OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 7 May 1991 *

Mr President,
Members of the Court,

1. In this application the Commission is asking the Court to declare that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty and Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services. [1]

More specifically, the Commission challenges the provisions of Decree No 79-233 [2] which restrict the scope of the Community legislation; those provisions extend beyond the permissible limits the obligation incumbent on the lawyer providing services to work in conjunction with a local lawyer, and they envisage the application, also in relation to those covered by the directive, of French legislation which provides for the territorial exclusivity of the *ius postulandi.*

2. I shall deal briefly with the first two complaints which are not disputed by the French Government and which, in my view, are well founded.

The Commission is correct in arguing that the first paragraph of Article 126-2 of the decree is contrary to Article 1 of the directive, in so far as, by referring to lawyers who are nationals of the Member States and are established in their own country of origin, it seems to exclude from its own field of application, contrary to what is laid down by the directive, lawyers of French nationality who are established in another Member State.

Moreover, even if, as is clear from the wording of the other provisions of the decree (see, for instance, Article 126-1), that exclusion would seem to be involuntary and probably the result of an oversight by the legislature, the fundamental need for legal certainty nevertheless warrants the amendment of the provision in question.

3. Secondly, the Commission points out that by requiring the lawyer providing services to work in conjunction with a local lawyer even when appearing before bodies and authorities which have no judicial function and in proceedings in respect of which French law does not make it compulsory to be represented by a lawyer, the fifth paragraph of Article 126-3 of the decree is contrary to Article 5 of the directive, which instead provides for the possibility of imposing that obligation only in respect of the pursuit of activities relating to the representation and defence of a client in legal proceedings.

* Original language: Italian.

1 — OJ 1977 L 78, p. 17.

2 — Official Journal of the French Republic of 23 March 1979.

That complaint as well would seem to be well founded. It follows from the case-law of the Court that Article 5 of the directive cannot have the effect of imposing upon a lawyer providing services requirements for which there is no equivalent in the professional rules which would apply in the absence of any provision of services within the meaning of the Treaty, nor is there any consideration relating to the public interest which, in judicial proceedings for which representation by a lawyer is not mandatory, can justify the obligation for a lawyer to work in conjunction with a lawyer practising before the court in question.[3]

4. The Commission's third criticism, unlike the first two, is challenged by the defendant.

In order to understand the nature of that allegation a brief preliminary explanation is called for. France, like other Member States, applies the principle of the territoriality of the *ius postulandi*, according to which a lawyer, whilst being authorized to provide assistance throughout the national territory, is entitled to represent a party to a case, and thus to carry out the requisite procedural formalities in his capacity as authorized representative, only before the Tribunal de Grande Instance (Regional Court) of the Bar of which he is a member.

That restriction, which applies in general terms to all lawyers established on French territory, is extended to lawyers providing services who are established in other Member States by the fourth paragraph of Article 126-3 of the decree, according to which, in order to be able to conduct the proceedings or carry out the procedural formalities, the lawyer must, in cases where it is compulsory to be represented by a lawyer, retain a lawyer who is a member of the Bar of the Tribunal de Grande Instance or, so far as the Cour d'Appel is concerned, an *avoué* practising before that court.

5. Whilst acknowledging that, as Article 5 of the directive provides, it is permissible to require a lawyer providing services to work in conjunction with a colleague who practises before the judicial authority in question,[4] the Commission regards as inconsistent with Community law the prohibition on a lawyer established in another Member State representing a party to a case by carrying out the requisite procedural formalities.

6. In reply the French Republic states that the rule concerning the territorial exclusivity of the *ius postulandi*, as applied in France, is fully justified inasmuch as it is intended to ensure the proper administration of justice by guaranteeing permanent contact between the lawyer and the court and enabling the local lawyer to follow the different stages of the procedure so as to be answerable to the court.

The defendant adds that, in its judgment in Case 427/85,[5] the Court did not intend to criticize the territorial exclusivity of the *ius postulandi* as such, but only certain

3 — Judgment in Case 427/85 *Commission* v *Germany* [1988] ECR 1123, paragraphs 13 and 14.

4 — See, for the same view, the Court's judgment in *Commission* v *Germany*, cited above, paragraph 43. It should be noted that Germany has intervened in these proceedings in support of the defendant under the misapprehension that the Commission did not accept the argument that the local lawyer must be admitted to practise before the judicial authority in question.

5 — *Commission* v *Germany*, cited above.

particularly vexatious formalities, which are not justified by objective requirements.

7. Let me say at once that the French Government's point of view does not, it seems to me, correspond to a correct reading of the relevant provisions of the Treaty.

On the basis of Article 59, all restrictions on freedom to provide services must be abolished in order to enable, in particular, the person providing a service, as laid down by the third paragraph of Article 60, to pursue his activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals.

However, those provisions, whose principal aim is to enable the person providing the service to pursue his activities in the host Member State without suffering any discrimination, do not mean that all national legislation applicable to nationals of the host State and usually applied to the permanent activities of those established therein may be similarly applied in its entirety to the temporary activities of persons established in other Member States. [6]

As the Court has pointed out in Case 427/85, [7] the rule of territorial exclusivity is part of national legislation normally relating to a permanent activity of lawyers established in the territory of the Member State concerned, all of whom have the right to gain admission to practise before a judicial authority and to pursue before it all the activities necessary for the representation and defence of clients. Accordingly, that rule is inapplicable to activities of a temporary nature pursued by lawyers established in other Member States, since the conditions of law and fact which apply to those lawyers are in that respect fundamentally different.

8. As for the reasons relied upon by the defendant, it must be borne in mind that similar objections had been raised by the German Government in Case 427/85 and rejected by the Court.

In particular, as regards the need to ensure that the lawyer representing a party to a case maintains the necessary contact with the court, the Court of Justice has frequently stated that modern methods of transport and telecommunications make it possible to ensure that lawyers maintain contact with their clients and the judicial authorities in an appropriate manner. [8]

9. Admittedly, the French Government's concern is, in any event, worthy of the closest attention, since it is undeniable that one of the main tasks of a State governed by the rule of law is precisely to ensure the proper administration of justice.

From that point of view, therefore, it is indisputable that the court must be afforded, in addition to the assistance provided by the

6 — Judgment in Case 279/80 *Webb* [1981] ECR 3305, paragraph 16.

7 — Judgment in *Commission* v *Germany*, cited above, paragraphs 41 and 42.

8 — Judgment in Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, paragraph 21; *Commission* v *Germany*, cited above, paragraph 28.

most modern methods of telecommunications, the possibility of communicating easily and swiftly with the parties' lawyers, in order to ensure that the proceedings are conducted expeditiously in compliance with the principle that each side must have the opportunity to state its case.

While that is true, it seems to me that appropriate contact between court and lawyer could be ensured, also with a view to avoiding dilatory practices or objective delays, by a provision which is less burdensome for the lawyer providing the services such as, for example, the requirement of an address for service at the chambers of the local lawyer in conjunction with whom he works.

10. Moreover, in response to an express question on that point, the Commission itself stated at the hearing, confirming a standpoint which it had already taken in Case 427/85,[9] that it considered the requirement of an address for service to be an acceptable, albeit extreme, possibility.

It should be borne in mind, in addition, that the Court's Rules of Procedure also seem to lay down the aforesaid requirements, by providing that the applicant must have an address for service in the place where the court has its seat (Article 38(2)).[10]

Such a provision would seem to me, therefore, to be suited to the purpose of ensuring that legal proceedings are conducted properly and efficiently, without placing unnecessary obstacles in the path of freedom to provide services.

11. Finally, so far as concerns the accountability of the local lawyer to the judicial authorities, the Court has already pointed out in Case 427/85 that, in principle, the lawyer providing services and the local lawyer selected, both being subject to the ethical rules applicable in the host Member State, must be regarded as being capable, in compliance with those ethical rules and in the exercise of their professional independence, of agreeing upon a form of cooperation appropriate to their client's instructions.

Hence although it is open to the national legislature to lay down a general framework for cooperation, the resultant obligations must not be disproportionate in relation to the objective of the duty to work in conjunction, which is to enable the lawyer providing services to carry out the tasks entrusted to him by his client with due regard for the proper administration of justice.

In that light, the local lawyer cannot be required to act as authorized representative or defending counsel, or to sign the procedural documents: those conditions would seem to be neither necessary nor useful for the provision of the support required by the lawyer providing services.[11]

9 — See the Report for the Hearing in Case 427/85 *Commission* v *Germany*, cited above, p. 1134.

10 — It should be noted that in their new version the Rules of Procedure, which are being published in the Official Journal, also provide for an address for service, but no longer treat an application as inadmissible by way of penalty for non-compliance.

11 — Judgment in *Commission* v *Germany*, cited above, paragraphs 24 to 26.

12. In the light of the foregoing considerations, therefore, I propose that the Court:

(1) declare that the French Republic has failed to fulfil its obligations under Articles 59 and 60 of the EEC Treaty and Council Directive 77/249 to facilitate the effective exercise by lawyers of freedom to provide services by:

— depriving French nationals who practise as lawyers in a Member State other than the French Republic of the benefit of the rights conferred by the directive;

— requiring the lawyer providing services to work in conjunction with a lawyer established in French territory even in cases where the assistance of a lawyer is not compulsory;

— subjecting the lawyer providing services to the principle of territorial exclusivity of the *ius postulandi*;

(2) order the defendant to pay the costs;

(3) order the intervener to bear its own costs.