In Case 15/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Köln (Higher Regional Court, Cologne) for a preliminary ruling in the action pending before that court between.

SOCIÉTÉ GÉNÉRALE ALSACIENNE DE BANQUE S.A., having its registered office at Strasbourg,

and

WALTER KOESTLER, Ministerialrat (Counsellor) at the Federal Ministry of Defence, residing at Bonn-Bad Godesberg,

on the interpretation of Articles 59 and 60 of the EEC Treaty with reference to the legislation of the Federal Republic of Germany relating to stock exchanges and commodity markets,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and Issues

The facts of the case, the course of the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

### I — Facts and written procedure

Mr Walter Koestler, of German nationality, was from 1968 Director of Administration in the German-French Military Scientific Research Institute in

Saint-Louis (Haut-Rhin) where he resided from 1 July 1968 to 28 July 1973.

While Mr Koestler was resident in France he arranged for the Société Générale Alsacienne de Banque, a limited liability company incorporated under French law, having its registered office at Strasbourg, which passed on his orders to a stockbroker, to carry out stock exchange time-bargains on the Paris stock exchange, mainly in foreign shares. These transactions did not take the form of the purchase of the shares themselves but of the settlement of the differences between the agreed share prices and the actual share prices on settling day. The gains or losses arising out of these time-bargains were entered by the Société Générale Alsacienne de Banque in an account opened in the name of Mr Koestler.

On 31 January 1975 the debit balance payable by Mr Koestler to the Société Générale Alsacienne de Banque arising out of these transactions, including interest, costs and taxes amounted to FF 852 620.39.

Since the Société Générale Alsacienne de Banque was unable to obtain payment of this sum from Mr Koestler it commenced legal proceedings in the Landgericht (Regional Court) Bonn on 22 May 1975 for recovery of the debt.

In its judgment of 13 January 1977 that court decided that the sum of FF 473 937.47 attributable to the time-bargains was not actionable, because the claim was barred by the plea that the contract was an agreement to pay differences (Differenzeinwand) deriving from Article 62 *et seq.* of the Law relating to stock exchanges and commodity markets (Börsengesetz) of 22 June 1896 and in Articles 762 and 764 of the BGB German Civil Code).

The Société Générale Alsacienne de Banque appealed against this judgment on 1 March 1977.

The Oberlandesgericht Köln (Higher Regional Court, Cologne) by a default judgment of 11 August 1977 upheld in substance the judgment of the court of first instance. It held that, although the legal relations between the parties were undoubtedly governed by French law, in the case of stock exchange time-bargains carried out on a foreign stock exchange the plea that the contract was an agreement to pay differences provided for by German law, by virtue of the provision relating to public policy in Article 30 of EGBGB (Law introducing the Civil Code), can be raised even if the law applicable is a foreign law which does not recognize this plea. Furthermore, Mr Koestler has capacity to carry out stock exchange time-bargains within the meaning of Article 53 (2) 2 of the Law relating to stock exchanges and commodity markets because, when the transactions were concluded, he had neither residence nor place of business in the Federal Republic. Finally, recognition of this plea that the contract was an agreement to pay differences does not contravene Articles 59 and 60 of the EEC Treaty.

Mr Koestler appealed on 6 September 1977 against the default judgment of 11 August 1977.

The Oberlandesgericht Köln, before which the case was brought again, by an order of its 10th Civil Senate dated 23 January 1978 decided, pursuant to Article 177 of the EEC Treaty, to stay proceedings until the Court of Justice had given a preliminary ruling on the following questions:

1. Properly interpreted, do Articles 59 and 60 of the EEC Treaty exclude the objection under German law that a contract is an agreement to pay differences (Differenzeinwand —

articles 764 and 762 of the Bürgerliches Gesetzbuch (Civil Code); Articles 61, 58 and 50 of the Börsengesetz (Law relating to stock exchanges and commodity markets; Bundesgerichtshof, Neue Juristische Wochenschrift 75, 1600; 72 382) in a case where a French bank is claiming, from a customer of German nationality, the repayment on the basis of French law of credit for time-bargains (agreements to pay differences) carried out on the Paris stock exchange in accordance with an agreement?

2. Is it relevant for the answer to Question 1 whether under German law the German customer had capacity in accordance with Article 53 of the Börsengesetz to enter into time-bargains?

The order of the Oberlandesgericht Köln was lodged at the Court Registry on 13 February 1978.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 19 April 1978 by the Commission of the European Communities and on 2 May 1978 by the Société Générale Alsacienne de Banque.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

## II — Written observations submitted to the Court

The *Société Générale Alsacienne de Banque*, the plaintiff in the main action considers the fact that its customer is a German national to be irrelevant: according to the case-law of the Bundesgerichtshof (Federal Court of Justice) a customer who is a French national may also avoid payment of a debt due to a French bank arising out of a stock exchange time-bargain by moving to the Federal Republic of Germany.

Articles 59 and 60 of the EEC Treaty have direct effect and take precedence not only over Articles 764 and 762 of the BGB and Articles 58 and 60 of the Law relating to stock exchanges and commodity markets but also over the rule on conflict in private international law contained in Article 61 of this Law and the exception of public policy contained in Article 30 of EGBGB.

Articles 59 and 60 prohibit restrictions on freedom to provide services within the Community where nationals of the Member States are concerned. Article 60 defines the concept of "provision of services": activities of a commercial character are considered to be such services, in so far as they are not governed by the provisions relating to freedom of movement for goods and capital. In this case the operations of the Société Générale Alsacienne de Banque cannot be assigned to the categories of movement of capital or of goods; the transactions in question were a specific provision of services for a customer subject to the business conditions of a bank.

The respective registered office and residence of the two parties, who are nationals of a Member State, were in France. However this fact does not preclude the application of Article 59: the provision of services continues until the business relations between the parties have been brought to an end. The situation envisaged by Article 59, namely that nationals of Member States established in a Member State other than that of the person for whom the service is intended are to enjoy the benefit of freedom to provide services,

arose at the latest when Mr Koestler took up his residence in the Federal Republic of Germany.

Having regard to the case-law of the Court of Justice on the interpretation of restrictions on freedom to provide services and the prohibition of discrimination on ground of nationality Article 59 must be interpreted as prohibiting every actual or legal restriction and obstacle likely to have an effect on freedom to provide services within the Common Market.

The interpretation of Articles 59 and 60 must at the very least prevent the plea that the contract was an agreement to pay differences under German law being raised to defeat payment of a debt which arose in France, according to French law, out of stock exchange time-bargains. Otherwise German law or case-law could in fact nullify a debt payable under French law simply because the debtor has taken up residence in the Federal Republic of Germany and thus submitted to the law of that country. Freedom to provide services within the Community would be subjected to a restriction owing to the fact that it is in practice impossible for a French bank to carry out on French territory stock exchange time-bargains for customers through stockbrokers: it would always be apprehensive lest the plea that the contract was an agreement to pay differences under German law be raised at a later date and its customers avoid payment by moving to the Federal Republic of Germany as soon as a large debt arose from the time-bargains covered by a credit.

Community law does not allow a Member State such hegemony; Article 5 of the Treaty does not permit one Member State to put its own legal provisions into effect in another Member State, especially if as a result they adversely affect undertakings and citizens of that State.

Freedom to provide services does not allow Articles 764 and 762 of the BGB and Article 61 of the Law relating to stock exchanges and commodity markets to be interpreted as meaning that they can apply to a time-bargain based in French law and governed by the French legal system; it matters little in this connexion whether the German customer has capacity or not under German law, in accordance with Article 53 of the Law relating to stock exchanges and commodity markets, to enter into time-bargains.

Should the Court of Justice not accept this interpretation of Articles 59 and 60 of the EEC Treaty the fact remains that the prohibition by Community law of restrictions on freedom to provide services does not assume that a customer, who has capacity to enter into time-bargains within the meaning of Article 53 of the Law on stock exchanges and commodity markets, is entitled to raise the plea that a time-bargain in currencies which is valid in France, is an agreement to pay differences. The view of the Bundesgerichtshof that all time-bargains on foreign stock exchanges are amenable to the plea that the contract was an agreement to pay differences, because foreign stock exchanges do not fulfil the conditions of Article 50 in conjunction with Articles 61 and 58 of the Law on stock exchanges and commodity markets is clearly incompatible with Articles 59 and 60 of the EEC Treaty. The consequential discrimination not only lies in the fact that the Paris stock exchange suffers a disadvantage compared with the Frankfurt stock exchange; as far as banks are concerned the discrimination lies primarily and conclusively in the fact that carrying out time-bargains on the Paris stock exchange for a customer and the opening of a credit for this purpose are given a different legal interpretation in the Federal Republic of Germany, having regard to Article 50 of the Law

relating to stock exchanges and commodity markets, from similar transactions carried out on a German stock exchange in the same securities. The discrimination in question occurs in the laws relating to the running of stock exchanges.

The *Commission of the European Communities* points out that the Court is requested in the first question to rule whether, having regard to the facts therein mentioned, the application of German law, and in particular those provisions which provide for the plea that a contract is an agreement to pay differences lead inevitably to a restriction on the freedom of the plaintiff company in the main action to provide services. In this connexion it is necessary to take into consideration the fact that Article 61 of the German Law on stock exchanges and commodity markets is generally regarded as a rule on conflict in German private international law and Article 50 as an integral part of the provision relating to German public policy within the meaning of Article 30 of the EGBGB.

The Société Générale Alsacienne de Banque in the course of its business relations with Mr Koestler engaged in activities of a commercial character and therefore provided services within the meaning of Article 60 of the EEC Treaty. Article 59 implies that services are provided beyond the frontiers of Member States of the Community either where the person providing the services and the person for whom the services are intended are resident in different Member States or where the services are provided in a Member State other than that in which the person providing the services resides. Only the first alternative could be applied to this case; however, it is uncertain whether it can be substantiated: Mr Koestler was resident in France when the transactions in question with the plaintiff in the main action were concluded and it has not been proved that he was still resident in the Federal Republic. It is for the national court, for the purpose of determining the preliminary question whether the business relations between the parties to the main action are to be classified as provision of services within the meaning of the EEC Treaty, to decide whether Mr Koestler arranged from his residence in France for all the transactions to be carried out or whether he gave some of his orders from Germany.

Subject to this reservation it must be said that the concept of "restrictions" within the meaning of Article 59 of the Treaty must be given a broad interpretation as is shown by the case-law of the Court of Justice and the General Programme for the abolition of restrictions on freedom to provide services, adopted by the Council on 18 December 1961 (Official Journal, English Special Edition January 1974, Second Series, IX. Resolutions of the Council and of the Representatives of the Member States, p. 3). According to this programme any difference of treatment as between persons providing services and nationals, in particular "provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to an activity as a self-employed person and in particular the power to enter into contracts ... and to enjoy all rights arising under such contracts" is regarded as a restriction. "Any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the provision of services ... where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals" are also to be regarded as restrictions.

The mere fact that there are differences between the national provisions which allow time-bargains in securities is not sufficient to show that there is a "restriction" within the meaning of Article 59 of the EEC Treaty. Should the need arise measures for the co-ordination or the approximation of national laws can be envisaged in this field.

The question to be determined is whether the fact that the plea that a contract is an agreement to pay differences provided for by the German Law relating to stock exchanges and commodity markets prevents a French bank from enforcing claims arising out of services which it provided, solely because the defendant in the main action resides in Germany or, at least, was resident in that country when the bank asserted its rights is a prohibited "restriction" on the right to provide services. The Commission inclines to the view that there is a "restriction" of the activities of the bank providing services in France owing to the fact that it has been subjected to a legal order which in the last resort prevents it from carrying out stock exchange time-bargains on behalf of customers resident in Germany. In this case all the services were provided in France; the unconditional applicability of the German Law relating to stock exchanges and commodity markets does not appear to be in any way objectively justified or necessary in order to protect German public policy in a case where a German national of his own accord concludes, outside the field of application of the German legal system, time-bargains governed by the law of another country. Such an "export" of the German legal system cannot be justified as being in the interest of the general public. A comparison with Council Directive 63/340/EEC of 31 May 1963 (Official Journal, English Special Edition 1963-1964, p. 31) makes it clear that the considerations which, according to the German view, might justify the application of the German Law relating to stock exchanges and commodity markets to time-bargains concluded abroad must give way before the principles of Article 59 of the Treaty and the introduction of the free movement of services within the Community which is the objective of that article.

The question whether the defendant in the main action at the time when the transaction at issue was concluded fulfilled the requisite conditions to have capacity to enter into time-bargains assumes decisive importance for the application of German law; however, in view of the answer which has to be given to the first question this question is not relevant in the present context.

The questions referred by the Oberlandesgericht Köln should be answered as follows:

1. Article 59 of the EEC Treaty must be interpreted as meaning that a Member State may not make the provision of services subject to any restriction which subjects the exercise of the rights invoked by the person providing the services as against the person for whom the services are intended to the latter's domestic legal system, if the recovery of debts arising out of the provision of services is thereby barred, even if the whole of the service has been provided in the country of the person providing the services.

2. The question whether the person for whom the services are intended has capacity or not under his domestic law to conclude time-bargains is irrelevant in interpreting Article 59 of the EEC Treaty.

## III — Oral procedure

The Société Générale Alsacienne de Banque, the plaintiff in the main action,

represented by Ulrich C. Feldmann, Advocate in Cologne, in the place of Dietrich Ehle, and the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, submitted oral observations and answers to the questions put by the Court at the hearing on 29 June 1978.

The Advocate General delivered his opinion at the hearing on 21 September 1978.

## Decision

1 By an order of 23 January 1978, which was received at the Court on 13 February 1978, the Oberlandesgericht Köln, pursuant to Article 177 of the EEC Treaty, referred to the Court two questions on the interpretation of Articles 59 and 60 of the Treaty concerning the liberalization of the provision of services between Member States, with reference to the application of certain provisions of German law, the object of which is to bar legal proceedings in respect of obligations arising out of certain speculative stock exchange time-bargains.

2 The facts giving rise to the action brought in the Oberlandesgericht may be summarized as follows:

The plaintiff in the main action is a French bank having its registered office at Strasbourg, which on the instructions of the defendant in the main action, a German national who at the time was resident in France, carried out orders on the Paris stock exchange which were time-bargains in respect of the differences between the prices of transferable securities (Differenzgeschäfte). The credit or debit balance resulting from these speculative transactions was entered in a current account in conjunction with a credit which the bank had opened in favour of the party concerned. When the defendant took up his residence again in Germany he had, as a result of the losses which he had incurred, a large overdraft with the bank which he refused to discharge. Since the Société Générale Alsacienne de Banque had brought an action for recovery of the amount payable in the court having jurisdiction by reason of the debtor's residence, namely the Landgericht Bonn, that court, after analysing the items of the current account, rejected the part of the claim relating to the debit balance arising out of the time-bargains carried out on the instructions of the defendant. The Landgericht was in fact of the opinion that under the Law relating to stock exchanges and commodity markets and the German Civil Code (Articles 762 and 764)

this part of the obligations entered into by the defendant must be treated in the same way as debts arising out of a wagering contract and that as such it is not actionable. The Oberlandesgericht before which the dispute was brought on appeal, in a first judgment given in default, upheld in substance the decision of the court of first instance. The appeal court takes the view that by virtue of the provisions of German law including those of private international law the recovery of a debt arising out of time-bargains of this kind cannot be actionable in Germany, even if the debt in question was contracted abroad and assuming that it is valid under the law of the State where it arose. In fact the appeal court considers that in such a case legal action for the recovery of a debt of this kind is against German public policy. When the dispute was again brought before the appeal court by way of appeal against the judgment given in default it nevertheless looked into the question whether this conclusion, based on provisions of German law, might perhaps be modified by the provisions of Community law relating to the liberalization of the provision of services. For the purpose of clearing up this doubt the Court has referred for a preliminary ruling two questions worded as follows:

1. Properly interpreted, do Articles 59 and 60 of the EEC Treaty exclude the objection under German law that a contract is an agreement to pay differences (Differenzeinwand — Articles 764 and 762 of the Bürgerliches Gesetzbuch (Civil Code); Articles 61, 58 and 50 of the Börsengesetz (Law relating to stock exchanges and commodity markets); Bundesgerichtshof, Neue Juristische Wochenschrift 75, 1600; 72, 382) in a case where a French bank is claiming, from a customer of German nationality, the repayment on the basis of French law of credit for time-bargains (agreements to pay differences), carried out on the Paris stock exchange in accordance with an agreement?

2. Is it relevant for the answer to Question 1 whether under German law the German customer had capacity in accordance with Article 53 of the Börsengesetz to enter into time-bargains?

3 The national court was right to accept that in a case of this kind the provisions of the EEC Treaty relating to the liberalization of the provision of services apply.

There is in fact no doubt that services such as those at issue which consist in a bank having orders carried out on a stock exchange and in current account transactions in conjunction with the opening of a credit constitute the provision of services within the meaning of the first paragraph of Article 60 of the Treaty which refers generically to all activities of a commercial character.

Furthermore the transactions in question cannot be regarded as services provided only within a Member State, when the person in receipt of the services, before the termination of the contractual relations between the parties, has taken up residence in another Member State, so that the requirement of the first paragraph of Article 59 that liberalization measures provided for by the Treaty must benefit all persons providing services "who are established in a State of the Community other than that of the person for whom the services are intended" has been met.

This must in particular be the case if the subject-matter of the action consists, as it does in these proceedings, of the balance of a current account, the transactions on which cannot be regarded as completed before this balance has been discharged.

4 The applicability of the rules of Community law relating to the liberalization of the provision of services having then been established it is appropriate in the first place to show how these provisions are to be applied to the question raised by the national court.

The principle underlying the second paragraph of Article 60 is that the State in which the person for whom the services are intended resides must treat the person providing the services in the same way as it treats its own nationals.

For the purpose of implementing this principle of non-discrimination the General Programme for the abolition of restrictions on freedom to provide services, adopted by the Council on 18 December 1961 (Official Journal, English Special Edition January 1974, Second Series, IX. Resolutions of the Council and of the Representatives of the Member States, p. 3) defined the restrictions to be eliminated pursuant to the Treaty in the following terms:

"Any measures which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned (Title III: Restrictions, A., first paragraph).

Furthermore, any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the provision of services are also to be regarded as restrictions where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals (Title III: Restrictions, A., third paragraph)".

The question whether the legal concepts indicated by the above-mentioned German judgments might lead in law or in fact to discrimination against a person providing services established in another Member State must be examined in the light of these provisions.

5 The fact that debts arising out of a wagering contract or other similar debts are not actionable cannot be regarded as discrimination against a person providing services established in another Member State if the same limitation applies to any person providing services established within the territory of the same State whenever that person claims payments of a debt of the same kind, and this has not been disputed in the present case.

The refusal by a Member State, for reasons founded on the social order to allow an action based on a claim of this kind, even if it was valid in another Member State, to be brought by a financial institution established in that Member State cannot therefore be regarded as contrary to Community law, when the Treaty, whilst it prohibits discrimination, does not impose any obligation to treat a foreigner providing services more favourably, with reference to his domestic law, than a person providing services established in the Member State where the services have been provided.

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

7 Having regard to this answer there is no need to answer the second question.

## Costs

8 The costs incurred by the Commission of the European Communities, which submitted obervations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Oberlandesgericht Köln the decision as to costs is a matter for that court.

On those grounds,

THE COURT

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

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

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 24 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

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

*Mr President,*
*Members of the Court,*

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

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

1 — Translated from the German