OPINION OF ADVOCATE GENERAL ELMER

delivered on 10 December 1996 *

1. The French Cour de Cassation has in this case requested the Court to interpret the EEC Treaty rules on the provision of services relating to movements of capital.

The facts of the case and the national legislation

2. In this case, the Banque H. Albert de Bary et Cie (hereinafter 'Bary et Cie'), a Netherlands bank with its registered office in Amsterdam and authorized in the Netherlands to engage in banking activities, including the granting of mortgage loans, granted a mortgage loan of DM 930 000 on 29 November 1984 to the French company Société Civile Immobilière Parodi (hereinafter 'Parodi').

3. On 13 March 1990 Parodi instituted proceedings against Bary et Cie, arguing that the loan agreement should be declared void and seeking payment of FF 1 251 390 corresponding to the expenses which Parodi had incurred in connection with the loan. In support of its claim, Parodi argued that, when the loan was granted, Bary et Cie had not been authorized to engage in banking activities in France, as required by French law.

4. Parodi referred in this connection to French Law No 84-46 of 24 January 1984 'on the activity and supervision of credit institutions' (hereinafter 'the French Law'), which contains the following provisions:

'*Article 15*

Prior to operating, credit institutions must obtain the authorization issued by the Committee for credit institutions ...

The Committee for credit institutions shall verify whether an applicant undertaking satisfies the obligations set out in Articles 16 and 17 of this Law and has an appropriate

* Original language: Danish.

legal form to operate as a credit institution. It shall take account of the proposed activities of the undertaking, the technical and financial means which it intends to utilize, and the status of those providing the capital and, where appropriate, of their guarantors.

The Committee shall also determine whether an applicant undertaking is likely to attain its development objectives under conditions compatible with the proper functioning of the banking system and guaranteeing adequate security for customers.

The Committee may also refuse to grant an authorization if the persons referred to in Article 17 are not of sufficiently good repute and lack appropriate experience.

...

Article 16

Credit institutions must have paid-up capital or funds at least equal to an amount determined by the Banking Regulation Committee.

Every credit institution must at all times be able to demonstrate that its assets actually exceed, by an amount at least equal to the minimum capital, the liabilities in respect of which it is indebted to third parties.

The branches of credit institutions having their registered office outside France are required to show that they have operating funds in France in an amount at least equal to the minimum capital required of credit institutions established under French law.

Article 17

The activities of credit institutions must be directed in practice by at least two persons.

Credit institutions having their registered office outside France shall appoint at least two persons to whom they shall entrust the actual determination of the activities of their branch in France.'

The question referred for a preliminary ruling

5. By judgment of 15 June 1993, the Cour d'Appel (Appeal Court), Chambéry, dismissed Parodi's claim. Parodi thereupon appealed against that judgment to the Cour de Cassation.

6. By judgment of 13 June 1995, the Cour de Cassation stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'As regards the period preceding the entry into force of Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC [1] [hereinafter "the second banking coordination directive"], are Articles 59 and 61(2) of the EEC Treaty to be interpreted as precluding national legislation requiring authorization in order to supply banking services, in particular in order to grant a mortgage loan, where the bank concerned is established in another Member State where it has been authorized?'

1 — OJ 1989 L 386, p. 1.

The relevant provisions of Community law

7. The following provisions of the EEC Treaty, as it was worded in 1984, are relevant to the case:

'*CHAPTER 3*

SERVICES

Article 59

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be ... abolished ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...

Article 61

...

2. The liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital.

...

CHAPTER 4

CAPITAL

Article 67

1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

...

Article 69

The Council shall, on a proposal from the Commission, ... issue the necessary directives for the progressive implementation of the provisions of Article 67 ...'

8. At the material time, the directive in force was the First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty, [2] as amended by the Second Council Directive of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty [3] (hereinafter 'the first capital directive'). [4] That directive was adopted pursuant to, *inter alia*, Articles 67 and 69 of the Treaty and contains the following provisions material to the present case:

'*Article 3*

1. Subject to paragraph 2 of this Article, Member States shall grant all foreign exchange authorizations required for the

2 — OJ, English Special Edition 1959-1962, p. 49.

3 — OJ, English Special Edition 1963-1964, p. 5.

4 — It should further be pointed out that Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions (OJ 1973 L 194, p. 1) and First 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 (OJ 1977 L 322, p. 30) were also in force at the time. The former directive did not harmonize Member States' legislation concerning entitlement to grant mortgage loans, and the latter directive addressed solely the issue of establishment.

conclusion or performance of transactionsand for transfers between residents of Member States in respect of the capital movements set out in List C of Annex I to this Directive.

2. Where such free movement of capital might form an obstacle to the achievement of the economic policy objectives of a Member State, the latter may maintain or reintroduce the exchange restrictions on capital movements which were operative on the date of entry into force of this Directive. It shall consult the Commission on the matter.

...'

List C of Annex I sets out the capital movements covered by Article 3 and refers *inter alia* to: 'Granting and repayment of medium- and long-term loans and credits not related to commercial transactions or provision of services'.

According to the explanatory notes on that category contained in Annex II to the directive, it covers *inter alia* loans and credits granted by non-residents to residents, including medium-term (one to five years) and long-term (five years or more) loans and credits granted by financial institutions.

Proceedings before the Court

9. Bary et Cie takes the view that the French Law discriminates against credit institutions established in Member States other than France *vis-à-vis* credit institutions that are established in France. The answer to the question submitted should therefore be that the provisions in Articles 59 and 61(2) fall to be construed as precluding national legislation such as the French Law.

10. The Belgian Government submits that it was indeed possible, in the period material to this case, for a Member State to require that a credit institution already authorized in its State of origin should also be authorized in the State in which it supplied its services, although such a requirement could be imposed only if it was necessary in order to protect the recipient of the service. It cannot, however, be regarded as necessary to require authorization in connection with loans to a company in order to protect that company. France could, however, have made use of the derogating provision in Article 3(2) of the first capital directive, in conjunction with List C of Annex I thereto, under which Member States are entitled to maintain restrictions on certain capital movements, including mortgage loans.

11. The French Government submits that the rules on freedom to provide services must be construed as meaning that, in the period material to the case, there was nothing to preclude national legislation such as the French legislation, since it is necessary to protect the borrower even when a mortgage loan is granted, and since that protection could not be regarded as assured by the State of origin at the time in question. The French Government also explained during the hearing that the establishment of a subsidiary in France was not a precondition for a credit institution established in another Member State being able to obtain authorization to engage in credit activities in France. At the time in question, France had exercised the right under Article 3(2) of the first capital directive, in conjunction with List C of Annex I thereto, to maintain restrictions in regard to, *inter alia*, mortgage loans, and the rules on services could therefore not be applied to the extent to which such restrictions existed (see Article 61(2) of the Treaty).

12. The Commission and the United Kingdom take the view that the Treaty provisions on freedom to provide services do not preclude a requirement of authorization in the State in which the service is provided, on condition that the requirement applies without distinction to domestic providers of services and providers of services from other Member States, that there are interests which justify an authorization requirement, that those interests have not already been taken into account in the State of origin, and that it is not possible to achieve the same result by less restrictive means. The Commission also pointed out during the hearing that, according to its archives, the French Republic had to some extent used the derogating provision in Article 3(2) of the first capital directive, in conjunction with List C of Annex I thereto, under which Member States are entitled to maintain restrictions on certain capital movements, including mortgage loans, and that capital movements in connection with mortgage loans had therefore not been completely liberalized in France.

Discussion

13. A loan by a bank to a borrower in another Member State must be regarded as constituting a service connected with a movement of capital. Under Article 61(2) of the Treaty, the liberalization of banking services connected with movements of capital is to be effected in step with the progressive liberalization of movement of capital. The abolition of restrictions on movements of capital does not follow directly from Article 67 of the Treaty but is based on directives adopted by the Council under Article 69. [5]

5 — See the judgment in Case 203/80 *Casati* [1981] ECR 2595, paragraphs 8 to 13.

14. The Treaty provisions on services are thus applicable to banking services connected with a movement of capital only in so far as the form of movement of capital in question has been liberalized (see the Court's judgment in Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [6] ('the *Svensson* case'), paragraph 11). That case concerned the compatibility with Community law of national legislation restricting the grant of State interest-rate subsidies on building and house-purchase loans to cases in which the loan had been taken out with a credit institution established in the Member State in question. The Court first considered whether the capital movements of the type in question — a mortgage loan — had been liberalized. Since this was the case at the relevant time, the Court applied the Treaty rules on services (Article 59) and on capital (Article 67) to the rules governing interest-rate subsidies for mortgage loans.

15. At the period relevant to the present case, the Community legislation in regard to the liberalization of capital movements consisted solely of the first capital directive. Article 3(1) of that directive liberalizes the capital movements that are set out in List C of Annex I thereto, and the Member States are accordingly required to grant the necessary foreign exchange authorizations. The category 'Granting and repayment of medium-and long-term loans and credits not related to commercial transactions or to provision of services' is mentioned in Annex I, List C, and is thus covered by Article 3. Under Annex II, VIII. A, this category covers *inter alia* medium-and long-term (i. e. for more than one year) loans and credits granted by financial institutions. It may therefore be assumed that the grant by banks of medium-and long-term loans, including mortgage loans, is covered by the liberalization of those capital movements resulting from Article 3(1) of the directive. Article 59 of the Treaty on freedom to provide services thus applies to the grant of such loans (see Article 61(2)).

16. The national court has sought only the Court's interpretation of the rules in Articles 59 and 61(2), and it may thus be argued that it is not necessary to address the question whether the situation should also be assessed under Article 67 of the Treaty on movements of capital. In the abovementioned *Svensson* case, the Court referred to both Article 59 and Article 67 — mentioned in the question submitted for a preliminary ruling in that case — and interpreted those provisions in the same way. Such a parallel reference appears most consistent with the fact that Article 61(2) states that such services must be liberalized 'in step with' the progressive liberalization of movement of capital. Notwithstanding the fact that the national court refers only to the rules on services, I find

6 — [1995] ECR I-3955.

that it would be most logical for the Court, in its judgment in the present case, to refer also to the rules on capital movements.

17. At the period material to this case, there had not yet been an approximation of Member States' legislation regarding the services in question such as would have made it possible to assess the situation under such harmonized rules rather than under the general Treaty rules in Articles 59 and 67 on the free movement of services connected with capital movements. Such harmonization was achieved only with the implementation of the second banking coordination directive at a date considerably later than that relevant to the present case.

18. In a judgment of 25 July 1991, [7] the Court ruled as follows regarding the details of the substance of the Article 59 prohibition of restrictions on the freedom to provide services:

'... Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'

19. The requirement of authorization to operate as a credit institution, as set out in the French law, is in my view likely to hinder or impede loans by credit institutions lawfully established in other Member States to borrowers in France. A national rule such as the French rule must therefore, in my view, be regarded as involving a restriction on the freedom to provide services connected with capital movements. [8]

20. This does not, however, mean that a rule such as the French rule is at variance with the Treaty. The Court has consistently held [9] 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. However, the freedom to provide services is

7 — Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221.

8 — See in this connection Case 33/74 *Van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

9 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 17.

one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.

...

Such a measure [requirement of licences/authorization] would be excessive in relation to the aim pursued, however, if the requirements to which the issue of a licence is subject coincided with the proofs and guarantees required in the State of establishment. In order to maintain the principle of freedom to provide services the first requirement is that in considering applications for licences and in granting them the Member State in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of his establishment; the second requirement is that it must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment.' [10]

21. The Court restated this principle in a series of cases concerning the insurance sector (the 'co-insurance cases'), [11] ruling that:

'... regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered to be incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment. In addition, 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.'

22. The interest in ensuring consumer protection, to which the French Government refers, must undoubtedly be treated as important and can, according to the Court's settled case-law, justify restrictions on freedom to provide services. [12] Consumers may in general be defined as natural persons who, in a transaction, are acting for purposes

10 — *Webb*, cited above, paragraph 20.

11 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27, Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, Case 220/83 *Commission* v *France* [1986] ECR 3663, and Case 206/84 *Commission* v *Ireland* [1986] ECR 3817.

12 — See, *inter alia*, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 58.

which can be regarded as outside their trade or profession. [13] However, the right of Member States to restrict the freedom to provide services connected with capital movements with a view to protecting the weaker party to a contract cannot be limited to persons covered by this narrow definition but must also be capable of protecting other persons who, as borrowers, may be subject to unfair contractual conditions.

23. Parodi is not a natural person but a property company, and the case-file does not provide any more detailed information concerning its status. During the hearing before the Court, the French Government stated that there are many forms of property company in France and that it is, for instance, possible for a family to set up such a company with a view to constructing a home for family members. Persons who head such family enterprises are not, in my view, necessarily distinct from ordinary consumers and cannot therefore automatically be expected to possess such knowledge as would enable them to be conversant with credit conditions.

13 — See Article 1(2)(a) of the Council's subsequent Directive 87/102 of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Council Directive 90/88 of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1990 L 61, p. 14). The directive also does not prevent Member States from extending application of the rules contained therein to apply to non-consumers as well.

24. The Court also has before it only scant information concerning the specific objective pursued by the French legislation's requirement of authorization, including the practice followed by the authorities in question in relation to banks in other Member States. I would, however, point out that the French rules on authorization to carry on a banking activity do not at first sight appear to contain rules specifically designed to protect consumers and borrowers, but appear rather to be directed at various aspects of prudential considerations which seek to ensure that banks remain solvent in regard to their depositors. It would appear that these aspects were also taken into account by the competent authorities in the Netherlands when they granted authorization to Bary et Cie to operate as a bank in that country.

25. Even though the scant information available in this case may thus suggest that the French requirement of authorization is contrary to Articles 59 and 67 of the Treaty, I find that it must be left to the national court to determine whether it was in this case so vitally important to protect Parodi that the French Government was entitled under Community law to require that Bary et Cie be authorized to carry on banking activities in France in order to be able to grant a mortgage loan to Parodi, including the extent to which supervision under the French legislation was already ensured by that under Netherlands legislation. I therefore find that

the answer should be as proposed by the Commission and the United Kingdom.

26. The French Government pointed out during the hearing that the French Republic had, at the period in question, made use of the derogating provision in Article 3(2) of the first capital directive and maintained exchange restrictions so far as foreign currency loans with an equivalent value greater than FF 50 million were concerned. The Commission has confirmed that its archives also suggest that France had exercised the possibility of maintaining exchange restrictions.

To the extent to which France lawfully maintained certain restrictions on movements of foreign currency, it follows from the above interpretation of Article 61(2) of the Treaty that the French requirement of authorization does not in any way set aside the Treaty provisions on the free movement of banking services relating to capital movements (see, in this connection, Case 267/86 *Van Eycke* v *ASPA*). [14]

Any reliance placed on the French Government's information regarding the quantitative limits of foreign currency restrictions will have no bearing on the resolution of this specific case, in which the amounts borrowed were much less. However, I take the view that the Court should leave it to the national court to consider to what extent the French Republic had lawfully maintained exchange restrictions pursuant to Article 3(2) of the first capital directive. The Court has not had an opportunity to examine the relevant provisions and documents, which have not been submitted to the Court, and this point does in fact involve a question of the interpretation of national law and the specific application thereof.

Conclusion

27. I accordingly propose that the Court reply as follows to the question submitted:

Article 61(2) of the EEC Treaty, read in conjunction with the combined provisions of Article 3(1) of and Annex I, List C, to the First Council Directive of 11 May

14 — [1988] ECR 4769.

1960 for the implementation of Article 67 of the Treaty, as amended by the Second Council Directive of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty, must be construed as meaning that, prior to the entry into force of Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, Articles 59 and 67 on freedom to provide services connected with capital movements applied to the granting by financial institutions of medium-and long-term loans and credits in so far as the Member State in question had not laid down exchange restrictions on such loans and credits under Article 3(2) of the first Council directive.

The provisions in Articles 59 and 67 of the EEC Treaty must be construed as precluding national legislation in a Member State under which a bank established in another Member State and there authorized to engage in banking activities is allowed to grant such loans and credits to borrowers in the Member State only if it has obtained prior authorization to operate as a credit institution in the Member State, unless that requirement of authorization

— is imposed on every person or company pursuing such an activity within the territory of the Member State of destination;

— is justified on grounds of general interests which are not taken into account under the provisions to which the person providing the service is subject in the Member State of establishment; and

— is objectively necessary to ensure compliance with the rules applicable in the sector under consideration and to protect the interests which those rules are intended to safeguard, and the same result cannot be achieved by less restrictive rules.