# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 22 January 1987 *

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

1. On 12 December 1977 the Council of the European Communities issued, pursuant to Article 57 of the EEC Treaty, Directive 77/780/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and the pursuit of the business of credit institutions (Official Journal 1977, L 322, p. 30). The directive constituted the first stage towards achieving freedom of establishment of credit institutions and the liberalization of banking services and set out (a) to 'eliminate the most obstructive differences between the laws of the Member States as regards the rules to which these institutions are subject' (second recital in the preamble) and (b) to introduce common requirements for the grant of authorization to pursue the business of a credit institution (eighth recital in the preamble). Once those objectives have been attained each State should be in a position to provide for 'overall supervision' of the activities of the credit institutions no matter where they are operating in the Community (third recital in the preamble; see also the Court's judgment of 11 December 1985 in Case 110/84 *Municipality of Hillegom* v *Cornelius Hillenius* [1985] ECR 3947 at p. 3962, paragraph 23 *et seq.*).

The directive, which the Member States were to implement by the end of 1979, was not incorporated into Italian law until July 1985, that is to say more than two years after the judgment in which the Court of Justice held that the Italian Republic had failed to fulfil its obligations in that respect (judgment of 1 March 1983 in Case 300/81 *Commission* v *Italy* [1983] ECR 449). However, the Corte d'Appello (Court of Appeal), Venice, had already been called upon to apply it in criminal proceedings.

2. The facts are as follows. Italo Bullo and Francesco Bonivento, employees of the Banca Agricola Popolare of Cavarzere (province of Venice), were charged with the offence of misappropriating private funds (Article 315 of the Italian Criminal Code) for having granted loans of an amount higher than that laid down in the relevant rules of the Banca d'Italia (Italian central bank) and of the Italian Treasury Ministry. Article 315 of the Italian Criminal Code provides that 'a public official or a person responsible for a public service who appropriates for himself or, in any way, diverts for the profit of himself or a third party money . . . not belonging to the public administration of which he was in possession by virtue of his office or service shall be punished by a term of imprisonment of from three to eight years . . .'.

Having been found guilty by the court of first instance, the two employees appealed *inter alia* on the ground that to classify employees of credit institutions as persons responsible for a public service is contrary to the provisions and objectives of Directive 77/780/EEC. In its order of 15 April 1985 the Corte d'Appello, Venice, held that the Banca Agricola Popolare was among the

* Translated from the Italian.

institutions to which the directive applied; however, as regards the implications of the directive with regard to the case at issue the national court requested the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty.

It asked in particular whether there may 'lawfully be *included* in or, by contrast, *must* there be *excluded* from, the "result to be achieved" [under the directive] ..., as regards the rules [laid down by the directive] on the structural organization of the credit institution..., the classification of the employees of the "credit institutions" ... as "public officials" or as "persons responsible for a public service" as defined in... the Italian Codice Penale [Penal Code] now in force'. The order states that it is critical to resolve this issue 'both because the answer to the question may affect the severity of the penalty laid down... and because if the second interpretation [referred to in the order] ... is correct, a question might arise as to the constitutional lawfulness [cf. Article 315 of the Italian Penal Code] ... and the question might also arise whether or not [the national court] ... ought to apply the directive directly'.

Let us dwell briefly on that last remark. Although it was understandable at the time at which it was made it does not correspond to the present situation. Nine years ago the Court of Justice stated that the national court is 'under a duty to give full effect to [provisions of Community law] ..., if necessary refusing of its own motion to apply any conflicting provision of national legislation..., and it is not necessary for the court to request... the prior setting aside of such provision by legislative or other constitutional means' (judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* [1978] 629, 645, paragraph 24). The Italian Constitutional Court did not accept that principle immediately. However, recently it has recognized its effectiveness, stating that it 'applies not only to the rules laid down by the institutions of the EEC by regulation but also to the rulings resulting... from judgments of the Court of Justice interpreting Community legislation' (judgment No 113 of 1 April 1985, No 107 bis *GURI*, 8.5.1985.

Accordingly, if the Court's answer to the question put by the national court differs from that which I shall shortly put forward, the Corte d'Appello, Venice, will have to decide the main case in the light of the relationship between Community law and national law as it is defined by those judgments.

3. In the course of the proceedings before the Court of Justice written observations have been submitted by the accused, the Italian Government and the Commission of the European Communities. The accused consider that to classify employees of private banks as 'persons responsible for a public service' gives the courts the power directly to supervise the activities of those institutions and precludes any discretion in their administration because it assigns criminal-law importance to contracts which should be regarded as lawful in so far as they take place in the context of a private undertaking. Indeed, in their view such checks and constraints are incompatible with the entrepreneurial nature of the business of a credit institution; hence they impede the implementation of the objectives pursued by the directive and conflict with the freedom of establishment and freedom of competition guaranteed by the Treaty.

For their part, the Italian Government and the Commission point out that no provision of the directive debars the Member States from applying the classification at issue to employees of private banks. Moreover, it is impossible to infer the existence of such a

prohibition from the directive taken as a whole; this can be seen simply from the fact that the directive did not take the place of national rules, it merely coordinated them.

4. As has been seen, the approximation of legislation effected by the directive is concerned with the 'credit institution', that is to say 'an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account' (first indent of Article 1). Power to carry out such activities is conditional on 'an instrument issued . . . by the authorities' of the Member States (second indent of Article 1), the issue of which is dependent on a series of requirements (Article 3). The paramount consideration of the directive as a whole is the prohibition of any discriminatory treatment *vis-à-vis* credit institutions on the basis of nationality or of the fact that an undertaking is not established in a Member State where the services are provided (first recital in the preamble).

The directive, however, contains no provision relating, even remotely or indirectly, to the employment relationship and the status of employees of credit institutions; nor does the result intended to be achieved by the directive — the free pursuit of the business of credit institutions throughout the Community — entail the exemption of those employees from the duty to comply with the criminal-law provisions in force in the Member State of establishment, at least unless those provisions are drafted or applied in a discriminatory manner. Furthermore, within the Italian legal order the classification at issue is important solely for the purposes of criminal law, sometimes as part of the *actus reus*, at others as a condition for the application of a more severe penalty. Consequently, from the point of view of Community law, it does not affect credit institutions from other Member States; more specifically, it does not restrict their right of access to the exercise of banking business in Italy.

The accused do not agree. However, their argument, based on the entrepreneurial nature of banking business, is unfounded. As we have seen, it is on the basis of the entrepreneurial nature of banking business that the directive gives deposit-taking and loan-granting institutions the right of unrestricted establishment in any Member State. But this does not imply that Community law precludes in principle the national legislature from conferring on the courts — and in particular on the criminal courts — a 'power of supervision' over the administration of the banks. Such a power would be incompatible with the Treaty and with the directive at issue only if it goes so far as to restrict the right of establishment; as I have just observed, that is certainly not the case here even if it is assumed (but not necessarily accepted) that Article 315 of the Italian Criminal Code does enable the courts to supervise the activities of the credit institutions.

I am aware that the classification of employees of private banks as persons responsible for a public service is the subject of lively debate in the banking industry and in Italian legal circles and I personally regard as persuasive the arguments of those who consider it to be anachronistic or, in any event, excessive in the light of today's requirements for the protection of credit. However, the fact remains that the issue is purely one of domestic law and its resolution is a matter solely for the national legislature.

5. In the light of the foregoing considerations I propose that the Court should answer the question referred to the Court of Justice for a preliminary ruling by the Corte d'Appello, Venice, by order of 15 April 1985 in the criminal proceedings against Italo Bullo and Francesco Bonivento as follows:

'Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions does not preclude the legislation of a Member State from attributing to the employees of such institutions the classification of "public officials" or "persons responsible for a public service" for the ends and purposes of the application of provisions of criminal law.'