# JUDGMENT OF THE COURT
9 July 1997 *

In Case C-222/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

**Société Civile Immobilière Parodi**

and

**Banque H. Albert de Bary et Cie**

on the interpretation of Articles 59 and 61(2) of the EEC Treaty,

THE COURT,

composed of: G. F. Mancini, President of the Second and Sixth Chambers, acting for the President, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, P. Jann, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

* Language of the case: French.

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Banque H. Albert de Bary et Cie, by Louis Garaud, of the Paris Bar;

— the French Government, by Catherine de Salins, Head of Sub-Directorate in the Legal Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Foreign Affairs Secretary in that Directorate, acting as Agents;

— the Belgian Government, by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent;

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent;

— 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 the French Government, represented by Philippe Martinet, the Belgian Government, represented by Jan Devadder, the United Kingdom Government, represented by Eleanor Sharpston, Barrister, and the Commission, represented by Dimitrios Gouloussis, at the hearing on 22 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1996,

gives the following

## Judgment

1 By judgment of 13 June 1995, received at the Court on 26 June 1995, the French Cour de Cassation (Court of Cassation) referred for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 59 and 61(2) of the EEC Treaty.

2 That question has been submitted in a dispute between Banque H. Albert de Bary et Cie, a company established under Netherlands law, having its registered office in Amsterdam (hereinafter 'the de Bary Bank'), and Société Civile Immobilière Parodi, a real-property company established under French law, having its registered office in Megève (hereinafter 'SCI Parodi'), concerning a mortgage loan in the amount of DM 930 000 granted to the latter by the de Bary Bank on 29 November 1984.

3 On 13 March 1990 SCI Parodi brought an action against the de Bary Bank seeking that the loan be declared void on the ground that the de Bary Bank had not, when it granted the loan, been authorized as required by Law No 84-46 of 24 January 1984 on the activity and supervision of credit institutions (*Journal Officiel de la République Française* of 25 January 1984, p. 390, hereinafter 'the 1984 Law'), along with reimbursement of the sum of FF 1 251 390, representing solely the amount of the charges and interest paid to the de Bary Bank and excluding capital received.

4 By judgment of 12 June 1991, the Tribunal de Grande Instance (Regional Court), Bonneville, dismissed SCI Parodi's claim. On appeal, the Cour d'Appel (Appeal Court), Chambéry, upheld that judgment on 15 June 1993, *inter alia* on the ground

that the de Bary Bank enjoyed freedom of establishment and the freedom to provide services in the Community in the light of both the EEC Treaty and 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).

5 The Cour de Cassation, to which SCI Parodi appealed, decided to stay the proceedings and refer to the Court the following question:

'As regards the period preceding the entry into force of 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, are Articles 59 and 61(2) of the EEC Treaty to be interpreted as precluding national legislation requiring authorization in order to supply banking services, in particular in order to grant a mortgage loan, where the bank concerned is established in another Member State where it has been authorized?'

6 The 1984 Law contains *inter alia* the following provisions:

'*Article 15*

Prior to operating, credit institutions must obtain the authorization issued by the Committee for credit institutions referred to in Article 29.

The Committee for credit institutions shall verify whether an applicant undertaking satisfies the obligations set out in Articles 16 and 17 of this Law and has an appropriate legal form to operate as a credit institution. It shall take account of the proposed activities of the undertaking, the technical and financial means which it intends to utilize, and the status of those providing the capital and, where appropriate, of their guarantors.

The Committee shall also determine whether an applicant undertaking is likely to attain its development objectives under conditions compatible with the proper functioning of the banking system and guaranteeing adequate security for customers.

The Committee may also refuse to grant an authorization if the persons referred to in Article 17 are not of sufficiently good repute and lack appropriate experience.

...

*Article 16*

Credit institutions must have paid-up capital or funds at least equal to an amount determined by the Banking Regulation Committee.

Every credit institution must at all times be able to demonstrate that its assets actually exceed, by an amount at least equal to the minimum capital, the liabilities in respect of which it is indebted to third parties.

The branches of credit institutions having their registered office outside France are required to show that they have operating funds in France in an amount at least equal to the minimum capital required of credit institutions established under French law.

*Article 17*

The activities of credit institutions must be directed in practice by at least two persons.

Credit institutions having their registered office outside France shall appoint at least two persons to whom they shall entrust the actual determination of the activities of their branch in France.'

7 By its question, the national court is asking essentially whether Article 59 of the Treaty is to be construed as precluding a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory.

8 It should be noted at the outset that the transaction which consists, for a bank established in a Member State, in granting a mortgage loan to a borrower established in another Member State is necessarily a provision of services connected with movement of capital within the meaning of Article 61(2) of the Treaty. Article 61(2) provides that: 'The liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital.'

9 Article 61(2) of the Treaty thus allows Member States, where there has been no liberalization of movements of capital, to retain measures designed to restrict those movements, without its being possible to contest such measures under Articles 59 and 60 of the EEC Treaty on the ground that they constitute indirect obstacles to the free provision of services.

10 It follows that the only case in which the Treaty provisions on services do not apply to banking services is where there is a restriction on the free movement of capital relating to such transactions which is compatible with Community law.

11 Regarding the free movement of capital, Article 67(1) of the EEC Treaty does not have the effect of abolishing restrictions on movements of capital by the end of the transitional period. Their abolition is a matter for Council directives adopted on the basis of Article 69 of that Treaty (Case 203/80 *Casati* [1981] ECR 2595, paragraphs 8 to 13, and Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, paragraph 5).

12 At the time when the loan at issue in the main proceedings was made, on 29 November 1984, the relevant directive was the First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1959-1962, p. 49, hereinafter 'the first capital directive'), as amended and supplemented by Second Council Directive 63/21/EEC of 18 December 1962 (OJ, English Special Edition 1963-1964, p. 5).

13 Article 3(1) of the first capital directive liberalizes the capital movements set out in List C of Annex I to that directive, as supplemented by the second directive, Directive 63/21, so that Member States are obliged to issue the necessary foreign exchange authorizations. Article 3(2), however, permits a Member State to maintain or reintroduce exchange restrictions on capital movements mentioned in List C if their liberalization might form an obstacle to the achievement of its economic policy objectives.

14 The category 'Granting and repayment of medium-and long-term loans and credits not related to commercial transactions or to the provision of services' is mentioned in List C of Annex I, as amended by Directive 63/21, and thus comes under Article 3 of the first capital directive. Under Heading VIII. A of Annex II, this category includes *inter alia* the granting of medium-and long-term loans and credits (that is to say, granted for more than one year) by financial institutions. It follows that the granting of a mortgage loan comes within the category (in principle liberalized) of capital movements resulting from Article 3(1) of the first capital directive.

15 At the hearing, the French Government indicated, without being contradicted by the Commission, that it had properly exercised the possibility of derogation under Article 3(2) of the first capital directive in order to restrict certain foreign exchange transactions such as currency loans made outside France. However, it follows from the national legislation on foreign exchange control applicable at the time of the events in the main proceedings that this legislation made such loans subject to authorization where they exceeded an amount equivalent to FF 50 million. In contrast, for loans of a lower amount, such as that at issue in the main proceedings, no authorization was required.

16 It must therefore be held that, in the main proceedings, the rules on capital movements were not of such a kind as to restrict the freedom to conclude mortgage-loan contracts in the form of provision of services under Article 59 of the Treaty.

17 Since transactions such as the granting of mortgage loans by banks are services within the meaning of Article 59 of the Treaty, it is necessary to examine whether legislation such as that referred to by the national court is compatible with the Treaty provisions on freedom to provide services.

18 The Court has consistently held in this regard that Articles 59 and 60 of the Treaty require 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 (see, in particular, Case C-3/95 *Reisebüro Broede* v *Sandker* [1996] ECR I-6511, paragraph 25).

19 Even if a national rule such as the 1984 Law is not discriminatory and applies without distinction to national providers of services and to those of other Member States, it none the less makes it more difficult for a credit institution established in another Member State and authorized by the supervisory authority of that Member State to grant a mortgage loan in France in so far as it requires that institution to obtain a fresh authorization from the supervisory authority of the State of destination. Such a national rule thus creates a restriction on the freedom to provide services.

20 However, in view of the special nature of certain provisions of services, specific requirements imposed on the provider that are attributable to the application of rules governing this type of activity cannot be regarded as incompatible with the Treaty.

21 It must be remembered, however, that, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraphs 17 and 20; Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27; and Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 15).

22 It must be recognized in this regard that the banking sector is a particularly sensitive area from the point of view of consumer protection. It is, in particular, necessary to protect the latter against the harm which they could suffer through banking transactions effected by institutions not complying with the requirements relating

to solvency and whose managers do not have the necessary professional qualifications or integrity.

23 However, those needs, which are specific to the banking sector, had already led the Council, at the time of the facts in the main proceedings, to adopt First Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322, p. 30, hereinafter 'the first banking directive').

24 The first banking directive was no more than a first step, however, towards the mutual recognition by Member States of authorizations issued by each of them to credit institutions. It is common ground that such mutual recognition was made possible only by the entry into force 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, hereinafter 'the second banking directive').

25 The first banking directive confined itself to imposing a number of minimum conditions on Member States. Member States were, however, obliged under Article 3 thereof to require authorization on the part of all credit institutions wishing to commence banking activity within their territory of origin. The securing of such authorization was subject to certain minimum requirements (Article 3(1)), without prejudice to other conditions of general application laid down by national laws (Article 3(2)).

26 It must therefore be accepted that, as Community law stood at the time of the facts in the main proceedings, there were within the banking sector imperative reasons relating to the public interest capable of justifying the imposition by the Member State of destination of conditions regarding access to the activity of credit institutions and their supervision which could go beyond the minimum conditions required by the first banking directive and already implemented in the Member State of origin.

27 It is for the national court to determine whether the French legislation contains conditions of this kind in addition to those of the first banking directive and whether such conditions are in accordance with the criteria established by the case-law cited in paragraph 21 of this judgment.

28 As the Advocate General rightly notes at point 24 of his Opinion, the Court does not have information as to the exact purpose served by the authorization required by the national legislation or as to the competent authorities' practice in regard to banks established in other Member States. However, the national provisions applicable in the main proceedings do not appear to be specifically designed to protect borrowers but rather to give effect to prudential rules intended to guarantee that the banks are solvent in regard to savers.

29 Furthermore, a distinction must be drawn according to the nature of the banking activity in question and of the risk incurred by the person for whom the service is intended. Thus, the conclusion of a contract for a mortgage loan presents the consumer with risks that differ from those associated with the lodging of funds with a credit institution. In this regard, the need to protect the borrower will vary according to the nature of the mortgage loans, and there may be cases where, precisely because of the nature of the loan granted and the status of the borrower, there is no need to protect the latter by the application of the mandatory rules of his national law (see to this effect *Commission* v *Germany*, cited above, paragraph 49).

30 Finally, the de Bary Bank and the Belgian Government submit that the authorization required by the French legislation was coupled with a condition of establishment, thereby making it impossible to carry out banking activities in France by way of the free provision of services. That is denied by the French Government.

31 Subject to the national court's determination of this issue, it must be noted that, as the Court has already pointed out, if the requirement of an authorization constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom. It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided. If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued (see *Commission* v *Germany*, cited above, paragraph 52, and Case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, paragraph 31).

32 The reply to the question submitted must therefore be that, with regard to the period preceding the entry into force of the second banking directive, Article 59 of the Treaty must be construed as precluding a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory, unless that authorization

— is required of every person or company pursuing such an activity within the territory of the Member State of destination;

— is justified on grounds of public interest, such as consumer protection; and

— is objectively necessary to ensure compliance with the rules applicable in the sector under consideration and to protect the interests which those rules are intended to safeguard, and the same result cannot be achieved by less restrictive rules.

## Costs

33 The costs incurred by the French, Belgian and United Kingdom Governments and by the Commission of the European Communities, 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 French Cour de Cassation, by judgment of 13 June 1995, hereby rules:

**With regard to the period preceding the entry into force of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regula-**

**tions and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, Article 59 of the EEC Treaty must be construed as precluding a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory, unless that authorization**

**— is required of every person or company pursuing such an activity within the territory of the Member State of destination;**

**— is justified on grounds of public interest, such as consumer protection; and**

**— is objectively necessary to ensure compliance with the rules applicable in the sector under consideration and to protect the interests which those rules are intended to safeguard, and the same result cannot be achieved by less restrictive rules.**

Mancini Moitinho de Almeida Murray

Sevón Kakouris Gulmann

Edward Puissochet Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 9 July 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President