OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 June 1995 *

1. Is the Italian law which prohibits lawyers established in another Member State who provide services in the territory of the Italian Republic from opening in Italy chambers or a principal or branch office [1] compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services? [2]

2. That is, in essence, the question which has been referred by the Consiglio Nazionale Forense [3] for a preliminary ruling in proceedings the fact of which, as described by the CNF, are as follows.

3. Mr Gebhard, a German national, is a graduate in law of the University of Tübingen. He is authorized to practise as a Rechtsanwalt and has been a member of the Stuttgart Bar since 3 August 1977.

4. As from 1978, he linked up with the Milanese professional firm of lawyers 'Bergmann & Scamoni' through 'professional collaboration' pursuant to Directive 77/249.

5. In 1989, Mr Gebhard brought that collaboration to an end and opened his own chambers in Milan, where he represents clients in legal proceedings in conjunction ('di concerto') with a number of Italian 'procuratori'.

6. Accused of wrongly using the title 'avvocato' he was brought before the Milan Bar Association, which decided on 4 December 1989:

— to enrol him on the ad hoc register provided for by Article 12 of Law No 31 of 9 February 1982;

— to prohibit him from using the title 'avvocato';

* Original language: French.

1 — Article 2 of Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of a Member State of the European Community to provide services (GURI No 42 of 12 February 1982).

2 — OJ 1977 L 78, p. 17.

3 — National Council of Bar Associations, hereinafter referred to as 'the CNF'.

— to make further inquiries into the exercise of his professional activity.

7. On 30 September 1990, disciplinary proceedings were initiated against Mr Gebhard on the ground that he had practised his profession in Italy on a permanent basis whilst using the title 'avvocato' and had thereby infringed the obligations laid down by Law No 31/1982 on the provision of lawyers' services. [4]

8. By decision of 30 November 1992, the Bar Association suspended Mr Gebhard from professional practice for six months by way of penalty. In addition, it did not respond to his application to be entered on the rolls of the Milan Bar Association, which he had made on 14 October 1991 pursuant to Council Directive 89/48/EEC of 21 December 1988. [5]

9. It was against that decision of 30 November 1992 and the decision impliedly rejecting his application to the entered on the rolls that Mr Gebhard lodged an appeal with the CNF, which has referred to the Court for a preliminary ruling two questions, which may essentially be reformulated as follows:

(1) Is the law implementing Directive 77/249 in Member State A compatible with that directive in so far as it provides that it is not permissible for a lawyer established in Member State B and providing services in Member State A to open chambers in the territory of that State, whether in the nature of a principal or a branch office, given that the directive contains no reference to the fact that the opening of chambers could be construed as reflecting an intention on the part of the practitioner concerned to carry on his activities, not on a temporary or occasional basis, but on a permanent basis?

(2) What criteria can be used to distinguish the activities of a lawyer carried out as a provider of services and the activities of a lawyer established in a Member State? In order to assess whether or not a professional activity is temporary, is it permissible to rely on the duration or frequency of the services provided by a lawyer acting pursuant to the regime laid down by Directive 77/249?

10. In answer to written questions put by the Court, Mr Gebhard stated that he had no chambers of his own in Germany and was not a member of chambers there but had the status of an independent collaborator of chambers in Stuttgart since 1980. He was still a member of the Bar at Stuttgart and spent

4 — Cited on footnote 1.

5 — Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1988 L 19, p. 16.

20% of his time in Germany. In Italy, where he lived, he had his own chambers where he worked as counsel not practising at the Bar advising essentially on law other than Italian law. When it came to the application of Italian law and court work in Italy, he had recourse to Italian practitioners.

11. As the Court intimated to the parties before the hearing, this case cannot be considered, regard being had to the underlying facts, without contemplating the application of Article 52 of the EC Treaty. I shall devote my concluding observations to this aspect.

12. By way of preliminary, let us assure ourselves that the CNF, which is making its first request for a preliminary ruling on interpretation to the Court, is in fact a court or tribunal within the meaning of Article 177 of the EC Treaty.

13. The CNF, which was constituted by law, [6] hears appeals from local Bar Associations against decisions relating to entries on the rolls of the Bar Associations and disciplinary matters. It gives legal rulings and an appeal will lie from its decisions to the Sezioni Riunite della Corte di Cassazione (Combined Chambers of the Court of Cassation). It therefore satisfies the requirements laid down by the judgment in *G. Vaassen (née Göbbels).* [7] In addition, it is a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings. [8]

14. Admittedly, in its order in *Borker*, [9] the Court held it may be requested to give a preliminary ruling under Article 177 only 'by a court or tribunal which is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature' and that that is not so in the case of a Bar Association which 'does not have before it a case which it is under a legal duty to try but a request for a declaration relating to a dispute between a member of the Bar and the courts or tribunals of another Member State'. [10]

15. Clearly, it was not the nature of the body requesting the preliminary ruling, but the purpose of the question referred which led to Court to hold that it had no jurisdiction.

16. There is no doubt that a dispute relating to the conditions for entry on the rolls of the Bar Association or a dispute relating to a penalty imposed by a Council of Bar Associations is a dispute which that body is 'under a legal duty to try'.

6 — Royal Decree-Law ('regio decreto-legge') No 1578 of 27 December 1933, which was enacted as Law No 36 of 22 January 1934, as amended.

7 — Case 61/65 *G. Vaassen (née Göbbels)* [1966] ECR 261, at 273.

8 — See paragraph 15 of the judgment in Case C-24/92 *Corbiau* [1993] ECR I-1277.

9 — Case 138/80 *Borker* [1980] ECR 1975.

10 — Paragraph 4.

17. Moreover, several questions have been referred to the Court for a preliminary ruling on the conditions for entry on the rolls of the Bar of a Member State, [11] including one [12] referred by a court of appeal hearing an appeal from a decision of a Council of Bar Associations. [13]

The first question

18. The right of establishment and the provision of services constitute two separate branches of Community law, which are dealt with in two separate chapters of the EC Treaty and do not overlap.

19. The principle of freedom of establishment aims to foster the free movement of self-employed persons by enabling a self-employed person from one Member State to establish himself in another Member State on the same terms as a national of the latter State. In other words, '... establishment means integration into a national economy'. [14]

20. The principle of freedom to provide services merely enables a self-employed person established in a Member State in which he is integrated to exercise his activity in another Member State.

21. Establishment and the provision of services are mutually *exclusive*: it emerges clearly from Article 60 of the EC Treaty that the provisions on freedom to provide services are applicable only on condition that those on freedom of establishment are not applicable.

22. The rules governing those two major freedoms are very different. Thus, the activity of lawyers as providers of services is the subject of harmonizing Directive 77/249, which enables services to be freely provided under the original professional qualification, whereas conditions for the establishment of lawyers have not — yet — been the subject of an actual harmonizing directive. [15] The establishment of lawyers is governed by Article 52 et seq. of the Treaty.

11 — For example, the judgment in Case 292/86 *Gullung* [1988] ECR 111.

12 — Judgment in Case 65/77 *Razanatsimba* [1977] ECR 2229.

13 — It is observed that in that case the Cour d'Appel de Douai curiously annulled the decision of the Conseil de l'Ordre (Council of Bar Associations) to refer a question to the Court 'on the grounds that the Conseil de l'Ordre is not an ordinary court of law, that when it gives a ruling on admission to pupillage it is acting in an administrative capacity and not as a court, and that therefore it is not empowered to make a direct reference for a preliminary ruling to the Court of Justice'. For a critical commentary, see A. Brunois and L. Pettiti: 'Un conseil de l'Ordre peut-il renvoyer en interprétation devant la Cour de justice des Communautés? Les décisions ordinales ont-elles un caractère juridictionnel?' (*Gazette du Palais*, 25 October 1977, p. 513).

14 — See section 3 of the Opinion of Advocate General Darmon in Case 81/87 *Daily Mail* [1988] ECR 5500.

15 — A proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (COM(94) 572 final) was presented by the Commission on 21 December 1994.

23. A lawyer who establishes himself in a Member State has to comply with the rules on establishment of that State in so far as they are not discriminatory and do not restrict the free movement of persons.

24. The conditions imposed on establishment in the Member State in which the activity is carried out are, of course, much stricter than those imposed on the mere provision of services.

25. This is the importance of the distinction between establishment and the provision of services. An economic operator must not be able to circumvent the stricter rules governing the right of establishment by passing himself off as a provider of services when he carries out his activity under the same circumstances as an economic operator *established* in the Member State in which he carries out his activity. [16]

26. The Court held as follows in the judgment in *Van Binsbergen*: [17]

'... a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services'. [18]

27. As the Court has constantly reiterated since then, [19] the rules on the provision of services must not serve to circumvent or evade the rules on freedom of establishment. This risk of fraud is particularly obvious in the case of the lawyer's profession. Advocate General Darmon stressed this in his Opinion in *Gullung*: [20]

'... it could happen that a Community national might seek to rely on freedom to provide services in order, in fact, to set up nothing less than an establishment and thereby avoid the rules of professional conduct applicable in such a case'. [21]

28. Thus, a lawyer established in a Member State must enrol with the Bar Association

16 — This is what P. Troberg has termed a form of '*verschleierte Niederlassung*' [disguised establishment] in *Kommentar zum EWG-Vertrag*, 'Artikel 59', Goeben — Thiesing — Ehlermann, 4th edition, p. 1063.

17 — Case 33/74 *Van Binsbergen* [1974] ECR 1299.

18 — Paragraph 13.

19 — See, in particular, the judgment in Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 12.

20 — Case 292/86 *Gullung* [1988] ECR 111, at 123.

21 — Section 16.

and pay his subscription, join the retirement scheme, apply the local rules of professional conduct and on the calculation of fees and comply with the local rules on incompatibility, whereas a lawyer providing services will not necessarily be subject to those obligations.

29. In a context of free movement of lawyers characterized by a degree of imbalance — lawyers from some Member States 'move' more than others —, the distinction between the provision of services and establishment is genuinely important.

30. On the strictly legal level, this distinction is a tricky one, in so far as it is the upshot of a combination of criteria, closely depends on the factual circumstances in question and has never been precisely and systematically defined.

31. On scrutinizing the Court's case-law and the texts of secondary legislation based on Article 52 or Article 59 of the EC Treaty, it is possible to discern two major criteria by which the provision of services can be distinguished from establishment:

(1) a temporal criterion: provision of services is temporary in nature as compared with the on-going nature of establishment;

(2) a geographical criterion: an economic operator established in a Member State is chiefly directed towards the market in that State, which is were he concentrates his activities. An economic operator who is a provider of services carries out his activity in the host State only on a secondary or ancillary basis.

Let us consider those criteria in turn.

32. Article 59 of the Treaty covers transfrontier trade in services of a *temporary nature*, as is shown by the very wording of Article 60 of the Treaty, in contradistinction to the *permanent nature* of the activity carried out by an economic operator who is *established* in a Member State. This is clearly shown by the judgment in *Webb*: [22]

'[the third paragraph of Article 60 of the Treaty, however,] does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the *temporary* activities of undertakings which are established in other Member States'. [23]

22 — Case 279/80 *Webb* [1981] ECR 3305.

23 — Paragraph 16, my emphasis.

33. The Court has also categorized certain activities as a provision of services on the ground that they were conducted 'as a rule ... only occasionally' [24] (activities carried out by insurance undertakings as leading insurers) or on the ground that they were 'limited in duration' [25] (services provided to tourists by tour companies or self-employed tourist guides).

34. I would further mention the judgment in *Steymann*, [26] according to which 'It is clear from the actual wording of Article 60 that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services'. [27]

35. That temporal factor is also to be found in the Community legislation on the provision of services: under Article 3(2) of Directive 65/1/EEC, [28] the provider of services is to pursue his activity in the Member State of the recipient 'for a length of time appropriate to the nature of the services being performed'. The provision of services performed by a lawyer under Directive 77/249 is characterized by its 'temporary nature'. [29]

36. The provider's activity is *precarious* and *episodic*. To use the Commission's term, it is *irregular*.

37. The second characteristic of the provision of services is that the provider's *main centre of activity* must be located in *a Member State other than* the Member State in which the service is provided.

38. It is his main centre of activity which enables the economic operator to provide services to a recipient in another Member State either without moving or by going temporarily to the State in which the service is provided. The centre of gravity of the activity of the provider of services cannot be located in the State where the service is provided (except where the recipient of the service goes to the provider's State in order to receive the service there). It is in the State in which he is established.

24 — Paragraph 18 of the judgment in Case 252/83 *Commission* v *Denmark* [1986] ECR 3713.

25 — Paragraph 6 of the judgment in Case C-180/89 *Commission* v *Italy* (the 'tourist guides' case) [1991] ECR I-709.

26 — Case 196/87 *Steymann* [1988] ECR 6159.

27 — Paragraph 16.

28 — Council Directive 65/1/EEC of 14 December 1964 laying down detailed provisions for the attainment of freedom to provide services in agriculture and horticulture, OJ, English Special Edition 1965-1966, p. 3.

29 — Paragraph 42 of the judgment in Case 427/85 *Commission* v *Germany* [1988] ECR 1123.

39. I would point at this juncture to the inadequacy of those two criteria. Where a patent agent established in the United Kingdom carries on, on a continuous basis, an activity as an adviser specializing in the monitoring and conservation of industrial property rights to undertakings in Germany and those undertakings constitute his main customers, he satisfies neither of those criteria.

40. This is sufficient to show the importance of the question raised: may a provider of services have chambers in the host State without being caught by Article 52 of the Treaty? May he be prohibited from opening such chambers?

41. Examination of the Court's case-law shows that *the provision of services does not necessarily preclude the presence of permanent infrastructure in the Member State of the recipient of the service.*

42. In the judgment in Case 205/84 *Commission* v *Germany*, [30] the Court held very firmly that:

'... an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act *on a permanent basis* for the undertaking, as would be the case with an agency'. [31]

43. Consequently, there is not a provision of a service unless the insurer is established in a Member State other than that of the policyholder and does not maintain a permanent presence in the second State or direct his business activities entirely or principally towards the territory of that State. [32] The Court summarized its position as follows in the judgment in Case 220/83 *Commission* v *France* when it held that: [33] '... *the requirement of establishment, which represented the very negation of the freedom to provide services,* exceeded what was necessary to attain the objective pursued and ..., accordingly, that requirement was contrary to Articles 59 and 60 of the Treaty'.

44. In certain exceptional circumstances, however, the Court does not preclude the provider of services from being able to have available to him a 'permanent presence' in the Member State in which the services are provided.

30 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

31 — Paragraph 21, my emphasis.

32 — See paragraph 24 of the judgment in Case 205/84 *Commission* v *Germany*, cited above.

33 — Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 20, my emphasis. See also the judgments of the same date in *Commission* v *Denmark*, cited in footnote 24, at paragraph 20, and in Case 205/84 *Commission* v *Germany*, cited in footnote 30, at paragraph 52.

45. Thus, in *Van Binsbergen* (cited above), the Court held, with regard to legal representatives acting before courts and tribunals in the Netherlands, that:

'... the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professionalethics'. [34]

46. In the judgment in *Coenen and Others*, [35] the Court held that the host State was authorized to require the provider of services (an insurance intermediary) to have a place of business on its territory for the purpose of providing the services: '... the Member State in question normally has effective means at its disposal for carrying out the necessary supervision of the activities of [the provider of the services] and to ensure that the service is provided in accordance with the rules issued under its national legislation'. [36] In contrast, the additional requirement that the person providing services in the territory of that State must also have a private residence in that State was held to be incompatible with the Treaty. [37]

47. The Court adhered to that point of view in its judgment in *Ramrath*. [38]

48. Mr Ramrath, an office employee of the company Treuarbeit in Luxembourg, had been personally authorized to act as an auditor in Luxembourg and the company itself had been authorized as a legal person. In 1989 he was assigned, still as an employee, to the office of Treuarbeit in Düsseldorf, while wishing to continue to pursue his activity as a provider of services in Luxembourg. The Luxembourg authorities withdrew his authorization on the ground that he no longer had a professional establishment in Luxembourg. May the Member State in which the service is provided require, without infringing Article 59 of the Treaty, the provider to have a 'permanent presence' or an establishment in its territory where the provider *is not* established?

49. In the course of a review of proportionality, the Court held in *Ramrath* that:

'... in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered

34 — Paragraph 14.
35 — Case 39/75 *Coenen and Others* [1975] ECR 1547.
36 — Paragraph 10.
37 — Paragraph 11.
38 — Case C-106/91 *Ramrath* [1992] ECR I-3351.

incompatible with the Treaty. Nevertheless, as one of the fundamental principles of the Treaty, freedom of movement for persons may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established ...'. [39]

50. The Court considered that, as a result of the Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audit of accounting documents, [40] it was for each Member State to lay down the criteria for the independence and integrity of auditors. In order to supervise the auditor's compliance within its territory with the professional rules, a Member State was justified in laying down requirements of the auditor as regards 'the existence of infrastructure' and his 'actual presence' in its territory. However, those requirements were unjustified where the provider of services was established and authorized to practise as an auditor in another Member State and provided his services in the host State as the employee of a person who was himself established and authorized in that State. Effectively, it was through that person that the competent authorities could ensure compliance with its professional rules by his employees. [41]

39 — Paragraph 29.
40 — OJ 1984 L 126, p. 20.
41 — Paragraph 36.

51. What lesson is to be learnt from this case-law?

52. Activity as a provider of services precludes the provider from establishing himself — and hence from having a permanent establishment — in the State where the services are provided.

53. Exceptionally, that Member State may, however, require the provider to have a permanent structure in its territory. It is for that State to show that that presence in its territory is strictly justified. Consequently, it may be permissible under Article 59 of the Treaty for the provider to have a permanent structure in the Member State where the services are provided.

54. In this case, the opposite situation is involved: the Italian State is not seeking to rely on an exception to the principle of lawyers' freedom to provide services. *It is relying on the opposite of that principle* and is seeking to prohibit a mere provider of services from having any permanent structure in its territory.

55. It is therefore not for the Italian State to show that its legislation complies with the

principles and rules applicable to the provision of services and that the prohibition which it has laid down is justified.

56. It is for the lawyer providing the services to show that a permanent structure in the territory of the Member State in which the service is provided *is necessary for the exercise of his activity and that, in the absence of such structure, it would be impossible for him to perform his services.*

57. Therefore, it is the use of the temporal criterion and the criterion of the principal place of business which will enable it to be determined whether a lawyer with a permanent structure in the territory of a Member State is working there as a provider of services or as an established lawyer.

58. Consequently, a general, absolute prohibition imposed by a Member State on a provider of services having a permanent structure in the territory of that State appears to be an excessive restriction on the freedom to provide services in so far as it does not enable the lawyer to adduce proof to the contrary to the effect that that structure is necessary.

59. The situation would be otherwise only if the specific features of the lawyer's profession were totally incompatible with the presence in the Member State where the services are provided of a permanent structure available to the provider of the services.

60. I shall draw two conclusions from this.

I — The principle remains: the presence of chambers is a sign of establishment.

II — Exceptionally, the lawyer providing services must be able to provide proof that the presence of chambers in the territory of the State in which the services are provided is essential in order for him to be able to perform those services.

Let us take up those two points.

I — The principle remains: the presence of chambers is a sign of establishment.

61. In the first place, let us pinpoint what is meant by chambers. A lawyer's chambers

consist of an address, a telephone and secretarial services, in short *a place where services are offered to the public.*

62. To permit a lawyer providing services to open *chambers* in the host State is to enable him to *offer services* to potential clients and deal with their requests. It therefore enables a lawyer who is providing services to offer the same services as an established lawyer and to compete with him without being subject to the same obligations (under Article 4(1) of Directive 77/249 such a lawyer may not be registered with a professional organization in the host Member State and is subject to the professional rules — in particularly in the disciplinary field — which are applicable in his State of origin).

63. Accordingly, when Mr Gullung opened an 'officine de jurisconsulte' (small legal advice office) in Mulhouse and used notepaper headed 'Cabinet d'avocat et de conseil' (Advocate's and Legal Adviser's Chambers), it might be asked whether he was not already 'established' for the purpose of pursuing his activities in France. [42]

64. In such a case, what is involved is a permanent establishment, which the Court regards as being the very negation of the freedom to provide services. [43]

65. Secondly, the interpretation of Article 59 of the Treaty as far as lawyers are concerned has to take account of the possibility, which is a wide one, of a lawyer who is established in one Member State opening secondary chambers in another Member State.

66. Since the judgment in *Klopp*, [44] the Court has considered that a lawyer's freedom of establishment may not be confined to the right merely to set up one establishment within the Community, even in the absence of directives on establishment. Thus, a lawyer may use his freedom of establishment in order either to transfer his main place of activity to another Member State or to set up a secondary establishment.

67. The opportunity for lawyers to be established simultaneously in more than one Member State while complying with the rules on establishment which are applicable in each of those States caused the Court to put a *restrictive interpretation* on the rules relating to the provision of services which, without affording the same safeguards to the consumer, could be used to circumvent the rules on establishment. I would add that lawyers' freedom of establishment was greatly facilitated by the judgment in *Vlassopoulou*. [45]

42 — See the judgment in *Gullung*, cited above, paragraph 26.

43 — See paragraph 19 of the judgment in Case 63/86 *Commission v Italy* [1988] ECR 29.

44 — Case 107/83 *Klopp* [1984] ECR 2971.

45 — Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

II — Exceptionally, the lawyer providing services must be able to provide proof that the presence of chambers in the territory of the State in which the services are provided is essential in order for him to be able to perform those services.

I shall make four observations in this connection.

(1) *The presence of 'permanent infrastructure' in the Member State where the service is provided may correspond to a need on the part of the provider of the services.*

(2) *Directive 77/249 does not prohibit the provider of services from having permanent infrastructure in the territory of the Member State in which the services are provided, on condition that that infrastructure is necessary.*

(3) *Supervising compliance with the rules of professional conduct does not require that the lawyer providing services may not have a permanent structure. On the contrary, a permanent structure facilitates supervising the activity of the provider of services.*

(4) *The risk of 'disguised establishment' is limited.*

(1) *The presence of 'permanent infrastructure' in the Member State where the service is provided may correspond to a need on the part of the provider of the services.*

68. A lawyer providing services may carry out his activities from his original chambers either because the recipient moves or because the subject-matter, the product of the service, is sent to him directly, by post, for instance. He may give advice which is drawn up in his chambers and then sent to the recipient resident in another Member State: in such case, the provider of the services has no need physically to cross the frontier for the purposes of his activity. [46] The prohibition on opening chambers in the State of the recipient of the services obviously has no effect on the performance of this type of services.

69. In another typical case, provided for by Article 60(3) of the Treaty, the provider of the services moves within the territory of the State in which the services are supplied: the lawyer meets his client there, advises him or represents or assists him in judicial proceedings. He may at the same time be moved to

46 — See, as regards this type of provision of services, paragraph 22 of the judgment in Case C-384/93 *Alpine Services* [1995] ECR I-1141.

spend a considerable period of time there, for instance on the occasion of a major trial.

70. Admittedly, the Court has held that '... modern methods of transport and telecommunications facilitate proper contact with clients and the judicial authorities'. [47]

71. It is therefore for the lawyer providing services to show that, despite those means, it is *necessary* for him to set up chambers in the Member State in which the services are provided. Moreover, the case-law of the Court supports this view: '... with regard to freedom to provide services, access to ownership and *the use of immovable property* is guaranteed by Article 59 of the Treaty in so far as such access is *appropriate* to enable that freedom to be exercised effectively'. [48] In my view, it is only exceptionally that a lawyer providing services will be able to demonstrate that opening chambers in the host Member State is *essential.*

(2) *Directive 77/249 does not prohibit the provider of services from having permanent infrastructure in the territory of the Member State in which the services are provided, on condition that that infrastructure is necessary.*

72. Directive 77/249/EEC provides for a number of measures to facilitate the effective pursuit of the activities of lawyers by way of provision of services.

73. Each Member State must recognize as lawyers persons practising the profession in the various Member States. A lawyer providing services is to adopt the professional title used in the Member State in which he is established.

74. He is subject to the rules of the host Member State, such as those concerning incompatibility, professional secrecy and the prohibition on the same lawyer acting for parties with conflicting interests, and publicity. [49]

75. In order to carry out judicial activities properly so-called before courts and tribunals, the host Member State may require a

47 — Judgment in *Klopp*, cited above, at paragraph 21. See also paragraph 28 of the judgment in Case 427/85 *Commission* v *Germany*, cited in footnote 29, and paragraph 35 of the judgment in Case C-294/89 *Commission* v *France* [1991] ECR I-3591.

48 — Judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 24, my emphasis.

49 — Article 4(4) of Directive 77/249.

lawyer providing services from another Member State to be introduced to the presiding judge and to work in conjunction with a lawyer who practises before the judicial authority in question. [50] The Court has explained the rationale of that provision as follows: '... the obligation imposed upon him to act in conjunction with a local lawyer is intended to provide him with the support necessary to enable him to act within a judicial system different from that to which he is accustomed and to assure the judicial authority concerned that the lawyer providing services actually has that support and is thus in a position fully to comply with the procedural and ethical rules which apply'. [51]

76. A lawyer providing services is to pursue activities relating to the representation of a client in legal proceedings or before public authorities '... under the conditions laid down for lawyers established in [the host] State, *with the exception of any conditions requiring residence*, or registration with a professional organization, in that State'. [52]

77. Thus the directive precludes a lawyer providing services from residing in the territory of the Member State in which the services are provided, since such *residence* would constitute irrebuttable proof that he spends the major part of his time there, that the centre of gravity of his activity is located there and that he is therefore *established* there.

78. The directive does not preclude such a lawyer from having a structure enabling him to perform from time to time his activity as a provider of services on a temporary basis.

79. That was already the effect of Article 3(2) of the General Programme for the abolition of restrictions on freedom to provide services adopted by the Council on 18 December 1961. [53]

(3) *Supervising compliance with the rules of professional conduct does not require that the lawyer providing services may not have a permanent structure. On the contrary, a permanent structure facilitates monitoring the activity of the provider of services.*

80. With the exception of the lawyer's out-of-court activities, this supervision is secured by the institution of working in conjunction with a lawyer practising locally, which the host Member State may require a lawyer providing services who is from another Member State to comply with.

50 — Article 5.

51 — Paragraph 23 of the judgment in Case 427/85 *Commission* v *Germany*, cited in footnote 29.

52 — Article 4(1) of Directive 77/249, my emphasis.

53 — That programme (OJ, English Special Edition, Second Series IX, p. 3) provides that: '... the following restrictions are to be eliminated .... The like shall apply to provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to the provision of services, and in particular the power:

...

(d) to acquire, use or dispose of movable or immovable property or rights therein'

(Title III, section A, third paragraph).

81. The Court's judgment in *Ramrath* has shown that the presence of a permanent structure *facilitates* supervising the activity of the provider of services.

(4) *The risk of 'disguised establishment' is limited.*

82. In the first place, the fact that there is permanent infrastructure in the host Member State does not mean that the activity carried on there by the lawyer is also permanent. The lawyer must be able to show that the permanent provision of an office in the Member State where the services are provided is essential in order for him to perform his services even though he uses it only from time to time.

83. Secondly, it must be considered that the Court has consistently held that '... a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State'. [54] In addition, those measures must be *proportional* to the objective pursued. [55] It appears certain to me that measures less restrictive of trade in services than a general, absolute prohibition on having chambers should enable the activity of lawyers providing services in the host Member State to be regulated and supervised in such a way that any fraud against the rules on establishment may be detected. Apart from the possibility of requiring the lawyer providing services to work in conjunction with a lawyer practising locally, the host Member State might, for instance, provide for compulsory declaration.

84. In the final analysis, the absolute, general bar on opening chambers imposed by the Italian legislation on lawyers providing services is based on an *irrebuttable presumption of fraud*: on the ground that a lawyer providing services who opens chambers could only be a lawyer who intends to circumvent the rules on establishment, the law closes off that possibility. I consider, in contrast, that opening chambers may answer a real need for lawyers providing services and that it is for the State in which the chambers are opened to prove, on a case-by-case basis, the existence of any fraud on the rules governing freedom of establishment.

85. I conclude that Articles 59 and 60 of the Treaty and Directive 77/249 must be interpreted as precluding national legislation of a host Member State prohibiting lawyers providing services from opening *chambers* in the territory of that State.

54 — Paragraph 20 of the judgment in Case C-23/93 *TV 10* [1994] ECR I-4795.

55 — See the judgment in Case 52/79 *Debauve* [1980] ECR 833, paragraphs 12 and 22.

The second question

86. It follows from the foregoing that the distinction between the provision of services and establishment is not based on a single criterion: as has been seen, a lawyer providing services who is established in another Member State may, exceptionally, have chambers in the host State and the existence of permanently-open chambers does not raise an irrebuttable presumption that the owner of those chambers is a locally established lawyer.

87. Consequently, there is a range of *indicia* which enables the provision of services to be distinguished from establishment.

88. The location of the lawyer's main centre of activity, the place where he has his principal residence, the size of his turnover in the various Member States in which he carries out his activity, the amount of time spent in each of those States and the place at which he is entered on the Bar rolls will each afford evidence for the purpose of determining the nature of his activity in each of the Member States considered.

Application of Article 52 of the Treaty

89. It also follows from the foregoing that the situation in which a lawyer entered on the rolls of the Bar in one locality in Member State A who opens permanent chambers in the territory of Member State B where most of his professional activity is carried out does not fall within the field of application of Article 59 of the Treaty.

90. The fact that the lawyer providing services has specialized in a particular branch of law and in a certain type of client and that he essentially applies in the Member State where the services are provided the law of another Member State does not preclude his competing with lawyers established in the former State who also specialize in that law and target that type of client. The appellant in the main proceedings might compete, for instance, with German lawyers established in Italy in compliance with the Italian rules on establishment.

91. A lawyer established in Member State A who opens chambers in Member State B on the basis of his original qualification and gives legal advice solely on the law of Member State A *is established de facto in Member State B* and comes within the scope of Article 52 of the Treaty. [56]

56 — It is significant in this regard that the appellant in the main proceedings — as several parties observed before the Court — has himself placed himself within the ambit of Article 52 of the Treaty by applying to be placed on the rolls of the Milan Bar Association and relying on Directive 89/48.

92. The question as to whether he must comply with the rules and obligations to which established lawyers are subject or whether he is exercising a separate occupation not subject to the same requirements is a question of national law and has not yet been harmonized.

93. For example, in some Member States the lawyer's profession has a monopoly over legal advice. In other Member States, the profession lives alongside chambers of jurists from other Member States who advise only on the law in those States.

94. I therefore propose that the Court should rule as follows:

'Articles 59 and 60 of the EC Treaty and Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services must be interpreted as precluding national legislation of a host Member State prohibiting lawyers providing services from opening *chambers* in the territory of that State.

The location of the lawyer's main centre of activity and the duration and frequency of the services provided in the host Member State are appropriate criteria for establishing the demarcation line between the activity of a lawyer which comes under the provision of services and that which comes under the heading of establishment.

The situation of a lawyer from Member State A entered on the rolls of a Bar Association of that State who opens permanent chambers in Member State B where he advises principally on the law of Member State A falls within the field of application of Article 52 of the EC Treaty irrespective of the title which he may use.'