JUDGMENT OF THE COURT
25 February 1988 *

In Case 427/85

Commission of the European Communities, represented by Friedrich-Wilhelm Albrecht, Legal Adviser in the Commission's Legal Department, assisted by Heinrich Hüchting, Rechtsanwalt, Bremen, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry of Economic Affairs, and by Horst Teske, Ministerialrat in the Federal Ministry of Justice, with an address for service in Luxembourg at the German Embassy, 20-22 avenue Emile Reuter,

defendant,

APPLICATION under Article 169 of the Treaty establishing the European Economic Community for a declaration that the Federal Republic of Germany has failed, in regard to the exercise by lawyers of freedom to provide services, to fulfil its obligations under 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,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and J. C. Moitinho de Almeida (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

* Language of the Case: German.

having regard to the Report for the Hearing and further to the hearing on 8 July 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 3 December 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 23 December 1985, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, in regard to the exercise by lawyers of freedom to provide services, the Federal Republic of Germany had failed to fulfil its obligations under 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 (Official Journal 1977, L 78, p. 17).

2 More particularly, the Commission criticizes the Federal Republic of Germany for bringing into force a national law intended to implement Directive 77/249 (the law of 16 August 1980 — *Bundesgesetzblatt* I p. 1453), paragraph 4 of which provides:

(a) that a lawyer from another Member State who, in connection with the provision of services, carries on in the Federal Republic of Germany activities relating to the representation or the defence of a client in legal proceedings may act only in conjunction with a German lawyer, even in those cases where under German law there is no mandatory requirement of representation by a lawyer;

(b) that the German lawyer in conjunction with whom the lawyer from the other Member State acts must himself be the authorized representative or defending counsel in the proceedings;

(c) that, in addition, the lawyer providing the service

(i) may not appear in oral proceedings or at criminal trials unless he is accompanied by the German lawyer, and

(ii) may not visit, as defending counsel, a person held in custody unless accompanied by the German lawyer and may communicate in writing, as defending counsel, with a person held in custody only through the German lawyer;

(d) that the necessary co-involvement of the German lawyer must be proved whenever a step is taken; that any step which is taken in contravention of the aforementioned provisions by the lawyer providing the services or in respect of which such co-involvement is not proved at the time when it is taken is to have no effect; that such co-involvement is presumed to exist in the case of oral proceedings or criminal trials unless the German lawyer immediately countermands or amends the step;

(e) that, in cases where it is mandatory to be represented by a lawyer admitted to practise before the judicial authority in question, paragraph 52 (2) of the Bundesrechtsanwaltsordnung (Federal regulation concerning lawyers) is to be applied.

3 The Commission's complaints concern the manner in which the German legislation implements Directive 77/249 ('the Directive') as regards the duty of working 'in conjunction' imposed upon a lawyer established in another Member State who pursues activities on German territory as a provider of services. The concept of working in conjunction is based on Article 5 of the Directive, according to which 'for the pursuit of activities relating to the representation of a client in legal proceedings' the Member States may require lawyers providing services 'to work in conjunction' either with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an 'avoué' or 'procuratore' practising before it.

4 This action concerns three distinct problems, namely the scope of the work in conjunction, the detailed rules governing work in conjunction and the restriction to a specific geographical area of the right to plead.

5 Reference is made to the Report for the Hearing for a fuller account of the provisions of both the directive and the German legislation and of the background to the dispute and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

A — The scope of the work in conjunction

6 According to Article 4 of the abovementioned German Law of 16 August 1980 ('the Law of 1980'), the obligation to work in conjunction with a lawyer established in the Federal Republic of Germany applies where the lawyer providing services proposes to act 'as the representative or defending counsel of a client' in legal proceedings and in certain administrative proceedings.

7 According to the Commission, that provision defines too broadly the field in which work in conjunction with a German lawyer is required, not only as regards practising before courts of law but also as regards practising before administrative authorities and as regards contacts with persons held in custody. These three problems must be considered separately.

8 As regards practising before courts of law, the Commission considers that the obligation to work in conjunction laid down in Article 5 of the Directive may only apply where, under the domestic law of the host Member State, a party may be represented or defended in legal proceedings only by a lawyer acting as authorized representative or defending counsel. In all cases where the assistance of a lawyer is not a mandatory requirement under the domestic legislation and where, consequently, a party would be entitled to defend his own interests or even to entrust that task to a person who was not a lawyer, a lawyer providing services should be allowed to represent or defend a client without working in conjunction with a German lawyer.

9 The German Government relies upon the wording of Article 5 of the Directive and contends that the obligation to work in conjunction may be imposed with respect to all activities relating to the representation and defence of a client by a lawyer, whether or not the assistance of a lawyer is compulsory in that regard. In that connection, the German Government draws attention to the fact that, by not making the assistance of a lawyer compulsory in all cases, the German legislation

is designed to enable the parties to conduct their cases themselves. The question whether a third party may represent a party before the courts, in a professional capacity, is in its view governed by the rules applicable to certain professions such as those of notary, patent agent and approved tax adviser; apart from cases which are regulated in that way, the German law on legal practice ('Rechtsberatungsgesetz') contains a general prohibition on the provision of legal advice and assistance on a professional basis.

10 It must be observed in the first place, as the German Government correctly points out, that Article 5 of the Directive draws no distinction between the areas of activity of lawyers in which legal representation is mandatory and those in which it is not; it merely enables the Member States to require lawyers providing services to work in conjunction in the exercise of 'activities relating to the representation of a client in legal proceedings'.

11 However, that fact must be viewed in context. As is apparent from its preamble, the Directive contains only measures intended to 'facilitate the effective pursuit' of the activities of lawyers by way of provision of services, since, pursuant to the Treaty, any restriction on the provision of services has been prohibited since the end of the transitional period. That prohibition logically requires the abolition of all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.

12 The third paragraph of Article 60 of the Treaty makes clear that a person providing a service may, in order to do so, temporarily 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'. From this the Court has inferred in previous decisions (see in particular the judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305) that, regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities, but that the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by rules which are justified by the general good and are imposed on all persons pursuing activities in the host Member State, in so far as that interest is

not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established.

13 The Directive must be interpreted in the light of those principles. Article 5 of the Directive may not 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. It is undisputed that, in proceedings for which German law does not make representation by a lawyer mandatory, the parties may conduct their cases themselves; in such proceedings, German law also allows representation to be entrusted to a person who is neither a lawyer nor a specialist, provided that that person does not act in a professional capacity.

14 In those circumstances, it is apparent that there is no consideration relating to the public interest which, in court proceedings for which representation by a lawyer is not mandatory, can justify the obligation for a lawyer established in another Member State, who is providing his services in a professional capacity, to work in conjunction with a German lawyer.

15 Consequently, a lawyer providing services, who must in any event, by virtue of Article 4 of the Directive, observe in all proceedings before the German courts in which he is involved the professional rules applicable in the Federal Republic of Germany, cannot be obliged by the German legislation to work in conjunction with a lawyer practising before the judicial authority in question in proceedings for which that legislation does not make representation by a lawyer mandatory. In so far as the German law of 1980, by the generality of its terms, extends that obligation to such proceedings, it infringes the Directive and Articles 59 and 60 of the Treaty.

16 As regards the activities of lawyers providing services before administrative authorities, paragraph 4 (1) of the Law of 1980 refers to administrative proceedings relating to 'criminal offences, breaches of administrative regulations, misfeasance in office or professional misconduct'. In that connection, it is sufficient to state that the considerations set out above concerning proceedings before the courts are fully applicable.

17 Finally, as regards contacts with persons held in custody, the German Government puts forward a number of arguments concerning the answerability of lawyers to the courts. It is appropriate to consider those arguments, which are central to the issue of the arrangements for work in conjunction, in the context of the second problem raised by the present action.

18 It is apparent from the foregoing considerations that the Commission's complaints concerning the required scope of the work in conjunction must be upheld, apart from the complaint relating to contacts between lawyers providing services and persons held in custody, which will be examined below.

B — The detailed rules concerning work in conjunction

19 The Commission criticizes the Federal Republic of Germany in general terms for having determined the meaning of 'work in conjunction' in the Law of 1980 in such a way that it goes beyond the limits laid down by the Directive and by Articles 59 and 60 of the Treaty. Its complaints relate in particular to the requirements concerning proof of work in conjunction, the role attributed to the German lawyer in conjunction with whom the foreign lawyer is to work and contacts between the lawyer providing services and persons held in custody.

20 According to the German Government, the detailed rules governing work in conjunction laid down in the Law of 1980 are a direct consequence of Article 5 of the Directive, which provides that the German lawyer with whom the work in conjunction is to be carried out must practise before the judicial authority in question and is, 'where necessary, answerable to that authority'. A German lawyer can only be so answerable if he is familiar with all the steps taken by the lawyer providing services and becomes aware of them at the right time, namely before they have taken effect. For that reason, the German lawyer must be constantly involved in the development of the case; such involvement in the case can be ensured only if the judicial authority in question can be certain that that is the case at all times, if the German lawyer is present at the oral stage of the proceedings and if he can claim the status of authorized representative or defending counsel.

21 The German Government also claims that the freedom to provide services should not interfere with the proper administration of justice. Unlimited access by foreign

lawyers to proceedings before German courts would be likely to create difficulties arising from insufficient knowledge of the rules of substantive and procedural law applied by those courts. Only the involvement of a local lawyer can ensure that cases are properly presented to the court.

22 It must be observed in the first place, with respect to the German Government's first argument, that the directive does not in fact explain the meaning of the expressions 'work in conjunction' and 'answerable to [the judicial] authority' used in Article 5. Those expressions must therefore be interpreted in the light of the purpose of the Directive, which is 'to facilitate the effective exercise by lawyers of freedom to provide services'.

23 Consequently, whilst the Directive allows national legislation to require a lawyer providing services to work in conjunction with a local lawyer, it is intended to make it possible for the former to carry out the tasks entrusted to him by his client, whilst at the same time having due regard for the proper administration of justice. Seen from that viewpoint, the obligation imposed upon him to act in conjunction with a local lawyer is intended to provide him with the support necessary to enable him to act within a judicial system different from that to which he is accustomed and to assure the judicial authority concerned that the lawyer providing services actually has that support and is thus in a position fully to comply with the procedural and ethical rules that apply.

24 Accordingly, the lawyer providing services and the local lawyer, 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.

25 That does not mean that it would not be open to the national legislatures to lay down a general framework for cooperation between the two lawyers. However, the resultant obligations must not be disproportionate in relation to the objectives of the duty to work in conjunction as defined above.

26 It must, however, be pointed out that the German Law of 1980 imposes upon the two lawyers who are required to work in conjunction obligations which go further than is necessary for the attainment of those objectives. Neither the presence of the German lawyer throughout the oral proceedings nor the requirement that the German lawyer must himself be the authorized representative or defending counsel nor the detailed provisions concerning proof of work in conjunction are in general necessary or even useful for the provision of the support required by the lawyer providing services.

27 It must be added that Article 5 of the Directive, in referring to the local lawyer's being 'answerable', is referring, as stated above, to answerability to the judicial authority concerned and not to the client. However, the problem of possibly inadequate knowledge of German law referred to by the German Government to justify the requirements of the Law of 1980 forms part of the responsibility of the lawyer providing services *vis-à-vis* his client, who is free to entrust his interests to a lawyer of his choice.

28 It should also be pointed out that the German Government's argument that only the forms of work in conjunction provided for by the German legislation make it possible to ensure that lawyers pursue their activities in such a way as to maintain sufficient contact with their clients and the judicial authorities is untenable. As the Court stated in its judgment of 12 July 1984 in Case 107/83 *Ordre des avocats au barreau de Paris* v *Klopp* [1984] ECR 2971, modern methods of transport and telecommunications enable lawyers to ensure the necessary contacts in an appropriate manner.

29 The reasons for considering that the detailed arrangements for work in conjunction laid down by the Law of 1980 are, by reason of their disproportionality, incompatible with the Treaty do not however apply in the same way to the provisions of that law concerning visits to persons held in custody. Such visits are of a special nature, specific to the relationship which is established between persons in custody and the competent court, which does not exist in the case of other persons.

30 Moreover, it must be recognized that there may be cogent reasons, in particular those which relate to public security the appraisal of which is a matter for the Member State concerned, for a Member State to lay down rules governing contacts between lawyers and persons in custody.

31 Those considerations also apply where representation by a lawyer is not compulsory. Consequently, it must be stated that the German law which imposes an obligation to work in conjunction for the purpose of contacts with persons in custody, even where representation by a lawyer is not mandatory, is not, in that respect, contrary to the provisions of the Directive.

32 However, in so far as the German law provides that a lawyer providing services may not, as defending counsel, visit a person in custody unless accompanied by the German lawyer with whom he is working in conjunction, and cannot correspond with a person held in custody except through that German lawyer, without any exception being allowed, even with the authorization of the court or of the authority responsible for contacts with persons in custody, the restrictions laid down by that law go further than is necessary to achieve the legitimate objectives which that law pursues.

33 Accordingly, the Commission's complaints concerning the procedures for work in conjunction must be upheld.

C — Restriction to a specific geographical area of the right to plead

34 According to the Law of 1980, paragraph 52 (2) of the Bundesrechtsanwaltsordnung (Federal Regulation governing the Lawyer's Profession) must be applied by analogy in cases where representation by lawyers admitted to practise before the judicial authority in question is required. By virtue of the Code of Civil Procedure, such representation is compulsory in civil cases heard by a Landgericht (Regional Court) and the higher courts — (Oberlandesgerichte (Higher Regional Courts) and the Bundesgerichtshof (Federal Court of Justice) — and by a Familiengericht (Family Court). In so far as representation by a lawyer is compulsory in cases before those courts, that lawyer must therefore be admitted to practise before the court before which the case is brought. A lawyer not so admitted only has the right to present observations in the course of the oral proceedings with the assistance of the duly admitted lawyer; the Law of 1980 places the lawyer providing services in the same position.

35 The Commission considers that Article 5 of the Directive merely allows a requirement to be imposed that the lawyer providing services should act in conjunction with a lawyer admitted to practise before the judicial authority in

question, but does not allow the services provided to be restricted to the making of statements during the oral proceedings with the assistance of the duly admitted lawyer, as occurs under the German legislation in all civil proceedings in which more than a specified amount is involved. The Commission adds that in its opinion the situation of the lawyer providing services is not comparable to that of a German lawyer, since a lawyer providing services in another Member State does not have any establishment there and is not admitted to practise before any judicial authority there.

36 The German Government points out that a German lawyer who is not admitted to practise before the judicial authority in question must also restrict himself to the limited participation provided for in paragraph 52 (2) of the Bundesrechtsanwaltsordnung and that, consequently, a lawyer providing services is not placed at a disadvantage by comparison with a lawyer established in the Federal Republic of Germany. The principle of restricting the right to plead to a specific geographical area was introduced in the interests of the proper administration of justice, and the lawyer's connection with a specific locality improves communication between the lawyer and the judicial authority in question and thus facilitates the conduct of the proceedings.

37 The German Government adds that, if the lawyer providing services were placed in the same position as a lawyer admitted to practise before the judicial authority in question, German lawyers would be placed at a disadvantage by comparison with their colleagues established in other Member States. To illustrate this, it refers in particular to the example of the Bundesgerichtshof, the Supreme Federal Court for civil and criminal matters: only a limited group of German lawyers specializing in appeals on points of law is admitted to practise before that court and can thus take all the procedural steps necessary, whereas, according to the Commission's view, any lawyer established in another Member State should have the same rights.

38 It appears that this difference of views is concerned essentially with the question whether the Federal Republic of Germany is entitled to impose upon lawyers providing services the same conditions as it applies to German lawyers not admitted to practise before the court in question. The provisions of the Directive do not provide an answer to that question; it must be considered in the light of the principles governing the freedom to provide services deriving from Articles 59 and 60 of the Treaty.

39 In that connection, it must be borne in mind that, according to Article 59, all restrictions on freedom to provide services are to be abolished, particularly in order to enable a person providing a service 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, to use the wording of the third paragraph of Article 60.

40 The principal aim of those provisions is to enable the provider of the service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of that State. As the Court made clear in its judgment of 17 December 1981 in *Webb*, cited above, that does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of persons established therein may be similarly applied in its entirety to the temporary activities of persons who are established in other Member States.

41 The rule of territorial exclusivity contained in paragraph 52 (2) of the Bundesrechtsanwaltsordnung is precisely part of national legislation normally relating to a permanent activity of lawyers established in the territory of the Member State concerned, all such lawyers having the right to gain admission to practise before one, and sometimes two, German judicial authorities, and to pursue before them all the activities necessary for representation of clients or the defence of their interests. On the other hand, a lawyer providing services who is established in another Member State is not in a position to be admitted to practise before a German court.

42 In those circumstances, it must be stated that the rule of territorial exclusivity cannot be applied 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 not in that respect comparable to those applicable to lawyers established on German territory.

43 However, this finding only applies subject to the obligation of the lawyer providing services to work in conjunction, within the limits and on the conditions described above, with a lawyer admitted to practise before the judicial authority in question.

44 As regards the German Government's argument concerning the special situation which arises in connection with appeals on points of law to the Bundesgerichtshof, it must be observed that that situation is not a result of the rule of territorial exclusivity as normally applied to German lawyers. No German lawyer can be established on German territory without being admitted to practise before a German court, such admission being granted as of right and without limitation as to number, whereas admission to practise before the Bundesgerichtshof is granted on the basis of selective admission to a specialized group of lawyers who have special experience or competence. Moreover, the Commission acknowledged, at the hearing, that its arguments in support of its complaints cannot apply to the special case of specialized Bars such as that at the Bundesgerichtshof.

45 Subject to the foregoing clarification, the Commisssion's complaints must, in the light of the foregoing considerations, be upheld.

46 Accordingly, it must be stated that the Federal Republic of Germany 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 requiring the lawyer providing services to act in conjunction with a lawyer established on German territory, even where under German law there is no requirement of representation by a lawyer,

by requiring that the German lawyer, in conjunction with whom he must act, himself be the authorized representative or defending counsel in the case,

by not allowing the lawyer providing services to appear in the oral proceedings unless he is accompanied by the said German lawyer,

by laying down unjustified requirements regarding proof of the co-involvement of the two lawyers,

by imposing the requirement, without any possible exception, that the lawyer providing services is to be accompanied by a German lawyer if he visits a person held in custody and is not to correspond with that person except through the said German lawyer, and

by making lawyers providing services subject to the rule of territorial exclusivity laid down in paragraph 52 (2) of the Bundesrechtsanwaltsordnung.

Costs

47 Under Article 69 (2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

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

by requiring the lawyer providing services to act in conjunction with a lawyer established on German territory, even where under German law there is no requirement of representation by a lawyer,

by requiring that the German lawyer, in conjunction with whom he must act, himself be the authorized representative or defending counsel in the case,

by not allowing the lawyer providing services to appear in the oral proceedings unless he is accompanied by the said German lawyer,

by laying down unjustified requirements regarding proof of the co-involvement of the two lawyers,

by imposing the requirement, without any possible exception, that the lawyer providing services is to be accompanied by a German lawyer if he visits a person held in custody and is not to correspond with that person except through the said German lawyer, and

by making lawyers providing services subject to the rule of territorial exclusivity laid down in paragraph 52 (2) of the Bundesrechtsanwaltsordnung.

(2) Orders the Federal Republic of Germany to pay the costs.

Mackenzie Stuart Bosco Moitinho de Almeida Koopmans Everling

Bahlmann Galmot Kakouris Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 25 February 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President