OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 11 July 1985

My Lords,

This reference under Article 177 of the EEC Treaty concerns Council directive 77/780 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (Official Journal 1977, L 322/30).

Under the directive, Member States are to require credit institutions to obtain prior authorization from the supervisory authorities before commencing their activities. Such authorization may only be granted when the conditions laid down in the directive are met. Moreover, credit institutions are subject to continuing supervision and under Article 8 the supervisory authority may withdraw the authorization issued to a credit institution in certain circumstances. Accordingly, Article 7 provides that the supervisory authorities of the various Member States shall collaborate closely in order to supervise credit institutions operating in more than one Member State. The same provision stipulates that to this end they shall supply each other with 'all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision and examination of the conditions for their authorization and all information likely to facilitate the monitoring of their liquidity and solvency'. To ensure that the supervisory authorities would be able to carry out these functions unimpeded, a provision relating to confidentiality was clearly needed.

By Article 12:

'(1) Member States shall ensure that all persons now or in the past employed by the competent authorities are bound by the obligation of professional secrecy. This means that any confidential information which they may receive in the course of their duties may not be divulged to any person or authority except by virtue of provisions laid down by law.

(2) Paragraph 1 shall not, however, preclude communications between the competent authorities of the various Member States, as provided for in this directive. Information thus exchanged shall be covered by the obligation of professional secrecy applying to the persons now or in the past employed by the competent authorities receiving the information.

(3) Without prejudice to cases covered by criminal law, the authorities receiving such information shall use it only to examine the conditions for the taking up and pursuit of the business of credit institutions, to facilitate monitoring of the liquidity and solvency of these institutions or when the decisions of the competent authority are the subject of an administrative appeal or in court proceedings initiated pursuant to Article 13.'

The reference arises in this way. On 27 July 1981 the plaintiff local authority deposited HFL 600,000 with the Amsterdam American Bank NV. On 23 October of the same year that bank was declared insolvent. On 2 August 1982 the local authority applied for and obtained an order for the provisional examination of witnesses, a procedure of Dutch law available before proceedings for substantive relief are commenced. The defendant Mr Hillenius was one of the witnesses subpoenaed to give evidence about matters relating to the bankruptcy and he duly appeared in court. He is head of the accountancy division of De Nederlandsche Bank NV, the Dutch central bank, which body is the supervisory authority for banks in the Netherlands under the directive. On his appearance before the court the defendant refused to answer a number of questions put to him on the grounds that they were covered by banking secrecy. These questions concerned the manner in which De Nederlandsche Bank had exercised its supervision of the bankrupt bank, and related in particular to various Latin American transactions. The purpose of the questions appears to have been to substantiate the plaintiff's conviction that the central bank had failed properly to supervise the activities of the American Amsterdam Bank. As Mr Hillenius has made clear in his written submissions, he has the full backing of the central bank.

The dispute as to whether Mr Hillenius was obliged to divulge the information concerned turned in particular on Article 12 of Directive No 77/780 but two provisions of Dutch law are also in point. One of these is Article 46 (1) of the Wet Toezicht Kredietwezen (Law on the supervision of credit) which was modified to give effect to the directive. So far as relevant that reads as follows:

'Any person performing any duty by reason of the application of this Law or orders adopted pursuant to this Law shall not make use of or divulge data or information provided pursuant to this Law or obtain during an inspection of books and records any further or in any other way than is necessary for the performance of his duty or required by this Law.'

The other provision is Article 1946 of the Burgerlijk Wetboek (Civil Code) which, in so far as is material, reads as follows:

'All persons capable of acting as witnesses shall be obliged to give evidence in legal proceedings.

Nevertheless the following persons shall be entitled to refuse to give evidence:

(3) All those persons who by reason of their calling, profession or legal position are obliged to maintain secrecy, but only and exclusively with regard to knowledge entrusted to them in that capacity.'

The District Court rejected Mr Hillenius' claim that he was not required to answer certain questions; the Regional Court of Appeal upheld his claim.

The case ultimately reached the Hoge Raad (the Supreme Court of the Netherlands), which, faced with these conflicting views, has referred the following three questions for a preliminary ruling:

'(1) Does Article 12 (1), laying down what the Member States must ensure, also cover the making of statements by the persons referred to in the first sentence of that provision acting as witnesses in a civil action?

(2) If so, must Article 12 (1) be understood as meaning that as regards the making of such statements an exception based upon a provision laid down by law, as referred to in the last phrase of that provision beginning with the word "except", may be assumed to exist only where it can be founded upon a legal provision specially enacted to form an exception to the prohibition of divulging the information in question?

(3) Or, still on the assumption that the first question must be answered in the affirmative, does Article 12 (1) allow a general provision such as the first paragraph of Article 1946 of the Burgerlijk Wetboek to be regarded as a provision laid down by law by virtue of which the information referred to in Article 12 (1) may be divulged?'

Observations have been put in by the parties to the main action, the Commission and the German, Italian and United Kingdom Governments.

I read paragraph 1 of Article 12 as laying down the general principle. No confidential information received by an employee (or a past employee) of a competent authority may be divulged to any person or authority except by virtue of provisions laid down by law. This covers all confidential information from whatever source; Member States must ensure that an enforceable obligation of professional secrecy exists in respect of all such information.

Paragraph 2 is dealing with a specific case falling within the general principle. The general ban on divulging confidential information does not prevent the competent authorities of the various Member States from passing it on to the competent authorities of other Member States. This is obviously necessary if the supervision and collaboration intended by the directive is to be effective. The ban does, however, apply to employees or former employees of the competent authorities of the Member State receiving information.

Paragraph 3 is not dealing with the divulging of information but with its 'use'. Use may involve divulging, but if used only internally for the purposes of arriving at a decision it does not necessarily do so. Without prejudice to cases covered by the criminal law, information received by the competent authorities may only be used for the purposes specified — i.e. to examine the conditions of the taking up and pursuit of credit institutions, to facilitate monitoring their solvency or in connection with an administrative appeal or with court proceedings under Article 13 of the directive. It may not be used for other purposes. I read 'such information' in paragraph 3 as referring back to paragraph 1 of Article 12 and not merely as limited to that information specified under paragraph 2. If the opposite had been intended I would have expected paragraph 3 to have been a sub-paragraph of paragraph 2 or to have referred to 'such information as is referred to in paragraph 2 hereof'. In the French text 'les informations' in paragraph 3 refers back to 'les informations confidentielles' in paragraph 1 and not to 'ces informations' in paragraph 2.

It follows that I do not accept the Commission's analysis which draws a clear distinction between, on the one hand, paragraph 1 (concerning all information gleaned other than from the competent authorities of the Member States) and, on the other hand, paragraphs 2 and 3 (information received from the competent authorities of other Member States).

As to the first question I can see no valid reason for reading the prohibition in Article 12 (1) as not applying to the situation where employees or former employees of the competent authorities are called to give evidence in civil proceedings. It may be an unusual use of language to describe a civil court of law as 'any person or authority' but in this directive those words in my view do include a court of law. Unless the ban on disclosure is general, subject to 'provisions laid down by law', the competent authorities will not receive the information they need. I do not accept the arguments of the Hillegom municipality that such testimony is a matter of procedural law which falls outside Article 12. I would for my part answer the first question in the affirmative.

The second question asks in effect whether 'the provisions laid down by law' have to be specifically enacted for the purpose of the directive. In my opinion those provisions are not necessarily so limited. If pre-existing national legislation creates an exception to the matters specifically dealt with by the directive, in a way which is compatible with the directive, then, in my opinion, that legislation can constitute a provision 'laid down by law' within the meaning of the directive. The United Kingdom contends that such provisions can include decisions of the courts as well as legislation. Under the common law system it seems necessary, or at least desirable, that such an exception should be included. Yet since all the language versions of the directive must have the same meaning, it is necessary to consider the other versions to resolve this question. They seem, as I understand it, to be limited to legislative provisions rather than case law. Thus the French version has 'dispositions législatives', the German 'Rechtsvorschriften'. Since no express reference is made to case law (particularly of the United Kingdom and Ireland) the words of the English-language version must in my view be read as meaning legislative provisions.

The third question creates more difficulty. If the Commission's dichotomy between (a) paragraph 1 and (b) paragraphs 2 and 3 were to be accepted, then there might be a difference between what provisions of law could be adopted, for the purposes of Article 12 (1), in relation to information obtained other than from the competent authorities of other Member States, and the specific uses of information received from such other authorities set out in paragraph 3. On the basis that this dichotomy does not exist, it can still be contended persuasively that the 'provisions laid down by law' within the meaning of Article 12 (1) must be limited to the uses specified in Article 12 (3). On that basis it is said that the answer to the third question is in the negative since laws of the kind in question fall outside Article 12 (3).

The strongest argument in favour of this latter contention is that if it were not so Member States would have a wide discretion as to what exceptions they create; national courts have no criteria from the directive to enable them to decide whether exceptions are compatible with the directive. In the result considerable uncertainty would arise.

Despite the force of this contention I have come to the conclusion that it should not be

accepted. Although national legislation must ensure that information can be used for the purposes specified in Article 12 (3) it does not seem to me that the provisions laid down by law, which I take to mean national law, are limited to those purposes. This directive is a first step in the harmonization of national laws relating to credit institutions. National laws on confidential information, and as to the right or the duty to refuse to answer, vary and have not yet been harmonized. In the present state of things, however regrettably imprecise may be the result, it seems to me that Member States have a discretion under Article 12 (1) of the directive to retain or introduce exceptions to the prohibitions on disclosure, which are not limited to the situations envisaged in Article 12 (3). Such exceptions must, however, be compatible with the overall purpose of the directive. Exceptions which would seriously inhibit the disclosure of information to the competent authority, or which might have a serious effect on the stability of credit institutions and which cannot be justified by other overriding considerations of the public interest, would not be compatible with the overall purpose of the directive.

The difficulties inherent in this solution flow from the present state of development of Community legislation. They cannot in my view, in the absence of clear words, be avoided by reading the uses specified in Article 12 (3) as a limitation on the power of Member States to retain or introduce appropriate legislation within the meaning of Article 12 (1).

Legislation of the kind contained in Article 1946 of the Netherlands Civil Code does not seem to me *ex facie* to be incompatible with Article 12 (1) of the directive.

Article 5 (3) of Council directive 83/350/EEC (Official Journal 1983, L 193, p. 18) of 18 July 1983 does not seem to me to affect the conclusions reached above.

Accordingly in my opinion the questions posed should be answered on the lines:

(1) The obligation of professional secrecy provided for by Article 12 (1) of Council Directive 77/780 covers testimony in civil proceedings given by the persons referred to in that provision.

(2) Legislative provisions may constitute 'provisions laid down by law' within the meaning of Article 12 (1) even if they have not been enacted specifically to implement that Article, provided that it is sufficiently clear from their wording that they relate to the matters concerned.

(3) 'Provisions laid down by law' within the meaning of Article 12 (1) of the directive are not limited to those concerned with the uses specified in Article 12 (3) of the directive but may include other national provisions relating to the obligation to give evidence in civil proceedings which are not incompatible with the overall purposes of the directive.

The Commission and the Governments which have intervened should bear their own costs. The costs of the parties to the main action fall to be determined by the national court.