OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 18 November 1987 *

Mr President,
Members of the Court,

1. The cour d'appel, Colmar, has referred two questions to the Court for a preliminary ruling. One question concerns the freedom to provide services and the other concerns the freedom of establishment of lawyers, and they arose in the course of proceedings the main features of which are as follows.

2. Mr Claude Gullung, who has both French and German nationality, practised as a notaire in the département of Bas-Rhin from September 1947 to March 1966, at which date he resigned following disciplinary proceedings against him which resulted in the imposition of disciplinary sanctions.

3. Initially Mr Gullung sought to have his name entered on the register of conseils juridique (legal advisers) but his application was rejected first by the tribunal de grande instance (Regional Court), Marseilles, and subsequently by the cour d'appel, Aix-en-Provence, by judgment of 27 November 1978, on the ground that he did not fulfil the conditions of good character required, which are identical to those in the case of an avocat. Mr Gullung then sought to be admitted to the Mulhouse Bar. The local Bar council rejected his application by a decision of 19 June 1979, confirmed by a judgment of the cour d'appel, Colmar, of 19 November 1979, on grounds concerned with Mr Gullung's character. His appeal against that judgment was dismissed by the Cour de cassation (Court of Cassation) on 7 February 1980.

4. At the same time as he was making his unsuccessful applications in France, Mr Gullung was registered as a Rechtsanwalt in Offenburg on 22 August 1979 after having been refused registration as a Rechtsanwalt in Freiburg. Subsequently he opened in Mulhouse a 'little legal advice office', to use the term employed by the cour d'appel, Colmar, where he used notepaper the heading of which included the words 'Cabinet d'avocat et de conseil' ('Avocat's and Legal Adviser's Chambers').

5. The conseil de l'ordre, Mulhouse, then adopted a decision prohibiting members of the Mulhouse Bar from lending assistance under the conditions laid down by the Council's directive of 22 March 1977 [1] and the French decree of 22 March 1979 [2] implementing the directive to any avocat who did not satisfy the necessary requirements as to good character and, in particular, to Mr Gullung. Mr Gullung brought an action against that decision before the cour d'appel, Colmar, which dismissed it by a judgment of 17 May 1982. During 1985 Mr Gullung, acting in conjunction with an avocat having a right of audience before the cour d'appel, Colmar, appeared on behalf of a civil party before the chambre d'accusation of that court. That appearance gave rise to decisions adopted by the conseils de l'ordre of Colmar and of Saverne similar to the one which had previously been adopted by the conseil de l'ordre, Mulhouse. Mr Gullung brought those two decisions before the cour d'appel, Colmar, which has referred the following two questions to the Court of Justice for a preliminary ruling.

6. The first question concerns the possibility for a person who is a national of two Member States by reason of dual nationality

* Translated from the French.

1 — Official Journal 1977, L 78, p. 17.

2 — *Journal officiel de la République française*, 23. 3. 1979, p. 659.

and who has been admitted to the legal profession in one of those two Member States to rely on Council Directive 77/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services in order to provide such services in the territory of the other Member State in which access to the legal profession has been refused to him by a court in the latter State for reasons connected with dignity, good repute and integrity. The Court is asked, more generally, whether the said directive is restricted by national public policy. The second question seeks to ascertain whether the establishment, pursuant to Article 52 of the EEC Treaty, in one Member State of a lawyer who is a national of another Member State presupposes membership of a bar in the host country where such membership is required by that country's legislation. If the reply to that question is in the negative, the Court is asked to state whether a lawyer who is a national of one Member State and established in another Member State without, however, being registered at a bar in the latter State may rely on the aforementioned directive.

7. Before examining those questions let me try to determine the possible effect of Mr Gullung's dual nationality. The Court has ruled in its judgments in *Knoors*[3] and in *Auer I*[4] that every Community national may rely, as against the State of which he is a national, on the provisions concerning freedom of establishment by application of the general principle of non-discrimination contained in Article 7 of the EEC Treaty.

8. The same principle must necessarily be applied to a person who is a national of two Member States with regard to each of the States in question. Nevertheless, the requirement that the situation in question must not be purely internal to a Member State still applies.[5] In that regard, if, as in this case, reliance is placed, as against a Member State, on the consequences of establishment in another Member State, it is obvious that there is a factor connecting that situation to provisions of Community law.

9. In addition, a Community national cannot be deprived of the benefit of the freedoms provided for by the Treaties or secondary Community law on the ground that he is a national of the State as against which he is relying on those provisions, provided that the situation in question involves the requisite 'external' factors.

I — The provision of services

10. In the light of those observations the first question therefore relates to the possibility for such a national to rely on Directive 77/249/EEC in a Member State where he has been refused access to the legal profession by a court on grounds connected with his character.

11. Let me begin by recalling to mind the Court's case-law concerning the conditions imposed by national legislation in relation to the provision of services. In its judgments in *Webb*[6] and in *Commission* v *Federal Republic of Germany*[7] the Court stated in that respect that

'all national legislation applicable to nationals [of the State where the service is given] and usually applied to the permanent activities of undertakings established therein' is not automatically applicable in its entirety 'to the temporary activities of

3 — Judgment of 7 February 1979 in Case 115/78 [1979] ECR 399.

4 — Judgment of 7 February 1979 in Case 136/78 [1979] ECR 437, paragraphs 28 and 29 of the decision.

5 — For a recent application of that rule see the Court's judgment of 23 January 1986 in Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, paragraph 14 of the decision.

6 — Judgment of 17 December 1981 in Case 279/80 [1981] ECR 3305.

7 — Judgment of 4 December 1986 in Case 205/84 [1986] ECR 3755, paragraph 26 of the decision.

undertakings which are established in other Member States[5].

In addition, it was pointed out in those decisions that any restrictions in the freedom to provide services could be imposed

'... only by provisions which are *justified by the general good* and *which are applied to all persons* ... operating within the territory of the State in which the service is provided' (the host Member State).[8]

In its judgment in *Commission* v *Germany* the Court went on to state that

'such requirements must be *objectively justified* by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected'.[9]

Three conditions are thus laid down with regard to the compatibility of any restriction on freedom to provide services with the Treaty: *protection of the general good, non-discrimination and observance of the principle of proportionality.*

12. I would also refer to the criteria laid down in the Court's judgment in *Van Binsbergen*[10] according to which, in relation to the provision of services as a legal representative,

'specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the *general good* — in particular rules relating to organization, qualifications, *professional ethics,* supervision and liability — which are binding upon any person established in the State in which the service is provided.'

8 — Judgment in Case 279/80, cited above, paragraph 17 of the decision, and judgment in Case 205/84, cited above, paragraph 27 of the decision, emphasis added.

9 — Judgment of the aforementioned Case 250/84, paragraph 27 of the decision, emphasis added.

10 — Judgment of 3 December 1974 in Case 33/74 [1974] ECR 1299, emphasis added.

13. Now that those general principles have been recalled to mind, let us examine the provisions of Directive 77/249 Article 4 (1) of which provides as follows:

'Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the *conditions laid down* for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State'.[11]

Article 4 (2) states that:

'a lawyer pursuing these activities shall *observe the rules of professional conduct of the host Member State*'.[11]

Finally, Article 4 (4) concerning the activities pursued by the provider of services other than those referred to in Article 4 (1) provides in essence that he is to remain subject to the conditions and rules of professional conduct of the country from which he comes without prejudice to respect for the rules of the host State in so far, in the first place, as the latter rules are capable of being observed by a lawyer who is not established in the host State and, in the second place, as their observance is objectively justified to ensure the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

14. Is it necessary to dwell at length on the aspect of professional ethics, in the wide sense of the term, which is covered by the rules of conduct of the legal profession? The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community adopted on 16 September 1977 by the Consultative Committee of the Bars and Law Societies of the European Community states that 'the proper performance of the lawyer's function cannot

11 — Emphasis added.

be achieved without the complete trust of everyone concerned. All professional rules are based from the outset upon the need to be worthy of that trust'. The Declaration goes on to state as follows: 'Relationships of trust cannot exist if a lawyer's personal honour, honesty and integrity are open to doubt'. Obviously good character, which is central to the conditions required for the practice of the profession in question, constitutes a requirement 'justified by the general good' and 'objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected', to cite the terms used by the Court in its aforementioned judgments in *Webb* and *Commission* v *Federal Republic of Germany.*

15. Might it not be objected that the directive prescribes the observance of the conditions and rules of professional conduct *at the time* when the services are provided and that what is in point in this case is a legal determination relating to past conduct? In my view such an argument is beside the point. By requiring observance of the rules of professional conduct, the directive *assumes implicitly* that the person providing the services has the capacity to comply with those conditions and rules. Hence, unless *variable standards* as regards the good character of a lawyer are accepted according to whether he is enrolled at the bar or whether he provides services, a person who has been refused access to the profession in a Member State cannot provide services as he does not satisfy the *actual conditions* laid down by the directive.

16. I consider it necessary to add two supplementary observations to that interpretation. In the first place, 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. In such a situation the Court has stated, in particular in its judgments in *Van Binsbergen*[12] and in *Commission* v *Federal Republic of Germany*[13] that the national authorities may

'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.'

It is not clear that the application of those principles is necessary for the purpose of the decision in the case before the cour d'appel, Colmar. Consequently, I do not propose that the Court's reply should refer to them expressly but in my view it appeared necessary to place the questions raised before the Court in the general framework of the scope of each of the freedoms concerned.

17. In the second place, in this case a court has considered the reasons which might bar access to the profession of lawyer. In my view it is not without significance that, in conformity with the 'right to an effective judicial remedy' recognized by this Court in its judgment in *Johnston,*[14] the relevant requirements as to good character may be subjected to judicial control. Observance of that principle, it hardly needs saying, does not reflect any mistrust of the professional organizations in the Member States but merely represents a legal requirement of a higher order and a guarantee of greater equanimity in giving effect to the freedoms provided for in the Treaty.

12 — Judgment of 3 December 1974 in Case 33/74 [1974] ECR 1299, paragraph 13 of the grounds of the judgment, emphasis added.

13 — Judgment of 4 December 1986 in Case 205/84 [1986] ECR 3755, paragraph 22 of the decision, emphasis added.

14 — Judgment of 15 May 1986 in Case 222/84 [1986] ECR 1651.

18. The interpretation of the directive which I am proposing to the Court seems to me to exclude recourse to the concept of public policy. Where a Community national is unable to rely on the directive concerning the provision of services because he is *unable to satisfy the conditions* laid down in the directive there is no need to have recourse to the exception provided for in Article 56 of the Treaty to which Article 66 refers.

II — Freedom of establishment

19. Does the establishment of a lawyer presuppose registration at a bar where the legislation of the Member State requires this? In order to clarify the purpose of this question let me begin by raising a matter discussed in the course of the written procedure and at the hearing by a number of the participants in these proceedings, namely the question of the establishment as a legal 'consultant' in one Member State of a lawyer established in another Member State. In its written observations the Commission referred expressly to that kind of situation. However, it had to point out at the hearing that the questions referred to the Court in this case were not concerned with such a situation. That is a view which I fully share, having regard both to the circumstances in the main proceedings and to the manner in which the cour d'appel, Colmar, formulated its question.

20. It should be noted that the dispute in the main proceedings arose in regard to activities relating to the *representation* of a client *in legal proceedings* or before public authorities, which is a characteristic activity of a *lawyer.* It should also be noted that the cour d'appel, Colmar, refers to the establishment by virtue of Article 52 of the Treaty of Rome of a *lawyer.* It seems to me therefore that it is hard to find any justification for extending the scope of the Court's reply so as to cover the discussion in question, although I do not underestimate its importance.

21. Consequently, I would merely state in that connection that I am somewhat puzzled by the argument put forward by the United Kingdom. This consists in drawing a distinction between lawyer, (avocat) in the wide sense, namely 'member of the legal profession', and avocat in the 'French' sense, in order to exempt the former from the requirement of enrolment at a bar if he wishes to practise only in a consultative capacity under his professional title as obtained in his country of origin. If a problem of that kind were submitted to the Court, I could not fail to remark that Article 1 (2) of the Directive of 22 March 1977 states that 'lawyer' (avocat) means any person entitled to pursue his professional activities under one of the following designations: avocat, advocaat, advokat, Rechtsanwalt, barrister, solicitor, avvocato, advocate. Is it not possible to see in this the beginnings of a Community definition of the term 'lawyer' for the purposes of the provision of services? Consequently, in the present state of Community law, I would entertain serious doubts about the advisability and relevance of casting aside the concepts thus defined when it comes to the matter of establishment. Such establishment, under a professional title obtained in the country of origin, with a view to engaging in consultancy without enrolling at a bar, inasmuch as it claims as its legal basis the absence of a legal monopoly in certain Member States, would not fail to give rise to uncertainty and confusion and, indeed, a disintegration of the rules governing the profession as a result of the exportation, as it were, of personal law, something which would assuredly be quite alien to any moves in the direction of integration which are based on the principle of equal treatment with nationals. Now that I have clarified these points, it remains for me to consider the question of principle referred to the Court by the cour d'appel, Colmar, in respect of the requirement of enrolment at a bar for the establishment of a lawyer.

22. In accordance with a long line of cases beginning with the Court's judgment in

Reyners it is sufficient, in the absence of the directives prescribed by Articles 54 (2) and 57 (1) of the EEC Treaty, to refer solely to Article 52 paragraph (2) of which provides that freedom of establishment is to include the right to take up and pursue activities 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.[15]

The objective of that principle of equal treatment with nationals which, the Court stressed in its judgment in *Reyners*, is of 'fundamental character . . . in the system of the Treaty',[16] is to put nationals of the State in question and other Community nationals on an equal footing in relation to the legislation of the host State. Such parity plainly excludes any additional condition,[17] any direct or covert discrimination on grounds of nationality and any requirement which has the effect of rendering freedom of establishment ineffective.

23. Thus, the Court stated in its judgment in *Thieffry*[18] that the refusal to give 'civil effect' to a diploma recognized as an equivalent qualification by the university authorities of the host State would constitute a discriminatory restriction. The Court stated in its judgment in *Klopp* that the national 'single chambers' rule could not, however, have the effect of causing the authorities of the host State to require a person to abandon the establishment he already had.

24. Subject to those points the principle remains that

'the practice of such professions [such as that of avocat] remains governed by the law of the various Member States'.[19]

In that respect the Court referred in its judgment in *Thieffry*[20] to

'the application of national professional rules justified by the general good, in particular rules relating to organization, qualifications, professional ethics, supervision and liability',

which must be reconciled with freedom of establishment. Without doubt that formulation, which has previously been employed in the Court's judgment in *Van Binsbergen*[21] in relation to the provision of services, constitutes the criterion by reference to which the conformity of national rules with the Treaty must be tested. In that respect, therefore, what is the position as regards compulsory registration with a professional organization?

25. I would observe, in the first place, that in its judgment in *Auer II* which concerned the profession of veterinary surgeon, in regard to which, it is true, a directive did refer on several occasions to such membership, the Court stated:

'The laws of Member States which provide for compulsory registration with a professional society are not, . . . , as such, incompatible with Community law'.[22]

It did so after stating that:

'Compulsory registration with or membership of a professional organization or body . . . must be regarded as lawful, inasmuch as they seek to ensure the observance of moral and ethical principles and thedisciplinary control of the activity of veterinary surgeons, requirements which are worthy of protection'.[22]

15 — Judgment of 21 June 1974 in Case 2/74 [1974] ECR 631.

16 — Case 2/74, cited above, paragraph 43 of the grounds of the judgment.

17 — Judgment of 28 June 1977 in Case 11/77 *Patrick* v *Ministre des affaires culturelles* [1977] ECR 1199.

18 — Judgment of 28 April 1977 in Case 71/76 [1977] ECR 765.

19 — Case 2/74, cited above, paragraph 48 of the grounds of the judgment.

20 — Case 71/76, cited above, paragraph 12 of the decision.

21 — Case 33/74, cited above, paragraph 12 of the grounds of the judgment.

22 — Judgment of 22 September 1983 in Case 271/82 [1983] ECR 2727, at p. 2744, paragraph 18 of the decision.

26. That recognition in principle of professional societies by Community law is certainly not contradicted by the Court's judgment in *AM & S* where the Court stated, when ruling on the confidentiality of written communications between lawyer and client, that the counterpart of the protection given to such communications

'lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose'. [23]

27. Finally, contrary to the observations submitted by the plaintiff in the main proceedings, I can find no support in the Court's judgment in *Klopp* for freedom of establishment regardless of the requirement of membership of a professional society. In fact, after referring to the principle of equal treatment with nationals, the Court stated that in the absence of Community rules

'each Member State is free to regulate the exercise of the legal profession in its territory'. [24]

Subsequently, referring to the 'special nature' of the legal profession, the Court recognized that the host Member State

'must have the right, in the interests of the due administration of justice, to require that *lawyers enrolled at a bar* in its territory should practise in such a way as to maintain sufficient contact with their clients and the judicial authorities and abide by the rules of the profession'. [25]

23 — Judgment of 18 May 1983 in Case 155/79 *AM & S Europe Limited* v *Commission* [1982] ECR 1575, at 1611, paragraph 24 of the decision.

24 — Judgment of 12 July 1984 in Case 107/83 *Ordre des avocats au barreau de Paris* v *Klopp* [1984] ECR 2971, at p. 2989, paragraph 17 of the decision.

25 — Case 107/83, cited above, paragraph 20 of the decision, emphasis added.

28. Would it be reading too much into the Court's decision to see in it, far from any authority for the 'deregulation' which has been alleged, but an affirmation that the requirement of registration at a bar is compatible with the Treaty? The Court in fact set out the reasons for the existence of that requirement. What is more, in determining the scope, with regard to freedom of establishment, of national rules governing access to the legal profession the Court did not, so far as registration at a bar is concerned, dissociate such a condition, imposed by national legislation, from establishment itself.

29. At the end of these observations which lead me to propose that the Court should hold that Article 52 of the EEC Treaty does not preclude the requirement at issue, permit me to refer briefly to some practical consequences of the contrary conclusion which would result in a distinction between national lawyers who alone would be subject to the requirement of enrolment and their Community colleagues who, on establishment, would be exempt from that obligation. The potential dangers of discrimination residing in the distinction between an 'established lawyer' and a 'registered lawyer' must not be disregarded. More particularly, unless one were to resign oneself to a very dangerous lack of supervision, thorny problems would not fail to arise once it came to imposing sanctions for even the most elementary breaches committed in the State of establishment. How is a person to be perceived if he remains wholly outside the professional organization in the host State? Should a Community lawyer who as a result of an apparently 'liberating' solution escapes supervision by a professional body be subject to *direct* State control contrary to the traditions of professional independence the benefit of which would thus be reserved to national lawyers alone. Serious disadvantages thus appear in a solution which is dictated neither by the Treaty nor by the case-law of the Court.

30. In view of the reply which I have thus proposed to the Court, it does not seem necessary to consider the alternative question put in the event of a negative reply, that is to say that the requirement of registration at a bar is incompatible with the EEC Treaty. In that connection I merely point out that it would be surprising for an *established lawyer* to rely on the provisions of the directive concerning the *provision of services.* Establishment necessarily concerns the full and complete practice of his profession. For an established lawyer to place himself in the context of the rules governing the provision of services would indicate total confusion on his part. In addition, it is not possible, in respect of the same activity, to rely indiscriminately both on the rules governing the provision of services and on those governing establishment. The application of one set of rules excludes the application of the other. In relation to distinguishing between the two situations the Court stated in its judgment in *Commission* v *Federal Republic of Germany* that

'a *permanent presence* ... 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'.[26]

The clarity of those principles makes any wider discussion pointless here, even if it were confined to a rehearsal of the Court's decisions concerning the use of freedom to provide services for improper purposes.

31. Consequently, I propose that the Court should rule as follows:

(i) a person who is a national of two Member States may rely, as against each of the States concerned, on the rights derived from the Treaty and from secondary law provided that there is a factor connecting his situation to the provisions laid down by Community law;

(ii) such a national, established as a lawyer in one Member State, may not, where he fails to satisfy its conditions, rely on Directive 77/249 facilitating the exercise by lawyers of freedom to provide services, in a State where access to the legal profession is refused by a court or tribunal for reasons of dignity, good repute and integrity;

(iii) Article 52 of the EEC Treaty does not prevent a Member State from making the establishment as a lawyer in its territory of a lawyer of another Member State subject to the requirement, imposed on its own nationals, of registration at a bar.

26 — Case 205/84, cited above, paragraph 21 of the decision, emphasis added.