

Grande Instance (Regional Court), in civil cases where it is compulsory to be represented by a lawyer, to retain a lawyer who is a member of the Bar of

that court or is authorized to plead before it in order to plead or carry out the procedural formalities.

REPORT FOR THE HEARING in Case C-294/89 *

I — Facts and procedure

According to Article 4(1) of the directive:

1. *Legal background*

(a) Community law

‘Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.’

On 22 March 1977 the Council adopted Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services (Official Journal 1977 L 78, p. 17).

Furthermore, Article 5 of the directive provides as follows:

According to Article 1(1), the directive is to apply, within the limits and under the conditions laid down therein, to the activities of lawyers pursued by way of provision of services. Article 1(2) defines the term ‘lawyer’ as meaning any person entitled to pursue his professional activities under one of the designations listed therein. Article 2 provides that such a person is to be recognized ‘as a lawyer’ for the purpose of pursuing his activities by way of the provision of services.

‘For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

— to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;

* Language of the case: French.

— to work in conjunction 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.’

country of origin’ under one of the designations listed in Article 1(2) of Directive 77/249 ‘shall be recognized in France as lawyers’.

In addition, the fourth and fifth paragraphs of Article 126-3 provide as follows:

(b) French law

The provisions designed to transpose Directive 77/249 into French law are laid down by Decree No 79-233 of 22 March 1979 on freedom for lawyers who are nationals of Member States of the European Communities to provide services in France, amending Decree No 72-468 of 9 June 1972 regulating the legal profession (*Journal Officiel de la République Française* of 23 March 1979, p. 659).

Decree No 79-233 incorporates in Decree No 72-468 Title IV bis headed ‘*De la libre prestation de services en France par les avocats des autres États membres des Communautés européennes*’ (Freedom for lawyers of other Member States of the European Communities to provide services in France), which contains six articles (Articles 126-1 to 126-6).

According to the first paragraph of Article 126-1, lawyers who are nationals of a Member State, are established on a permanent basis in a Member State other than France and who occasionally carry out professional activities in France may rely on those provisions.

The first paragraph of Article 126-2 provides that ‘nationals of other Member States of the European Community who carry on their professional activities in their

‘In order to conduct the proceedings or carry out the procedural formalities (the lawyer referred to in Article 126-1) must, in civil cases where it is compulsory to be represented by a lawyer, retain in proceedings before the Tribunal de Grande Instance (Regional Court) a lawyer who is a member of the Bar of that court or is authorized to plead before it, and in proceedings before the Cour d’Appel (Court of Appeal), an “*avoué*” practising before that court or, if none, a lawyer authorized to plead before it.

In proceedings before other courts, judicial or disciplinary bodies or the public authorities, he must, subject to the practices in force on the date when this article enters into effect, work in conjunction with a lawyer who is a member of a French Bar and who will, where necessary, be answerable to that court, body or authority.’

2. *Pre-litigation procedure*

On 26 December 1984 the Commission sent a letter of formal notice to the French Republic. In its letter, the Commission set out three complaints relating to the provisions of Decree No 72-468, as amended by Decree No 79-233. First of all, the Commission pointed out that the first paragraph of Article 126-2 of the decree restricted the benefit of freedom to provide services to lawyers who were nationals of a Member State other than the French

Republic, whereas, according to the Commission, French nationals were also covered by the directive. Whilst acknowledging that Article 126-1 of the decree seemed to suggest that the French Government did not intend to exclude from the scope of that decree French nationals practising as lawyers in another Member State, the Commission considered that for reasons of legal certainty, the first paragraph of Article 126-2 had to be amended in order to be in conformity with the requirements of the directive. The Commission's second complaint was in two parts. To begin with, it maintained that, contrary to the fourth and fifth paragraphs of Article 126-3 of Decree No 72-468, the obligation incumbent on a lawyer providing services to work in conjunction with a lawyer who was a member of a French Bar applied only in proceedings before the courts and before public bodies and authorities in the judicial sector. Secondly, the Commission emphasized that that obligation applied only in proceedings in which, according to the French legislation, it was compulsory to be represented by a lawyer and which were therefore the preserve of lawyers. Thirdly, the Commission argued that the obligation imposed on a lawyer providing services by the fourth paragraph of Article 126-3 of the decree to 'retain' a local lawyer in order to plead or carry out the procedural formalities in civil cases before certain courts — an obligation arising from the 'territorial exclusivity of the right to plead' — seemed to go beyond the obligation to work in conjunction imposed by Article 5 of the directive.

complaint and the first part of the second complaint set out in the letter of formal notice were justified, and offered to amend its legislation in order to take account of the Commission's observations on those points. With regard to the second part of the second complaint, however, the French Republic pointed out that in several courts in which it was not compulsory to be represented by a lawyer, the lawyer nevertheless enjoyed a monopoly with regard to representation in that, if the party in question did not intend to conduct his own defence, he had to be represented by a lawyer. Furthermore, the French Republic considered that the requirement for lawyers to work in conjunction also extended to proceedings in which a lawyer did not have that monopoly with regard to representation (proceedings before the commercial courts), where the lawyer providing services had no special authority but relied on his status as a lawyer. Finally, so far as concerned the territorial exclusivity of the right to plead, the French Republic emphasized, in particular, that the fourth paragraph of Article 126-3 of Decree No 72-468 placed a lawyer providing services in the same position as his French colleague who appeared before an appeal court or a regional court other than that of whose Bar he was a member.

On 6 September 1985 the Commission delivered a reasoned opinion under Article 169 of the Treaty. In that opinion, the Commission pointed out that the French Republic had acknowledged that the first complaint and the first part of the second complaint set out in the letter of formal notice were justified. So far as concerned the second part of the second complaint (the requirement for lawyers to work in conjunction where French law does not require the assistance of a lawyer), the

The French Republic replied on 14 March 1985. It did not deny that the first

Commission considered that the requirement to work in conjunction with a lawyer established in France seemed justified in proceedings in which the lawyer enjoyed a monopoly with regard to representation even where his assistance was not compulsory since the parties were capable of acting on their own. According to the Commission, however, that requirement did not apply to proceedings before the commercial courts in which a lawyer did not have a monopoly with regard to representation, even where the lawyer providing services relied on his status as a lawyer. Furthermore, so far as concerned the third complaint (territorial exclusivity of the right to plead), the Commission maintained the position it had adopted in its letter of formal notice. The Commission also argued that, pursuant to Article 4 of Directive 77/249, a lawyer providing services must have the possibility of pleading before a regional court in the same way as a lawyer who is a member of the Bar of that court, subject only to the reservation that he must work in conjunction with a lawyer who is a member of the Bar of that court. The Commission gave the French Republic a period of two months in which to comply with the terms of its reasoned opinion.

notice of 24 December 1984 was justified, and undertook to amend its legislation accordingly. Furthermore, so far as concerned the second complaint, the French Republic acknowledged that, following the aforesaid judgment in Case 427/85, the requirement for lawyers to work in conjunction could be imposed only in proceedings in which the assistance of a lawyer was compulsory. It offered to repeal the final paragraph of Article 126-3 of the decree. However, it disputed the third complaint on the ground that the rule concerning the territoriality of the right to plead was justified by the concern to ensure the proper administration of justice and subjected a lawyer providing services to constraints which were consistent with the concept of work in conjunction.

In view of the dispute between itself and the French Republic concerning the territoriality of the right to plead and the fact that the French legislation had not been duly brought into line so as to terminate the other two infringements, the Commission instituted these proceedings.

The French Republic replied on 10 January 1986. In its letter to the Commission, the French Republic maintained the position it had adopted on 14 March 1985 in reply to the letter of formal notice.

3. *Procedure*

The Commission's application was lodged at the Court Registry on 25 September 1989.

Following the Court's judgment in Case 427/85 *Commission v Germany* [1988] ECR 1123, and contacts between the Commission and the Ministry of Justice, the French Republic submitted fresh observations to the Commission by letter of 9 August 1989. In that letter, the French Republic did not deny that the first complaint set out in the letter of formal

By application lodged at the Court Registry on 13 February 1990, the Federal Republic of Germany sought leave to intervene in support of the form of order sought by the defendant. By order of 21 February 1990 the Court granted the Federal Republic leave to intervene.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open² the oral procedure without any preparatory inquiry.

II — Forms of order sought by the parties

The Commission, *the applicant*, claims that the Court should:

- (1) declare that, by failing to adopt, in compliance with Articles 59 and 60 of the EEC Treaty, all the laws, regulations and administrative provisions needed to comply fully with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, and in particular Article 1(2), Article 4 and the first subparagraph, second indent, of Article 5 of the directive, the French Republic has failed to fulfil its obligations under the Treaty;

- (2) order the French Republic to pay the costs.

The French Republic, *the defendant*, contends that the Court should reject the third complaint set out in the Commission's application.

The Federal Republic of Germany, *the intervener*, contends that the Court should:

- (1) hold that the legislation adopted by the French Republic to transpose Directive

77/249/EEC into national law is not contrary to Articles 59 and 60 of the EEC Treaty and the second indent of Article 5 of the aforesaid directive, at least in so far as it provides that, in civil cases in which representation by a lawyer is compulsory, the person providing services may designate in order to act in conjunction with him in proceedings before the regional court only a lawyer who is a member of the Bar of that court, and in proceedings before the court of appeal only a lawyer practising before that court, and dismiss the Commission's application on that point;

- (2) order the applicant to pay the intervener's costs.

III — Pleas in law and arguments of the parties

A — Scope of Directive 77/249

The Commission considers that the first paragraph of Article 126-2 of Decree No 72-468 is contrary to Article 1(2) of Directive 77/249 inasmuch as it excludes from the benefit of the directive French nationals practising as lawyers in a Member State other than the French Republic. It points out that their exclusion is also apparent in the title of the French legislation. According to the Commission, even if the exclusion of French nationals would seem to be involuntary (as is apparent from Article 126-1 of the decree), it is necessary for reasons of legal certainty to bring the French legislation into line with the requirements of the directive.

The Commission points out that the French Republic does not dispute the alleged

infringement and has undertaken to amend its legislation accordingly. It notes, however, that the French legislation has yet to be amended. The Commission accordingly maintains that complaint.

The *French Republic* states that it has drawn up a draft decree which takes account of the Commission's observations. It emphasizes the efforts it has undertaken to have that measure enacted as soon as possible.

The *Federal Republic of Germany* has not submitted any observations on that point.

B — *Scope of the obligation to work in conjunction*

The *Commission* considers that the fifth paragraph of Article 126-3 of Decree No 72-468 is contrary to Article 5 of Directive 77/249 inasmuch as it requires lawyers to work in conjunction in proceedings before bodies and authorities which are not involved in the administration of justice and in proceedings in respect of which French law does not make the assistance of a lawyer compulsory.

The *Commission* points out that those complaints are not disputed by the French Republic, which has undertaken to amend its legislation accordingly. It notes, however, that the legislation has yet to be amended and consequently maintains its complaints.

The *French Republic* states that a draft decree has been drawn up in order to bring

French law into line with the directive. It emphasizes the efforts it has undertaken to have that measure enacted as soon as possible.

The *Federal Republic of Germany* has not submitted any observations on this point.

C — *Territoriality of the right to plead*

The *Commission* considers it contrary to Community law to apply to a lawyer providing services the rule concerning the territorial exclusivity of the right to plead, according to which a lawyer established in France and appearing before a regional court other than that of whose Bar he is a member must retain a lawyer who is a member of the Bar of the regional court in question in order to plead or carry out the procedural formalities.

The *Commission* emphasizes that, in its aforesaid judgment in Case 427/85 *Commission v Germany*, the Court has already ruled on the compatibility with Community law of the rule concerning the territoriality of the right to plead. It points out that the Court did not regard the territoriality of that right as one of the terms of working in conjunction, but raised the question whether that rule, in so far as it governs the exercise of a permanent activity in a Member State by persons established in that State, could be similarly applied to the provision of services by persons established in another Member State. It points out that the Court decided that question by stating that, unlike lawyers established in a Member State in which that rule exists, a lawyer providing services is not in a position to be admitted to practise before a court of that

State, and consequently '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. 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' (paragraphs 42 and 43). The Commission further emphasizes that the German Government had attempted to justify the rule concerning the territoriality of the right to plead by reference to the concern to ensure the proper administration of justice, but that the Court was not swayed by its arguments.

According to the Commission, it follows that a lawyer providing services must be able to appear in France before any regional court on the same terms as a French lawyer who is a member of the Bar of that court, subject only to the reservation that he must work in conjunction with a lawyer who is a member of the Bar of that court, in accordance with Article 5 of that directive.

In that regard, in the Commission's view, the French legislation cannot (any more than the court before which proceedings have been instituted) require a lawyer working in conjunction to act otherwise than by confirming (or, if necessary, withdrawing) such cooperation. That follows from paragraph 24 of the aforesaid judgment in *Commission v Germany*, in which the Court stated that the lawyer

providing services and a local lawyer must be regarded as being capable of agreeing upon a form of cooperation appropriate to their client's instructions.

The Commission therefore considers that the rules which limit the right to plead are not applicable to a lawyer providing services. That is so as regards the rule concerning the territorial exclusivity of the right to plead and the rules which, in that connection, lay down that a lawyer established in France is the authorized representative and signs the procedural documents as proof of work in conjunction. In that regard, the Commission refers to paragraph 26 of the aforesaid judgment in *Commission v Germany* — in which the Court stated that the German provisions concerning proof of work in conjunction and the requirement that the lawyer working in conjunction should himself be the authorized representative went further than what was required by Article 5 of the directive — and to the judgment in Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, in which the Court stated that 'modern methods of transport and telecommunications facilitate proper contact with clients and the judicial authorities' (paragraph 21). The Commission adds that the fact that, under the French system, the lawyer providing services retains the right to conduct the proceedings is immaterial because it is above all for the client to direct the manner in which the case is conducted.

The *French Republic* sets forth in the first place the reasons which, in its view, justify the requirement imposed on a lawyer providing services to retain a lawyer who is a member of the Bar of the regional court hearing the case in order to plead. It is necessary, on the one hand, to maintain permanent contact with the court hearing

the case in order to ensure that the proceedings (and, in particular, preliminary hearings) are conducted expeditiously in compliance with the principle that both sides must have the opportunity to state their case and, on the other, to make it easier, where appropriate, for disciplinary proceedings to be initiated against the local lawyer where the lawyer providing the services does not comply with the relevant procedural and ethical rules, since the local lawyer is answerable to the Bar association of which he is a member.

In its view, it follows from those reasons that only a lawyer who is a member of the Bar of the regional court hearing the proceedings may be selected to work in conjunction with the lawyer providing services, and that the local lawyer can keep track of the various stages of the procedure.

In that regard, the French Republic considers that the Court's judgment in *Commission v Germany*, cited above, cannot be interpreted as precluding any form of territoriality with regard to the right to plead. In its view, that judgment applies only to the German rules. The French system, for its part, is proportionate to the requirements laid down and is consistent with the concept of work in conjunction. In that regard, the French Republic emphasizes that the lawyer providing services retains the right to conduct the proceedings, that the presence of the local lawyer is not required at the hearing or in meetings with the client and that the only proof of working in conjunction which is required is the local lawyer's signature at the foot of the procedural documents.

The French Republic also points out that work in conjunction is intended to ensure that the lawyer providing services has the

support he needs to enable him to act within a judicial system different from his own and to assure the court hearing the case that he is in a position to comply with the relevant procedural and ethical rules (judgment in *Commission v Germany*, paragraph 23). In that regard, the French Republic maintains that if the only requirement which could be imposed by national legislation were that the local lawyer should confirm (or possibly withdraw) such cooperation, the objective pursued could not be achieved.

The *Federal Republic of Germany* submits observations on the question whether it is compatible with Community law to require a lawyer called upon to work in conjunction with the lawyer providing services to be admitted to practise before the court hearing the case. In its view, certain passages in the application suggested that the Commission's answer to that question was in the negative. The Federal Republic of Germany points out, however, that in its reply the Commission expressly acknowledged that that requirement was compatible with Community law. It adds, however, that in view of the Commission's initial attitude, it has a legitimate interest in a ruling from the Court on that point.

The Federal Republic of Germany maintains that to reserve exclusively to lawyers admitted to practise before the court hearing the case the right to work in conjunction with the lawyer providing the services is consistent with Article 5 of Directive 77/249 and the Court's judgment in *Commission v Germany* (paragraphs 42 and 43).

Furthermore, the Federal Republic emphasizes that such exclusivity is justified by the existence of local customs and practices specific to each court and by the need, for examining magistrates, to be able to reach without difficulty the lawyer working in conjunction in order to secure his presence at hearings held to determine the course of the procedure. It also points out that the exclusive right in question in no way hinders the freedom to provide services since, if no lawyer who is a member of the Bar of the court hearing the case is prepared to work in conjunction with the lawyer providing the services, a lawyer who is a member of the Bar of that court is expressly designated by the President of that Bar. Finally, the Federal Republic points out that each Member State has a discretionary margin enabling it to organize the pleading system in such a way that it affects the operation of the courts as little as possible.

IV — Question put to the French Government

The Court of Justice requested the French Government to notify it of the enactment of

the draft decree amending Decree No 72-468 of 9 June 1972 regulating the legal profession, so as to take account of the Commission's observations regarding the persons covered by Directive 77/249 and the scope of the obligation to work in conjunction.

The French Government replied as follows:

'The proposed amendments to Decree No 72-468 of 9 June 1972 have not yet been made in view of the reform of the judicial and legal professions which is in progress. They will be taken into consideration in the decree which is to be adopted for the application of the law reforming certain legal and judicial professions, recently enacted by Parliament.'¹

T. F. O'Higgins
Judge-Rapporteur

¹ — *Journal Officiel de la République Française* of 5.1.1991.