OPINION OF ADVOCATE GENERAL MISCHO
delivered on 14 May 1998 *

1. Proceedings have been brought by the Ministère Public against André Ambry, in his capacity as manager of 'A Tours SARL', before the Criminal Chamber of the Tribunal de Grande Instance, Metz. He is charged with having assisted or engaged in an activity relating to the organisation and sale of travel or holidays without having the licence required under French legislation in order to pursue that activity. It is not disputed that Mr Ambry applied to the Préfecture of the Department of Moselle for a licence and that the Préfecture refused to issue one to him on the ground that the financial security which he possessed, and which had been granted to him by an Italian finance company, 'Compagnia cauzioni SpA', whose registered office is in Rome, did not meet the conditions laid down in Article 14 of Decree No 94.490 of 15 June 1994, [1] adopted in implementation of Article 31 of Law No 92.645 of 13 July 1992 [2] laying down the conditions for the pursuit of activities relating to the organisation and sale of travel or holidays.

2. Let me first of all specify the content of the provisions relating to the security which every travel agent must possess. Article 4 of Law No 92.645 states that only a natural or legal person having the status of trader ('commerçant') and holding a licence to operate as a travel agent, may engage in the organisation or sale of individual or group travel or holidays on a profit-making basis, and specifies the conditions for the issue of such a licence, which include, under (c), the following:

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

3. Article 12 of Decree No 94.490 provides:

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

1. either by a collective guarantee body having legal personality, on the basis of a guarantee fund established for that purpose;

* Original language: French.
1 — JORF, p. 8746.
2 — JORF, p. 9457.

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

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

The financial security bond must comply with all the provisions of this chapter.'

4. Article 14, on which the Préfecture based its refusal to issue a licence to Mr Ambry, provides:

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

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

...'

5. The detailed rules governing the manner in which the financial security may be called on are laid down in Article 16 of the Decree, which provides:

'The security shall be payable automatically on presentation of evidence by the creditor to the guarantee body that the claim is conclusively established and due and that the agency backed by the security is in default, and the

guarantor may not limit its liability in the event of a plurality of creditors or first require a sale of the assets of the principal debtor.

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

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

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

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

6. Mr Ambry defends himself before the criminal court by challenging the compatibility with Community law of the requirements laid down in Article 14 of the Decree where the security is issued to the travel agency by a credit institution or insurance company established in another Member State of the European Union. In his view, those requirements constitute an obstacle to the free movement of capital and freedom to provide services in the area of provision of financial security, as laid down in the Treaty and secondary legislation, so that the refusal to issue a licence to him constitutes a breach of Community law, and the unlawfulness of that refusal in itself, in his submission, constitutes a bar to the proceedings which have been brought against him.

7. Considering that the legality or otherwise of the provisions of Article 14 of the Decree under Community law determines whether the charges brought against Mr Ambry are well founded, the Tribunal de Grande Instance, Metz, refers the following question to the Court:

'Are the provisions of Article 14 of Decree No 94.490 of 15 June 1994, adopted pursuant to Article 31 of Law No 92.645 of 13 July 1992, to be regarded as not in conformity with Directive 73/183, the Coordination Directive of 15 December 1989, Article 59 of

the Treaty establishing the European Communities and Article 73s of the Maastricht Treaty, in so far as they require that, where a financial security is arranged in a Member State of the EC other than France, an agreement must be concluded between the credit institution or insurance company situated in that other Member State and a credit institution or an insurance company situated in France?'

The relevant provisions of Community law

8. Let me say straight away that the reference to Article 73s of the EC Treaty must be the result of a clerical error because there is no such article. In the context, one may assume that the national court means Article 73b of the EC Treaty, which prohibits restrictions on the movement of capital and payments.

9. Moreover, an analysis of the particulars of the issue, raised by Mr Ambry, whether the requirements laid down in the French legislation are compatible with Community law shows that the question should be slightly reformulated in order to provide a helpful response to the concerns of the national court. If Article 14 of the Decree were incompatible with Community law, it would be because it refuses to accord to a provision of services, the arrangement of a security by a financial institution or an insurance company established in another Member State, the same value as it does to the same service provided by an undertaking of the same type established in French territory, unless a special condition, namely the existence of an agreement with a credit institution or an insurance company established in France, is satisfied. This refusal to treat a service provided by an economic operator established in another Member State in the same way as a service provided by an economic operator established in the Member State concerned appears *prima facie* to be capable of calling in question the freedom to provide services and must therefore be assessed in the light of Article 59 of the EC Treaty and, because the services in question relate to financial services and insurance, in the light of the 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, [3] and Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), [4] which constitute the most recent Community legislation in this matter.

10. On the other hand, I do not see, and here I am in agreement with the position expressly adopted by the French Government and the position taken, by implication, by the Spanish Government, how Article 14 of the Decree

3 — OJ 1989 L 386, p. 1.
4 — OJ 1992 L 228, p. 1.

could interfere with the free movement of capital and payments which Article 73b is intended to ensure. It does not create any obstacle to the movement of funds between another Member State and France, unless one is disposed to consider that, by making recourse to a French travel agency of a credit institution or insurance company established in another Member State less attractive and hence probably less frequent, it automatically brings about a reduction in the flows of finance that inevitably stem from the provision of services across borders. However, this line of reasoning seems to me to be pointless since either the requirements laid down in Article 14 are permissible under the rules relating to the freedom to provide services and it would be totally inconsistent to try to challenge them on the basis of Article 73b, or else they are not, and this is sufficient for them to be declared unlawful without there being any need to have recourse to Article 73b.

11. For these various reasons I think that the question to which the Court must address itself is whether — and I will use in substance the formulation of the question suggested by the French Government — the principle of freedom to provide services, as contained in Article 59 of the Treaty and, in the case of banking or insurance, in the directives adopted in this field, in particular Directives 89/646 and 92/49, cited above, precludes the provisions of Article 14 of Decree No 94.490, which requires, where a financial security is arranged by a credit institution or an insurance company established in a Member State other than France, an agreement to be concluded between the guarantor and a credit institution or an insurance company established in France in order to repatriate travellers.

12. In order to make this assessment as to whether Article 14 is compatible with Community law, it is essential to take into account the fact that Law No 92.645, cited above, which is implemented by Decree No 94.490, transposed into national law Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. [5] It is necessary to do so because, if Article 14 is incompatible with Directives 89/646 and 92/49 but faithfully transposes a provision of Directive 90/134, the Court could find itself facing a problem which relates not to a conflict between national rules and Community rules but a conflict between different sets of Community rules of the same type and the same value, all three of which emanate from the Council.

13. The provisions of Directive 90/314 which are relevant for determining whether Article 14 is compatible with Community law are Article 7 and Article 8. Under Article 7,

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

5 — OJ 1990 L 158, p. 59.

14. Article 8 provides:

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

Opinion

15. Now that we have assembled all the relevant legislative provisions, we can begin to analyse the elements which will enable the Court to answer the question referred to it. I do not think there is any need to dwell for long on the fact that the requirement that there be an agreement with an institution situated on French territory, when the security has been arranged by an institution situated in another Member State under the regime of the freedom to provide services, clearly constitutes an obstacle to the exercise of such freedom. It does not, admittedly, go so far as to deny such an institution the opportunity of operating on the French market by providing its services from within another Member State, which would be the effect of a requirement to act through a branch or agency established on French territory. However, I cannot agree with the French Government when it states that, since there is no obligation to have an establishment in France or to prove that there is a permanent representative or a subsidiary company there, or yet to tie up funds there, the freedom to provide services is not being infringed. The requirement contained in Article 14 means that a foreign provider must overcome two obstacles: firstly, he will have to find an establishment situated in France that is prepared to conclude the agreement with him without which the security he is offering will not be recognised, which will not necessarily be easy since he will have to enlist the cooperation of a potential competitor, and, secondly, he will have to bear the costs involved in concluding such an agreement, because it is hard to imagine the French institution giving its help free of charge, and therefore to cut his prices in order to remain competitive vis-à-vis a French institution. The restriction is therefore undeniable.

16. Is such a restriction inevitable, however, since, as the French Government points out, the requirement laid down in Article 14 is virtually demanded by Article 7 of Directive 90/314? According to the French Government, the security arrangements prescribed by that article must display three features: they must operate in the event of the insolvency of the holiday organiser or the retailer, must enable money which has been paid to be refunded and consumers to be repatriated, and must provide 'sufficient evidence of security' for such refunding and repatriation.

17. Again according to the French Government, and as confirmed, it says, by the judgment of the Court in the case of *Dillenkofer and Others*, [6] Member States are, when they transpose that article, under a genuine obligation of result and must, through the means from which they may select, reach an optimum

6 — Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] ECR I-4845.

level of effectiveness and a certain degree of automatism in the implementation of the arrangements concerning a security.

18. Although I can only agree that Member States are under a genuine obligation of result regarding the security which must be available to customers of a travel agency, I must at the same time observe that the French Government acknowledges that Member States are free to choose the means to be employed for that purpose, and it by no means claims that the Community legislature requires them to resort to means which would cause them to be in breach of other obligations which they have under the Treaty or any instrument of secondary legislation.

19. In other words, there can be no question of regarding Article 7, and even less so Article 8, in any way as a kind of *carte blanche* given by the Community legislature, out of a concern to provide maximum protection for consumers, to Member States, and inspired by the idea that the end justifies the means, to exempt themselves from the rules governing the common market. This does not prejudge in any way the possibility of adopting, but under conditions laid down by the case-law of the Court, measures which might involve restrictions on the freedoms guaranteed by the Treaty, should this prove necessary in order to achieve the result required by Article 7.

20. This is why we should now examine whether the indisputable restriction on the freedom to provide services introduced by Article 14 of Decree No 94.490 may be justified, given that the obligation to conclude an agreement with an institution situated in France has no basis either in Directive 89/646 (credit institutions) or in Directive 92/49 (insurance). The Court has consistently held, as the Commission points out, that such a restriction may be justified by overriding reasons relating to the public interest, provided that it can be regarded as a non-discriminatory, proportionate measure which is objectively necessary and that the interest to be protected is not already safeguarded by the rules to which the person providing the service is subject in the Member State in which he is established, [7] and provided there has been no harmonisation at Community level. [8]

21. We must therefore consider whether those various conditions are met in this particular case. I shall deal quickly with the conditions which are clearly satisfied so as to be able to examine in detail what is the true problem with the French regulations. Clearly, the conditions laid down in Article 14 for recourse by a travel agent to a security provided by a service provider established in a Member State other than France are situated in the context of protection of consumers faced with a defaulting travel organiser or retailer, in that they supplement the obligation entered into by a guarantor established outside France through the involvement of an institution

7 — Judgment in Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15.

8 — Judgment in Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069.

situated within France, which means that there is indeed a public-interest objective which is being pursued. [9]

22. It is equally plain that the French legislation is not inconsistent with harmonisation at Community level, at least so far as the rules applying to travel agencies are concerned, since, as the Commission points out, on the one hand, Article 7 of Directive 90/314 does not define the detailed rules for arranging the security for which it provides and, on the other hand, Article 8 of that directive authorises the adoption, for the protection of consumers, of national measures which are more stringent than those laid down in the directive. Nor does the condition that the interest to be protected should not already be protected by rules to which the service provider is subject in the Member State in which he is established create any difficulties, since it is not the solvency of the guarantor that is at issue but his capacity to intervene effectively in order to take the place of a defaulting French travel agent. The issue therefore comes down to whether the French measure is or is not discriminatory, objectively necessary and proportionate.

23. The first point is less simple to determine than it would appear. A guarantor established in another Member State incurs a specific obligation for the very reason that he is not established in France, and this is the crux of Mr Ambry's challenge. This, therefore, has all the appearances of discrimination. But one might also consider, as does the Commission, that there is no discrimination — which consists, let it be recalled, in treating identical situations differently or different situations identically — since, as regards the possibility of immediately calling on the security, which is something required of all guarantors under Article 14, an institution situated outside France is not in the same position as an institution situated in France. The Commission points out in this connection that a French bank is in fact in a position to provide funds immediately to another institution situated in France and as a result participates in the same compensation system, whereas a foreign institution, which is unable to take advantage of a reciprocal agreement with a French bank, would not necessarily be able to do so. Similarly, the French Government points out, with reference to various studies and basing its argument on the fact that the Community legislature found it necessary to intervene by means of Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 on cross-border credit transfers, [10] that the transfer of funds from one Member State to another has hitherto operated under conditions which are not always satisfactory.

24. There seems to me to be some merit in these arguments, especially since the cross-border credit transfers which clearly cause problems are those in respect of which an individual approaches a bank in order to arrange for the transfer of funds and one may assume that where it is a bank or a similar body that wishes to send funds to another

9 — Judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 29 et seq.

10 — OJ 1997 L 43, p. 25.

Member State on its own account things work better.

25. They do not however appear to me to be totally convincing. One might ask oneself the question, to which I confess I do not know the answer, whether, in the event of a security being issued to a travel agency established in the North-East of France, as in the present case, by a bank situated in the Saarland, the funds which that bank would send via a courier to meet its commitments would take very much longer to arrive than funds sent by a French guarantor bank established in Perpignan or Bayonne. One might also ask oneself how, if cross-border credit transfers encounter so many difficulties, the assistance-provision organisations, which for years have been acting effectively to bring help to customers who have met with mishaps in distant lands, proceed.

26. Let us accept, however, since we cannot be certain, that the fact that there is a difference between the position of a institution situated in France and one situated in another Member State precludes one from considering that the requirements laid down in Article 14 constitute discrimination, and let us turn to the other conditions they must satisfy in order to be permissible under Community law. Are they both objectively necessary and proportionate? Sharing the view expressed by the Commission at the hearing, I am of the opinion that they are not, and for various reasons.

27. Before I set out those reasons, I should like to make it clear that I am sensitive to the arguments put forward by the French Government. I am in full agreement with it in considering that the security which a travel agent takes out must be capable of being called on immediately in the national territory if it is necessary to repatriate clients. We are all aware of the grotesque situation of the customers of an Austrian travel agency who were taken hostage by a Greek hotel owner, and whose adventures provided the background to the dispute which came before the Court in Case C-364/96 via a question referred to it by the Bezirksgericht für Handelssachen, Vienna, for a preliminary ruling.

28. However, quite apart from the obvious interest which a tourist awaiting repatriation has in the security being called on immediately, the speed with which the guarantor acts has another advantage. It makes it possible to limit the amount of the security required by the travel agency and therefore to encourage competition in the travel sector. If it takes time for the security to become operative, the tourist's stay will be extended, entailing additional costs for the guarantor over and above those which he should in any event have to bear in order to ensure the return of the people concerned. If they are returned very quickly the guarantor's part in the repatriation will normally involve it only in paying for the travel tickets in place of the defaulting travel agency. Immediate repatriation of customers is therefore in the evident interest of both those operating in the tourism business and the institutions which provide security for them.

29. I also see all the advantage that attaches to the involvement of the Préfecture, which is prescribed under Article 16 of Decree No 94.490. It can scarcely be doubted that it is preferable by far for a tourist stuck at the other side of the world to know that the public authorities of the Member State in which he bought his ticket are taking things in hand rather than him having to fend for himself when it comes to getting the guarantor to act.

30. It is likewise indisputable that the French legislation did not opt, as it could have done under Directive 90/314, for the solution which, by adopting as the sole permissible arrangement for the provision of a security the requirement that the travel agency should be a member of a collective organisation for that purpose, encompassing all French travel agencies, would have excluded *de facto* the possibility of credit institutions and insurance companies established in other Member States offering their services to the customers of French travel agencies.

31. Finally, it may be observed that, in the matter of insurance, the Community legislature itself considered that the presence in the Member State in which the consumer resides of a representative of the service provider established in another Member State may certainly prove valuable in a number of cases. This is why Member States have been expressly authorised to require such representation by Article 12a of Directive 88/357/EEC, introduced by Article 6 of Council Directive 90/618/EEC of 8 November 1990, amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC, which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance. [11]

32. Alongside these positive aspects of the French legislation, there are, however, other aspects, of a negative nature, that condemn it. The first is that it is quite apparent that the agreement that the foreign provider of services must conclude with an institution situated in France must not be limited merely to cooperation, with that institution lending the guarantor its assistance so that funds can immediately be made available to the Préfecture making the arrangements to repatriate the tourists and possibly advancing funds if it seems impossible for the cross-border credit transfer to be made rapidly. From the explanations provided by the French Government it would appear that what is required is that the Préfet must be able to bring summary proceedings before a French court against the institution situated in France if he considers that the guarantor is taking too long to act. This means that what is concerned is not merely a commitment of the institution concerned vis-à-vis the guarantor but a real commitment to assume, vis-à-vis the French authorities, all the commitments incumbent upon the guarantor himself. The requirement to assume an obligation of that nature is tantamount in practice to requiring that the security issued by a credit institution or an insurance company established in another Member State should be supplemented by an identical

11 — OJ 1990 L 330, p. 44.

security from an institution of the same type established in France, so that what is involved is a veritable refusal to accord to a security offered under the regime of freedom to provide services, introduced by Directives 89/646 and 92/49, a value equivalent to that of a security offered by an institution situated in France. Such a refusal to accept the validity of the 'European passport' which those directives were intended to create through an authorisation which would be valid in all Member States does not seem to me to be in proportion to the requirements of consumer protection on which it purports to be based.

33. The second is the argument, put forward by the French Government, that without the required agreement it is impossible to ensure that the Préfet will be able to bring summary proceedings against a guarantor who fails to act quickly. I can, of course, accept that the French Government would want a Préfet, when he is forced to take proceedings, to be able to bring the matter before a French court and not, in the emergency situation in which he has to act, to have to face the difficulties and delays which might accompany proceedings initiated in a foreign court. I think, however, that this concern is not one that can justify, with respect to the principle of proportionality, the requirement laid down in Article 14. In order for the same power to be made available to the Préfet, it would have been sufficient to require that where the security is provided by an economic operator established in another Member State that operator should accept a clause in the contract conferring jurisdiction on the French courts with regard to any disputes which might arise as a result of the implementation of the security, bearing in mind that the judgment delivered by a French court would enjoy all the facilities offered under the Brussels Convention for its enforcement.

34. The third negative aspect is that the French legislation is based on the premiss that making funds available for the purpose of repatriating the customers of a travel agency which is unable to meet its commitments will necessarily take too long for the repatriation to be arranged under the most satisfactory conditions and will always be less efficient than if the guarantor were established in France, without giving a foreign guarantor any opportunity to provide proof that, in his case, this premiss does not in any way reflect the real situation.

35. As I have already pointed out above, a guarantor may be established in another Member State but be situated in immediate geographical proximity to the Préfecture which is required to take action, which would certainly offer him numerous advantages, whereas a guarantor established in France could in fact be a long distance away and might take some time in order actually to deliver the necessary funds.

36. I admit, of course that a guarantor established in another Member State will in most cases encounter greater difficulties than one established in France, but the French legislation should have taken into account, in accordance with procedures which it is not for me to specify, the fact that there may be cases in which there can be no doubt about the effectiveness of action by a foreign guarantor. It would certainly have been less restrictive of the freedom to provide services to have adopted legislation which enabled the national authority to refuse to accept securities which did not meet certain objectively defined criteria of effectiveness, or to require the guar-

antor to provide concrete evidence enabling the effectiveness of the security provided by him to be recognised. By laying down a rule that is too general and which does not enable individual situations to be taken into account the French legislation, here again, departs from what is required by the principle of proportionality.

Conclusion

37. Taking all the foregoing factors into consideration, I propose that the Court should give the following answer to the question referred to it for a preliminary ruling by the Tribunal de Grande Instance, Metz:

The principle of freedom to provide services, as laid down in Article 59 of the EC Treaty and the Second Council Directive No 89/646/EEC of 15 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the activity of credit institutions and insurance companies, and amending Directive 77/780/EEC, and in Council Directive 92/49/EEC of 18 June 1992 on the coordination of the laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), precludes national rules, which like those resulting in France from Article 14 of Decree No 94.490, require, as regards the security which travel agencies must hold, where a financial security is arranged with a credit institution or an insurance company established in another Member State, the conclusion of an agreement between the guarantor and a credit institution or an insurance company established in national territory in order to ensure the repatriation of travellers.