JUDGMENT OF THE COURT
11 December 1985 *

In Case 110/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the action pending before that court between the

Municipality of Hillegom

and

Cornelis Hillenius

on the interpretation of Article 12 of the 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,

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet, Presidents of Chambers, G. Bosco, T. Koopmans, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of:

the Municipality of Hillegom, the plaintiff in the main proceedings, by E. J. Dommering, advocate at the Hoge Raad der Nederlanden,

Cornelis Hillenius, the defendant in the main proceedings, by J. L. W. Sillevis-Smitt, advocate at the Hoge Raad der Nederlanden,

* Language of the Case: Dutch.

the Government of the Federal Republic of Germany, by M. Seidel and E. Röder, acting as Agents,

the Government of the United Kingdom, by J. Braggins, acting as Agent,

the Government of the Italian Republic, by P. Ferri, avvocato dello Stato, acting as Agent, and

the Commission of the European Communities, by D. Gilmour and F. Grondman, members of its Legal Department, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By order dated 13 April 1984, which was received at the Court on 20 April 1984, the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 12 (1) of the 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 (Official Journal 1977, L 322, p. 30).

2 In July 1981 the Municipality of Hillegom, the appellant in the main proceedings, deposited HFL 600 000 with the Amsterdam American Bank NV which was declared insolvent in October of that year. The Municipality sought an order from the Arrondissementsrechtbank, Amsterdam, for the provisional examination of a number of witnesses. Under Netherlands law this procedure may be used in certain circumstances before an action is brought before the court. One of the persons it

wished to give evidence was Cornelis Hillenius, Head of the Accounts Department of the Nederlandse Bank which, pursuant to the Wet Toezicht Kredietwezen (Law on the Supervision of Credit), exercises overall supervision of credit institutions in the Netherlands and is the bank supervisory authority for the purposes of Directive 77/780.

3 After the Arrondissementsrechtbank had granted the order for the provisional examination of witnesses, Mr Hillenius claimed he was entitled to be exempted from giving evidence and refused to answer a number of questions which had been put to him in his capacity of witness and which related to the supervision by the Nederlandse Bank of the Amsterdam American Bank NV.

4 Mr Hillenius appealed to the Gerechtshof [Regional Court of Appeal], Amsterdam, against the examining judge's order refusing to allow him to be exempted from giving evidence. By order of 30 May 1983 the Gerechtshof quashed the examining judge's order. It took the view that Mr Hillenius had been justified in invoking his statutory duty not to divulge confidential information received in the course of his duties as a ground for his refusal to give evidence as a witness. The Municipality appealed in cassation to the Hoge Raad against that order.

5 The Hoge Raad states first of all that in refusing to give evidence as a witness Mr Hillenius relies on Article 46 (1) of the Wet Toezicht Kredietwezen which 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 obtained during an inspection of books and records any further or in any other way than is necessary for the performance of his duty or than is required by this Law.'

The Hoge Raad then observes that the dispute essentially concerns the relationship between Article 46 (1) of the Wet Toezicht Kredietwezen and Article 1946 of the Netherlands Code of Civil Procedure, which provides that:

'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.'

6 Since in Netherlands law a duty to maintain professional secrecy must exist before a right to be exempted from giving evidence may be recognized, although the mere fact that such a duty exists still does not mean that the person concerned has such a right, the Hoge Raad considers it necessary to determine the scope of Article 46 (1) of the Wet Toezicht Kredietwezen. In this regard it points out that that Law was adapted in order to bring Netherlands legislation into line with the directive, which means that Article 46 cannot be interpreted without taking account of the meaning of Article 12 of the Directive.

7 Article 12 of the Directive is worded as follows:

'(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.'

8 That was the context in which the Hoge Raad referred the following questions to the Court 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 Netherlands Code of Civil Procedure 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?'

The observations submitted to the Court

9 In the Municipality's view, the first question must be answered in the negative. It submits that the purpose of the Directive is to facilitate effective supervision of credit institutions, which means that the competent authorities must be able to exchange confidential information and that the confidentiality of the information exchanged must be safeguarded. However, Article 12 of the Directive regulates only the scope of and limitations on the voluntary use of the information provided; it therefore expressly leaves open the possibility for national legislatures to require the competent authorities to provide information. The Directive was therefore intended to regulate the voluntary use of information by the competent authorities but was not meant to encroach upon the powers of the legislatures of the Member States.

10 As regards the second and third questions, the Municipality observes that it is for the national court to weigh up the interests concerned by a duty to maintain professional secrecy against the interest in eliciting the truth in a civil trial. The legislative guarantees required by Article 12 (1) are entirely satisfied by such judicial assessment of the legislative provisions in the light of the facts of the case.

11 Mr Hillenius, on the other hand, takes the view that the scope and effect of the obligation to maintain professional secrecy referred to in Article 12 (1) of the Directive are determined by Community law and not by national law. That obligation is in principle intended to be an absolute requirement. Both the wording of Article 12 and the *ratio legis* of the Directive suggest that confidential information received by officers of the competent authority in the course of their duties may not be divulged, even to a court trying a civil action. Thus the justification for the obligation to maintain professional secrecy resides in the fact that the Community legislature sought to create the conditions necessary for effective supervision of credit institutions, which requires information to be exchanged between the competent authorities, and for ensuring the confidence of the institutions which are supervised and the confidence of the public in those institutions.

12 As regards the second and third questions, Mr Hillenius submits first of all that a derogation from the obligation to maintain professional secrecy may not be allowed except on the basis of a legislative provision specially enacted for that purpose. Furthermore, the aim of the Directive is to guarantee that the information exchanged by the competent authorities is not subject to different national rules. Article 12 (2) is clearly intended to be an exception to paragraph (1). Finally, the Directive was intended to leave scope for national legislative provisions on professional secrecy within the meaning of Article 12 (1) only in the areas mentioned in Article 12 (3).

13 The Government of the Federal Republic of Germany takes the view that Article 12 (1) of the Directive covers any disclosure of confidential information and therefore also covers the disclosure of information to the other party in a civil action. Professional secrecy is an important precondition for proper bank supervision. Since the various Council Directives concerning freedom of establishment, the activities and supervision of credit institutions require the national authorities to exchange certain important information on credit institutions, the protection of professional secrecy must also be guaranteed beyond a Member State's frontiers. As regards the second and third questions, the German Government observes that Article 12 (1) leaves it to the Member States to regulate the disclosure of confidential information by special or general provisions laid down by law.

14 The Government of the Italian Republic observes that the Directive refers to the concept of professional secrecy as it exists in the legislation of the Member States. It is therefore accepted that general interests may override the interests protected by professional secrecy. The Directive itself defines the possible limits to the obligation to maintain professional secrecy by means of a formal criterion, namely a provision laid down by law. Nevertheless, an extremely wide and imprecise definition of provisions laid down by law might make the obligation to maintain professional secrecy meaningless. Consequently, a provision of national law allowing an exception to the obligation to maintain professional secrecy without indicating sufficiently clearly the circumstances and grounds of public interest which might justify the exception would be contrary to the aim and spirit of the Directive.

15 As regards the second question, the Italian Government takes the view that Article 12 does not prescribe the way or the form in which dispensations from the obligation to maintain professional secrecy must be laid down by national legislation.

16 As regards the third question, the Italian Government considers that it cannot be resolved in the context of an interpretation of Community law.

17 Like the German Government, the United Kingdom emphasizes the fundamental importance of professional secrecy for the acquisition and exchange of confidential information by and between the competent authorities. In order, therefore, to encourage this exchange of information, specific provisions were adopted in paragraphs 2 and 3 of Article 12 for information which is communicated by one competent authority to another. However, the obligation to maintain professional secrecy is not absolute and must therefore be compatible with national law. Although the Directive was not intended to harmonize national provisions regarding professional secrecy and exceptions thereto, the exceptions may not be contrary to the aim of the Directive. It would therefore be inconsistent with the purpose of the Directive for disclosure to be permitted in such circumstances as to inhibit the acquisition and exchange of information. For that reason the United Kingdom suggests that Article 12 should be interpreted so as to permit, as an exception, any provision of national law permitting disclosure. As far as the last sentence of paragraph 1 is concerned, the Directive does not limit exceptions to the obligation of secrecy to those specifically recognized either in the text of the Directive itself or in the particular national implementing measure.

18 The Commission observes first of all that the Directive is only a first step in the harmonization of the laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions. The Directive is meant to eliminate only the most obstructive differences between the legislation of the Member States. However, in order to facilitate effective supervision of credit institutions, Article 7 of the Directive provides for close collaboration and the exchange of information between the competent authorities. It was in connection with that obligation to collaborate that Article 12 was enacted. The Commission then points out that the extent of the obligation to maintain professional secrecy varies from Member State to Member State, particularly as regards the possibility of communicating information to the revenue authorities. Those differences constitute an obstacle to the unimpeded exchange of information. In order to solve that problem Article 12 (1) requires the Member States to adopt rules on professional secrecy but leaves open the possibility for the scope of the obligation to maintain professional secrecy to be defined in legislative provisions. Whereas paragraph 2 guarantees the free exchange of information, paragraph 3 introduces a new element, namely that the information obtained from another Member State may be used only for the purposes mentioned in that paragraph.

19 In the Commission's view, Article 12 therefore introduces two sets of rules. The first set of rules concerns information obtained in a Member State whose legal provisions, within the meaning of the last sentence of paragraph 1, determine the scope of the obligation to maintain professional secrecy to which such information is subject. The second set of rules concerns information obtained in other Member States which is governed by Community rules subjecting the use and disclosure of such information to the criteria laid down in paragraph 3. The use of information obtained from other Member States in civil proceedings is therefore excluded except in the cases mentioned in Article 13.

20 In the Commission's view, the questions submitted by the national court concern only information obtained in the Member State concerned, that information being covered by the first set of rules. Under those rules the Member States are at liberty to permit wider breaches of professional secrecy, provided that the principle of professional secrecy is maintained. It is conceivable under those rules for national legislation to leave it to the national courts to weigh the interest protected by professional secrecy against other legitimate interests. In its view, a general legislative provision obliging a person to appear as a witness in civil proceedings

may be regarded as a provision laid down by law within the meaning of the last sentence of Article 12 (1), provided that the provision allows the courts to weigh the aforementioned interests against one another.

The aims of Directive 77/780 and the context of Article 12

21 For the purposes of giving a satisfactory answer to the questions raised with regard to Article 12 (1) of Directive 77/780, that provision should be placed in the context of the other provisions and aims of the Directive.

22 According to the second and third recitals in its preamble, the Directive is meant to eliminate only the most obstructive differences between the laws of the Member States as regards the rules to which credit institutions are subject and it is necessary to proceed by successive stages in order to create the legislative conditions required for a common market for credit institutions.

23 Article 7 of the Directive provides that the competent authorities are to collaborate closely. They are to supply one another with all information concerning the management and ownership of credit institutions that is likely to facilitate their supervision and the examination of the conditions for their authorization and all information likely to facilitate the monitoring of their liquidity and solvency. That is the context in which Article 12 (3) requires the Member States to provide that the authorities receiving such information may use it only to examine the conditions for the taking-up and pursuit of the business of credit institutions, to facilitate the monitoring of such institutions, especially as regards their liquidity and solvency, and finally where an administrative appeal is lodged or court proceedings are commenced against the decisions of the authority concerned. To that strict limitation on the use of information there is, however, a general exception as regards the use of information received in criminal proceedings.

24 Although Article 12 (1) requires the Member States to lay down an obligation to maintain professional secrecy, it does not define either the substance or the scope thereof. It leaves those questions to be determined by the Member States whilst providing that confidential information covered by the obligation of professional

secrecy may not be divulged except by virtue of provisions laid down by law. Similarly, Article 12 (2) provides that the obligation to maintain professional secrecy may not prevent the competent authorities from exchanging information and that information so exchanged is covered by that obligation.

The first question

25 The first question is in substance whether Article 12 (1), which states that the obligation to maintain professional secrecy imposed on persons now or in the past employed by the competent authorities means that any confidential information which they may receive in the course of their duties may not in principle be divulged to any person or authority, also applies in cases in which such persons give evidence in civil actions.

26 An analysis of the general aims of the Directive and the context of Article 12 (1) shows that, in order to create the legislative conditions required for a common market for credit institutions, the Directive is designed to facilitate the overall monitoring of credit institutions operating in more than one Member State by the competent authorities of the Member State in which the credit institution has its head office. Owing to the differences in the legislation of the Member States in this field, the Directive provides that the competent authorities are to collaborate closely in order to supervise the activities of credit institutions. To that end the Directive provides for professional secrecy to be ensured and requires the competent supervisory authorities to exchange information which may facilitate the monitoring of the liquidity and solvency of credit institutions.

27 If the monitoring of banks through supervision within a Member State and the exchanging of information by the competent authorities is to function properly, it is necessary to protect professional secrecy. The disclosure of confidential information for whatever purpose might have damaging consequences not only for the credit institution directly concerned but also for the banking system in general. Consequently, if there was no duty to keep confidential information secret, the obligatory exchange of information between the competent authorities might be jeopardized because the authority of a Member State could not be sure that the confidential information it provides to an authority in another Member State will in principle remain confidential.

28 With those considerations in mind the governments and the Commission as well as Mr Hillenius have rightly pointed out the great importance which the duty to maintain professional secrecy has for employees and former employees of a supervisory authority. Thus the actual words of Article 12 (1), which provides that confidential information received by employees of competent authorities in the course of their duties 'may not be divulged to any person or authority except by virtue of provisions laid down by law', as well as the aims of the Directive, make it clear that the ban on disclosure also covers statements which such persons make as witnesses in civil proceedings.

29 It follows that the answer to the first question must be that Article 12 (1) of the Directive, which states that the obligation to maintain professional secrecy imposed on persons now or in the past employed by the competent authorities means that the confidential information which they 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, also applies to statements which such persons make as witnesses in civil proceedings.

The second and third questions

30 The second and third questions raise the point whether the provisions laid down by law to which Article 12 (1) of the Directive refers must be understood as meaning provisions specifically intended to establish an exception to the ban on disclosing the kind of information covered by the Directive or whether they also include general provisions concerning the limits which the maintenance of professional secrecy places on the obligation to give evidence as a witness.

31 As the Court observed when examining the context of Article 12 and the aims of the Directive, Article 12 constitutes part of the first stage of the harmonization and coordination process regarding credit institutions. Although it in principle prohibits the Member States from divulging confidential information, it takes account of the considerable differences between the legislative provisions of the Member States concerning the protection of such information.

32 Article 12 (1) is not intended to lay down an absolute duty or to determine or harmonize the scope of professional secrecy; it guarantees professional secrecy subject to any derogations from the obligation to maintain it which may be laid

down by existing or future provisions of national legislation governing the circumstances in which confidential information may be divulged. It is therefore clear from the general reference to the provisions laid down by law in each Member State that at this initial stage, when the aim is only to eliminate the most obstructive differences between the legislative provisions of the Member States, the existing or future provisions of the Member States may contain exceptions to the duty to maintain professional secrecy.

33 As regards the conflict which may arise between the interest in establishing the truth, which is fundamental to the administration of justice, and the interest in maintaining the confidentiality of certain kinds of information, it is for the courts to find the balance between those interests if the national legislature has not resolved the conflict in specific legislative provisions. In a case such as this, in which the relevant provision of national law is, according to the national court's interpretation, general in character, it is therefore for the national court to weigh up those interests before deciding whether or not a witness who has received confidential information may rely on his duty of non-disclosure. In weighing up those interests the national court must in particular decide, should it be necessary in the case in point, what importance is to be attached to the fact that the information in question was obtained from the competent authorities of other Member States in accordance with Article 12 (2) of the Directive.

34 Consequently, the answer to the second and third questions must be that the provisions laid down by law allowing confidential information to be divulged, as envisaged by Article 12 (1) of the Directive, include general provisions not specifically intended to lay down exceptions to the ban on disclosing the kind of information covered by the Directive but establishing the limits which the maintenance of professional secrecy places on the obligation to give evidence as a witness.

Costs

35 The costs incurred by the Governments of the Federal Republic of Germany, the Italian Republic and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the appeal pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Hoge Raad der Nederlanden by order of 13 April 1984, hereby rules:

(1) Article 12 (1) of Directive 77/780/EEC, which states that the obligation to maintain professional secrecy imposed on persons now or in the past employed by the competent authorities means that the confidential information which they 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, also applies to statements which such persons make as witnesses in civil proceedings.

(2) The provisions laid down by law allowing confidential information to be divulged, as envisaged by Article 12 (1), cited above, include general provisions not specifically intended to lay down exceptions to the ban on disclosing the kind of information covered by the Directive but establishing the limits which the maintenance of professional secrecy places on the obligation to give evidence as a witness.

Mackenzie Stuart Everling Bahlmann Joliet

Bosco Koopmans Due Galmot O'Higgins

Delivered in open court in Luxembourg on 11 December 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President