It would provide no protection from the potentially grave effects, for both debtors and creditors, and disruption for the legal system, of incompetence or lack of expertise on the part of such collectors in the provision of judicial debt-collecting services.

32. I think that Germany is correct when it states that a distinction can be drawn between, on the one hand, the personal appearance of a party to legal proceedings and, by extension, the personal but non-professional representation of that individual by another individual, and, on the other, the professional legal representation of such individuals by third parties. Indeed, in some Member States private individuals may represent themselves in all cases regardless of the level of the jurisdiction involved. [39] The uncontrolled supply of legal services by unqualified persons is another matter. The dangers to the integrity of the administration of justice are well-known. The potential victims of such unsupervised persons are not only their clients, but their opponents, the courts and the public. The potential burden which the pursuit (or defence) of legal claims by impecunious litigants places on the smooth operation of a legal system is a burden which many, if not all, Member States are prepared to accept, at least to some degree. [40] Assuming, although it should be stated that there is no evidence in this regard before the Court, that France permits undertakings engaged in debt collection to bring, for example, applications before the appropriate French courts for attachment orders without the assistance of a lawyer, I do not think that Article 59 of the Treaty requires the German legal system to bear the burden of facilitating the exercise by French-based debt-collecting undertakings of professional legal services before German courts. It is one thing for a national legal system, such as that of Germany, to make available on an

39 — In the United Kingdom and Ireland, for example, natural persons may represent themselves right up to the highest levels of the judicial hierarchy, i. e. the House of Lords and the Supreme Court respectively. In Ireland this right has constitutional status as one of the unenumerated personal rights guaranteed by Article 40.3 of the Constitution; see, for example, the judgment of Mr Justice Kenny in *Macauley* v *Minister for Posts and Telegraphs* [1966] IR 345. A legal person must always, at least in the version of the common law applicable in England and Wales, Ireland and Northern Ireland, be represented by a lawyer; see (at least for Ireland) *Battle* v *Irish Art Promotion Centre Ltd* [1968] IR 252. However, natural persons may not, either at common law in those jurisdictions or, to date, under Article 40.3 of the Irish Constitution, appoint other natural persons to act on their behalf, whether on a non-professional or professional basis; see, for example, the Irish High Court judgment of Mr Justice Budd of 5 May 1992 in *P. M. L. B.* v *P. H. J.*

40 — It should be noted that Article 6(3)(c) of the European Convention on Human Rights only expressly recognizes the right of a person 'to defend himself in person' in cases where he is charged with a criminal offence.

intermittent basis the services (and time) of its court officials to private litigants but, in my view, altogether another to require them to supervise the activities of professional debt-collecting undertakings so as to ensure not only that such undertakings are not providing a defective service to their clients, but also to prevent them, having regard to the implications which attachment orders obtained under false pretences may have, especially for debtors, from misleading courts before which applications for judicial enforcement are brought.

33. I am satisfied that this conclusion is supported by the relevant case-law of the Court. In *Van Binsbergen*, which concerned the professional provision of legal services by a non-lawyer (Mr Kortmann) before Dutch social security courts, the representation by an 'advocaat' (lawyer) was not obligatory. The circumstances of that case are, thus, fundamentally different from the present case, where only lawyers may professionally represent clients in Germany. In *Van Binsbergen*, it is significant, in my view, that the Court stated that:

'However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — in particular rules relating to organization, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.'

As the activities of advisers like Mr Kortmann were unrestricted in the Netherlands, the Court considered that 'the requirement of residence within that State constitute[d] a restriction ... which is incompatible with Articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service'.

34. In this case the RBerG, as interpreted by the German courts, does not require the residence in Germany of undertakings providing debt-collecting services, but merely that they engage the services of a lawyer when undertaking judicial debt-collection work on behalf of their clients. [41] Such lawyers, as Germany expressly accepted at the hearing,

41 — At the hearing, reference was, in particular, made to a judgment of the Bundesgerichtshof of 7 November 1995 in which, by reference to Article 12 of the German Constitution concerning the freedom of occupation (Berufsfreiheit), the relationship between Article 3 of the BRAO and Article 1 of the RBerG was interpreted so as expressly to permit debt-collecting undertakings to engage lawyers to assist them in the judicial recovery of debts, once they have initially been authorized by the creditor to recover the debt. Thus, the debt-collecting undertaking is not prevented from having access to the Court — only from appearing itself on a professional basis.

do not have to be German lawyers. An undertaking such as INC could thus, for example, retain a French lawyer to travel to Germany to make the relevant application on its behalf. In this respect I think it is appropriate to recall that in *Commission* v *Germany* [42] the Court, *inter alia*, declared that by requiring a non-German lawyer who was providing services in Germany to act in conjunction with a lawyer established on German territory, even where under German law there was no requirement of representation by a lawyer, Germany had failed in its obligations under Articles 59 and 60 of the Treaty and the 1977 Directive. Thus, the Commission is mistaken when it states that the effect of the RBerG requirement is to partition off the German market for the monopolistic benefit of lawyers. Lawyers from other Member States can be retained by national or non-national debt-collecting undertakings whenever they deem it necessary to invoke the judicial process in Germany on behalf of their client creditors. Non-German debt-collecting undertakings are not therefore prevented from providing a comprehensive debt-collection service to clients whose debtors are resident in Germany.

35. In so far as the RBerG may tend to preserve for Community lawyers the monopoly of professional legal representation in Germany, that Member State is, in my opinion, in the present state of Community law justified in the public interest in maintaining it. Practising lawyers are qualified professionals who act in an independent capacity and are, as the Court has consistently pointed out, obliged to pursue both the interests of their clients and those of the administration of justice and, accordingly, are subject to strict professional regulation. [43] It is the application of these professional obligations to the lawyers that provides the necessary guarantee of integrity and expertise to the ultimate consumers of legal services (here, the creditors), to debtors and to the legal system. The RBerG prohibition is, thus, both apt and necessary to ensure the protection of those interests.

36. I do not think that the appropriateness of the German legislation is undermined simply because another Member State — in the present case, France — does not make the same legislative choice. As the Court stated, in the context of national legislation designed to protect the good reputation of a national financial sector, in *Alpine Investments*, 'the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law'. [44]

37. Therefore, I do not think that the provisions of German law in question in this case, in so far as they reserve the provisions of judicial debt-collection services to lawyers, are incompatible with Article 59 of the Treaty. It follows that the second question does not arise.

42 — Case 427/85 [1988] ECR 1123.

43 — See, generally, Case C 292/86 *Gullung* v *Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne* [1988] ECR 111.

44 — See paragraph 51 of the judgment. I agree with Advocate General Jacobs that '[O]therwise, it would follow that, in the absence of harmonization rules, Member States would need to align their legislation with that of the Member State which imposed the least onerous requirements'; paragraph 90 of his Opinion.

IV — Conclusion

38. I recommend accordingly that the Court answer the questions referred by the Landgericht, Dortmund as follows:

Article 59 of the EC Treaty does not prohibit a national rule which prevents an undertaking established in another Member State from securing judicial recovery of debts of others to the extent that this activity is reserved to lawyers under the national rule.