of these activities is compulsory or there is a legal monopoly in respect of it.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 21 June 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 28 MAY 1974 [1]

Mr President,
Members of the Court,

Introduction

Economic integration, which the Treaty of Rome basically seeks to attain, involves the development of trade in a single market as well as the free movement of goods and persons. For undertakings and workers it opens a field of action enlarged into the whole Community, multiplies business relations and thus contributes to breaking the national framework, which is henceforth too narrow.

It therefore requires not only that all restriction on freedom to provide services within this Community be abolished, but also that the right be recognized for nationals of any Member State to establish themselves in another Member State and to practise there, under the same conditions as nationals, their professional activities, be they industrial, commercial, agricultural or liberal.

With economic integration must obviously come the development of legal relations, that is, the growth and diversification of the services which individuals and undertakings need for purposes of consultation and in disputes.

They must further be able to have free recourse to these services and to choose, without consideration of nationality, the lawyers whom they consider the best qualified to advise them and to defend their interests.

Avocats, by their education and competence, their traditions and the professional rules to which they are subject, are in the first place the best able to meet these needs and to exercise this responsibility at a Community level.

1 — Translated from the French.

In the light of this, however, it is necessary that the practice of their profession is not subject to a condition of nationality in each State; it is on the contrary necessary for access to national Bars to be open to *avocats* of other Member States.

How is it therefore possible not to register some surprise that freedom of establishment for *avocats* has not yet been attained and that it can even be denied them?

In truth this problem, which brings into question the interpretation of Articles 52 and 55 of the Treaty of Rome, is one of those which have, since the coming into force of the Treaty, given rise to the most lively controversies and the most marked divergencies between the Bars and between the national Governments, to the point where action by the Community organs has been paralysed and no positive measure has until new been able to be taken to free the activities of the *avocat* at a Community level.

This is why it is fortunate that, using the procedure established by Article 177, the Conseil d'État de Belgique gives you the opportunity today of finally resolving this question and putting an end to the uncertainty which has obtained for so many years.

I — The basis of the question — facts

Born in Brussels on 19 May, 1931, of Dutch parents who had been settled for a long time in Belgium, the plaintiff was brought up in that country and studied there, receiving in 1957 the Belgian diploma of doctor of laws, and he continues to reside there.

But he has retained his original nationality and when he wanted to practise the profession of *avocat* in Belgium he came up against a legal obstacle arising from this nationality.

Since 1919 no one can be inscribed upon the rolls of the Ordre national des avocats de Belgique unless he has Belgian nationality.

Article 428 of the Code judiciaire promulgated in 1967 has maintained this requirement while nevertheless permitting the King to grant dispensation subject to specific conditions by decree issued on the advice of the Ordre national.

In accordance with this legislative provision the third paragraph of Article 1 of the Royal Decree of 24 August 1970 provides that Belgian nationality is not required for access to the Bar on condition, *inter alia,* that the national law of the foreign candidate or an international agreement accords reciprocity.

Although he fulfils the other conditions required by this Decree, since he has been resident in Belgium for more than three years and has never been a member of a foreign Bar, the plaintiff does not however satisfy the clause on reciprocity.

Until the present at least, his national law, that of the Netherlands, requires the possession of Dutch nationality for access to the profession of *avocat;* further, although an agreement relating to the practice of this profession was concluded on 12 December 1968 between Belgium and the Netherlands, this agreement relates only to the provision of services by *avocats* and does not affect their establishment in one or other of the countries.

The plaintiff therefore brought an action before the Brussels Conseil d'État for the annulment of Article 1 (3) of the Royal Decree, contending that it infringes Articles 52 to 58 of the Treaty of Rome. He maintained that the requirement of a condition of nationality or of reciprocity was, in his view, contrary to the provisions of the Treaty and, in any event, could not affect a national of a Member State of the Community.

Observing that the outcome of the proceedings depended on the interpretation of Community law, the Conseil d'État has referred two questions to you for a preliminary ruling.

With the first question the Belgian supreme court asks you what has to be understood by 'activities which in that State are connected, even occasionally, with the exercise of official authority' within the meaning of Article 55 of the Treaty. Must this Article be interpreted in such a way that within a profession like that of *avocat* only activities which are connected with the exercise of official authority are excluded from the application of Chapter II of that Treaty, or as meaning that this profession itself is to be excluded on the grounds that its exercise involes activities which are connected with the exercise of official authority?

The second question deals with Article 52 of the Treaty and asks you whether, since the end of the transitional period, it is a directly applicable provision, despite, in particular, the absence of directives as prescribed by Articles 54 (2) and 57 (1) of the said Treaty.

I consider it more logical to deal first of all with this latter question since it defines the nature, with regard to the doctrine of direct effect, of the *rule of principle* contained in Article 52, and only then to come to decide the scope of the exception contained within Article 55.

II — The direct applicability of Article 52

This examination must naturally be based on the case law of this Court with regard to the direct effect of Community law; I will first mention the criteria which permit a decision as to whether a provision of the Treaty is directly applicable in the legal order of the Member States and I will then examine whether Article 52 fulfils the conditions which you require.

Community rules which are directly applicable are an integral part of the law in force in the national order and confer on subjects the right to rely on such rules before the courts, according to the terms of the judgment of 6 October 1970 (*Grad,* Case 9/70, Rec. 1970, p. 825), either for the purpose of asserting subjective rights, or for safeguarding their interests, or, as in the present case, for the purpose of showing that a provision of national law which is incompatible with the Community rule cannot legally be held against them.

It is for your Court, to which application has been made for a preliminary ruling under Article 177 by a national court before which a Community standard has been cited, to decide in each instance whether the standard in question, by virtue of its own provisions, its general scheme and in the context and spirit of the Treaty, is capable of giving rise to direct effects in the relations between the Member State to which it is addressed and its nationals.

1. The first condition which the case law establishes is that the rule must be sufficiently clear and precise.

It is possible without hesitation to recognize this characteristic in Article 52, which seeks to abolish restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and which states that this freedom shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings.

This provision therefore prohibits States from imposing on Community nationals desirous of pursuing an activity, in particular a liberal one, on their territory, any condition more restrictive than those which are imposed on their own nationals.

Doubtless the terminology used is not strictly adequate: it is a question not so much of freedom of establishment as of the right of equality of treatment in the professional establishment, that is to say a prohibition on any direct or disguised discrimination based on nationality.

Nevertheless the rule thus enacted is perfectly clear.

It is moreover in keeping with the principle of free movement of employed

persons contained in Article 48, which by paragraph 2 thereof entails 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

Who would think of denying the direct effect of Article 48, which underlies and inspires all the case law of this Court with regard to employment of migrant workers?

In the same way Article 52 must be compared with Article 53, which provides: 'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States'.

This is a 'standstill' clause, that is to say a prohibition on aggravating the situation which existed in each Member State at the time of the coming into force of the Treaty by more restrictive or discriminatory measures.

This Court has expressly recognized that this rule is directly applicable by its judgment of 25 July 1964 *(Costa v Enel,* Case 6/64, Rec. 1964, p. 1162 *et seq.).*

Article 52 by its very nature and content is fully comparable with Article 53.

As regards this latter provision, however, should the reason for recognizing the direct effect be regarded as arising from the fact that it is limited to imposing on Member States an obligation to refrain, that is not to do something, whereas Article 52 involves a positive duty on national authorities to cease to apply any law, regulation or administrative measure calculated to be an obstacle to the establishment of Community nationals?

This objection must be dismissed. You have quite clearly decided that provisions of the Treaty giving rise to positive obligations on the part of States can be directly applicable. Thus in the judgment of 17 December 1970 *(SACE,* Case 33/70, Rec. 1970, p. 1213) you confirmed that the obligation based on Articles 9 and 13 (2) of the Treaty, which were concerned with the abolition of certain charges having an effect equivalent to customs duties on imports, had a direct effect in the relations of the Member State in question with its subjects.

2. The second criterion of direct applicability lies in the unconditional character of the Community standard, the implementation of which must not be subject to any fundamental condition.

In this respect likewise, Article 52 may perhaps be usefully compared with Article 48, for, while the abolition of restrictions on establishment for the pursuit of activities as self-employed persons must be attained only progressively during the course of the transitional period provided for by the Treaty, Article 48 provides, in very similar terms, that freedom of movement shall be secured by the end of this same period at the latest. But neither of these provisions is subject to any condition capable of thwarting their direct application.

The rule of equality of treatment with nationals, which arises both from Article 48 in relation to employed persons and to Article 52 in relation to the taking up and pursuit of activities as self-employed persons, has no limitations on it other than those justified on grounds of public policy, public security or public health under either Article 48 (3) or Article 56 of the Treaty.

Such reservations, which are very limited, are not of such a nature as to affect the direct effect of these provisions (cf. *Marsman,* (Case 44/72, Rec. 1972, p. 1243), no more than the exceptions provided on the one hand by Article 48 (4) as regards employment in the public service and on the other hand by Article 55 as regards activities which in a Member State are connected with the exercise of official authority.

Although these provisions certainly restrict the scope of the principle of equality of treatment, they do not bring its direct applicability into question.

3. There remains a third condition. The Community standard must be perfected; it must be sufficient in itself. Its implementation must not depend on measures being subsequently taken by Community Institutions or Member States with discretionary power in the matter.

It is in this field that some have raised doubts as to the direct effect of Article 52.

What is the truth on this point?

The text begins with the following words: 'Within the framework of the provisions set out below, restrictions on the freedom of establishment . . . shall be abolished by progressive stages in the course of the transitional period'.

It thus refers to Article 54 which specifies the procedure according to which the Community authorities are required to make the provisions necessary for the effective attainment of freedom of establishment.

It is therefore necessary to consider that the implementation of Article 52 is dependent on these Community measures being taken.

What are they?

First a general programme, which must be drawn up by the Council, acting unanimously on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, before the end of the first stage. The object of this programme is to set out the general conditions under which freedom of establishment is to be attained in the case of each type of activity and the stages by which it is to be attained.

The general programme was adopted by the Council in December 1961, that is within the period laid down. It divides the various activities in question into categories, establishes a schedule of due dates, defines the restrictions which are to be abolished and lays down the general conditions under which liberalization must take place.

The adoption of this programme, however, has not completely exhausted intervention by Community authorities, for Article 54 (2) requires, in addition, that the Council shall issue directives and Article 54 (3) includes a certain number of instructions, which are, however, not exhaustive, relating to the objectives of the Council's duties.

It is a fact that although for certain categories of activities these directives have been issued so that their liberalization has unquestionably been attained, for others the Council has not fulfilled the task which fell upon it and has not taken the measures laid down in Article 54 before the end of the transitional period.

Since this period expired on 1 January 1970, it must therefore be asked whether Article 52 has nevertheless become directly applicable notwithstanding the absence of intervention by the Council in certain at least of the fields where it was required.

This is the question which has to be resolved.

It appears to me decisive in this respect that Article 52 has mandatorily laid down that all restrictions on the freedom of establishment shall be abolished by the end of the transitional period. This is not exceptional wording in the Treaty.

The Treaty offers several examples of provisions based on the same technique, be it for the elimination of customs duties on imports between Member States (Article 13) and on exports (Article 16), or as regards the prohibition on Member States from imposing directly or indirectly internal levies of any kind on the products of other Member States higher than those which are imposed on similar national products. In these various circumstances the obligations imposed on the states had to be progressively fulfilled 'during the transitional period', as Article 13 states, or 'by the end of the first stage' as laid down in Article 16 or 'not later than at the beginning of the second stage', as

the third paragraph of Article 95 requires.

You have not hesitated to decide that at the expiry of the term laid down in each case the rules contained in these provisions became directly applicable.

This is what you decided in connexion with Article 95 in your judgment of 16 June 1966 *(Lütticke v Hauptzollamt)*, Case 57/65, Rec. 1966, p. 302.

Even more conclusive are the grounds of your judgment of 17 December 1970 (the aforementioned *SACE* case) in which you affirmed in regard to Article 13 (2) that 'although the Commission had to decide the rhythm with which charges having an effect equivalent to customs duties on imports had to be abolished during the transitional period, nevertheless it appeared from the very wording of Article 13 that these duties had in any event to be completely eliminated at the latest at the end of the said period; therefore from the end of this period Article 9 must have its full effect on its own'.

Pursuing your reasoning, you decided that 'Articles 9 and 13 (2), taken together, involve, *at the latest at the end of the transitional period,* a clear and precise prohibition on exacting the said charges, which is not subject to any reservation for the States to subject its implementation to a positive act of national law or to an intervention by the institutions of the Community; it lends itself, by its very nature, to producing direct effects in the legal relations between Member States and their subjects'.

The judgment of 26 October 1971 *(Eunomia,* Case 18/71, Rec. 1971, p. 811) says exactly the same thing as regards the progressive abolition of customs duties and charges having an equivalent effect on imports.

Finally this case law has recently again been confirmed by the judgment of 19 June 1973 (Case 77/72 *Capolongo,* [1973] ECR 623).

This is important, prime evidence which appears to me to be able, without difficulty, to be related to Article 52 and to lead, on similar grounds, to the recognition that this provision is capable of producing direct effects without intermediate acts either of Community Institutions or Member States being necessary for its implementation.

It may be observed that the wording with which Article 52 commences: 'Within the framework of the provisions set out below . . .', has no aim other than that of referring to the procedure by which the progressive abolition of restrictions should in general take place. It certainly does not have the effect either of legally subjecting this elimination to the issue of the directives provided for by Article 54 or of thwarting the time limit which the draftsmen of the Treaty have clearly and in a binding way established for its attainment.

Moreover, when they decided otherwise, they said so expressly. This is the case in particular with the medical and allied, and the pharmaceutical professions, for whom under Article 57 (3) 'the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States'.

It is once again useful to compare Articles 52 and 53. I have said that the contents of these two Articles are basically the same; both have as their objective to prohibit every Member State from subjecting the taking up and pursuit of activities as employed persons by Community nationals 'to severer rules than those to which nationals are subject' *(Costa v ENEL,* Rec. 1964, p. 1141 mentioned above). The only difference between these provisions is that with Article 53 the prohibition on *new* restrictions came into force with the entry into force of the Treaty, whereas Article 52, which required the abolition of existing restrictions, was not to take effect until the end of the transitional period.

Finally it is proper to enquire whether by inviting the Council to issue certain directives to implement Article 52, the draftsmen of the Treaty have given it a margin of discretionary power such that the effective fulfilment of the obligations which this Article imposes would have been possible only by means of these measures.

In common with the majority of writers (Rambow — *The end of the transitional period* — CMLR 1968/69; Schrans — SEW 1970, p. 253; Mégret — *Le droit de la Communauté économique européenne,* Vol. 3, 1971, p. 90) I think that the Council had *non-discretionary powers, (compétence liée)* as did moreover the Member States, and that it was legally bound to proceed to the elimination of all restrictions on freedom of establishment based on nationality, whether direct or disguised.

No doubt it had on the one hand power of deciding the pace at which the liberalization of the activities had to take place with regard to the various categories — this was moreover provided for in the general programme — and it could on the other hand decide the conditions under which the freedom of establishment should be attained.

Article 52, however, imposed on it in any event an obligation to achieve a particular state of affairs by a particular date. The Council did not have the power either to escape this obligation or to alter its content.

The Member States had the same obligation to achieve this state of affairs, with the same conditions, and the failure of the Council to take certain prescribed implementing measures within the period specified did not in any way authorize them to set themselves against the principle which it contains. Moreover, as we have seen, this Article does not prevent a State from laying down rules as to the conditions for taking up and pursuing activities as self-employed persons, provided at least that nationals of other Member States are assured in this field of a treatment similar to that which nationals enjoy.

As to the particular measures referred to in Article 57 relating in particular to the mutual recognition of diplomas or the coordination of provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons, they constitute a useful complement to the practical attainment of equality of treatment, but they do not appear to me to be a legally necessary condition.

The direct applicability of Article 52 is not dependent on the taking of these measures save in the special case of the medical and pharmaceutical professions.

I therefore consider, first, that the fact that the Treaty has provided for the intervention, in the form of directives by the Council, of measures intended to attain the objectives of Article 52 does not suffice to exclude the direct effect of this provision; and secondly, that the expiry of the transitional period marks the beginning of the direct applicability of this provision, although the directives in question, or some of them, had not yet been issued.

I have the less hesitation in proposing this interpretation since in the case submitted to the Belgian Conseil d'État it is in its purest form, so to speak, that the problem of equality of treatment arises, in the field, which is perfectly circumscribed, of the condition of nationality. It appears to me to result plainly from Article 52, which creates rights in favour of Community nationals, that a Member State cannot legally place such a condition of nationality, or of reciprocity, when nationality is lacking, in the way of a national of another Member State, who fulfils the conditions of residence and diplomas required by the national law, without infringing the equality of treatment which constitutes the very foundation of this provision of the Treaty.

III — Interpretation of Article 55 of the Treaty

We can now approach the problem of the interpretation of Article 55, which involves, as is known, a derogation from the principle of freedom of establishment by excepting from its application activities which in a Member State are connected, even occasionally, with the exercise of official authority.

1. Two views have been expressed on this subject and it is not surprising to observe that the divergencies which have come to light since the signing of the Treaty are found today in the observations which have been presented in the present case by the Governments of six of the Member States of the Community as well as by the Ordre national des avocats de Belgique and by the Commission.

For some, by excepting from the freedom of establishment activities which are connected with the exercise of official authority, the draftsmen of the Treaty intended to exclude from the scope of Article 52 certain professions in their entirety.

For others, the exception applies only to specific activities, without the professions in which these activities arise being wholly excepted from the freedom of establishment, in so far at least as the activities are separable from the normal practice of the professions.

To decide between these two opposite views it is necessary to start by placing Article 55 in the general context of the provisions of Title III, Chapter 2, of the Treaty, devoted to the right of establishment. Notice first of all that the principle, as it is expressed in Article 52, is the freedom of establishment, that is to say the right for Community nationals to take up and pursue activities as self-employed persons in the same conditions as nationals.

Like freedom of movement for workers, guaranteed by Article 48, the right of establishment constitutes one of the key provisions of the Treaty. It establishes a fundamental freedom for the benefit of nationals of Member States.

In so far as it creates an exception to this freedom, Article 55 can therefore only be interpreted strictly.

Quite recently you have had the occasion to rule on the scope of Article 48 (4), which likewise creates an exception, which concerns employed persons and is related to Article 55 in that it excludes such persons from the right to be employed in the public service.

You have asserted the strictest interpretation by declaring that 'taking account of the fundamental nature, in the scheme of the Treaty, of principles of freedom of movement and equality of treatment of workers within the Community, the exceptions made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation was included': Case 152/73 *Sotgiu* [1974] ECR, 162.

The same attitude must guide you in the interpretation of Article 55.

There is a second consideration: the rules of the Treaty must be applied uniformly; their scope must be the same in all Member States. Therefore it is right to adopt a Community concept of the phrase 'activities connected with the exercise of official authority'.

I understand by that that if each State retains the power to organize a particular activity in its territory under conditions such that it is connected with the exercise of official authority, it is still necessary for this concept to receive the same definition throughout the whole Community.

Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.

Connexion with the exercise of this authority can therefore arise only from

the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration.

In this respect Article 55 must be compared with Article 48 (4), the objective of which, as you have seen in the aforementioned case of *Sotgiu,* is to allow Member States to restrict the admission of foreign workers to certain activities in the public service which involve the exercise of powers of the State. The objective of Article 55 is very similar: it excludes the nationals of other Member States from activities as self-employed persons the pursuit of which would lead them to enjoy privileges of this nature.

The draftsmen of the Treaty have intentionally used the word 'activities' in Article 55.

They wished to draw a clear distinction between 'activities' and 'professions' as appears in particular from Article 57, the third paragraph of which relates specially to the medical and pharmaceutical professions whereas the second paragraph speaks of activities as self-employed persons in general. This is likewise the case with the second paragraph of Article 60, which refers to the 'activities' of the professions'.

This distinction is explained not only by the fact that having regard to the differences which obtain from one Member State to another in the definition, structures and characteristics of the professions, it would doubtless have been difficult to extract a common concept of 'profession' in all the States.

It finds its justification in the desire to exclude from the right of establishment only those activities which are connected with the exercise of official authority, and not professions.

The parenthesis 'even occasionally' reinforces, in my opinion, this interpretation. The practice of a profession covers in general a certain number of separate activities; some are essential, others are only ancillary, complementary or even occasional.

To the extent that one of these activities, even pursued occasionally, is connected with the exercise of official authority, it is by reason of this fact excluded from freedom of establishment. But that does not mean that the exclusion is extended to the profession as a whole.

If such had been the intention of the draftsmen of the Treaty, they would not have failed to say so expressly.

In consequence, to apply the exception in Article 55 to professions as a whole would mean conferring on it, to adopt the phraseology of your judgment in *Sotgiu,* a scope going beyond the aim in view of which this clause was included.

It is only in the case where the practice of a particular profession is inseparable from an activity referred to by this article that the exception could extend to the profession itself.

Finally it is not irrelevant to recall that, on the advice of its legal commission, the European Parliament, by a resolution of 17 January 1972, declared itself in favour of a restrictive interpretation of Article 55 and laid down that only those activities connected with the actual exercise of official authority are excepted from freedom of establishment, but that the professions in the framework of which these activities are pursued must be subject to this freedom.

2. In these circumstances what are the activities of the *avocat* with regard to Article 55?

I say activities and not profession, and this first observation leads me from the outset to dispose of an argument relied on by the National Council of the Ordre des avocats de Belgique and adopted by the Government of the Grand Duchy of Luxembourg in its observations.

The draftsmen of the Treaty have never had the intention, they say, to subject a profession such as that of *avocat,* as such, to the freedom of establishment. In particular the positions adopted at the beginning of 1957 by the heads of delegation to the Inter-governmental

Conference preparatory to the Treaty of Rome bear witness to this, as do certain declarations made at the time of the debates on the ratification of the Treaty in certain national parliaments.

But, Members of the Court, the States, signatories to the Treaty of Rome, have themselves excluded all recourse to the preparatory work and it is very doubtful whether the reservations and declarations, inconsistent as they are, which have been relied upon can be regarded as constituting true preparatory work. Nor can they be held against the new Members of the enlarged Community by virtue of the Act of Accession.

Above all you have yourselves rejected, on several occasions, recourse to such a method of interpretation by asserting the content and finality of the provisions of the Treaty.

No factor can be found, either in Article 52, the scope of which extends to all activities as self-employed persons, or in Article 55, which admits, as has been seen, only a limited derogation from freedom of establishment, which might lead one to think that the principle of equality of treatment has been excluded from the profession of *avocat.*

When the draftsmen of the Treaty desired to deal with certain professions in a particular way, such as for the purpose of subjecting the liberalization of activities to preliminary coordination of conditions for their pursuit in the Member States, they have not failed to say so expressly. This is the case, unique so far as I know, with the medical and pharmaceutical professions.

A fortiori, completely to exclude a particular profession from the effect of Article 52 would have required a clear provision.

According to the interpretation which I believe is correct, it must therefore be admitted that, of the activities of the *avocat,* only those which in a Member State are connected with the exercise of official authority can come within the exception contained in Article 55.

The regulations relating to *avocats* and the determination of their attributes, which are both connected with the judicial structures, remain governed by the national law.

I cannot therefore leave out of account the fact that the question raised in general terms by the Belgian Conseil d'État must be examined in particular with regard to the activities of the *avocat* in Belgium. I am however led to broaden in certain respects the scope of my examination and to shed light on certain characteristics common to the traditional activities of *avocats,* such as are found in the various Member States.

A distinction must be made in these activities between consultation on the one hand and pleading and representation in court on the other.

It goes without saying that the first of these activities has no connexion with the exercise of official authority. It remains however free in all member countries, save in Germany and subject, in France, to the recent legislation on the right to use the description legal adviser.

It is frequently undertaken by members of various legal professions enjoying independent status. It can also be undertaken by salaried lawyers, attached to an undertaking or a group of undertakings.

Is it different as regards representation and defence in court?

Avocats are certainly in this respect auxiliaries of justice. They usually have a monopoly of pleading. They are bound to their client by an authority *ad litem.* The civil or criminal procedure determines their role and the conditions under which they are called upon to intervene in the proceedings. Finally they may be entrusted with dock briefs (commis d'office) and are called upon to give legal aid or assistance.

But none of these considerations appears to me to be convincing that *avocats* are connected by reason of such activities with the exercise of official authority.

They involve collaboration with the administration of justice but they do not confer on the *avocat* any prerogative of official power.

Although undoubtedly the judicial power of judges arises from official authority, that of the State, and emanates directly therefrom, and *avocats* for their part facilitate the exercise of this power and cooperate with the judge in a manner for which their independence, competence and professional code specially qualify them, *avocats* are not themselves connected with the exercise of judicial power.

Nor is the monopoly of pleading, which is moreover not absolute, since it is subject to certain exceptions, in particular before courts of a social nature, to be equated with a privilege of official power. It gives the parties a guarantee of being assisted by a qualified and responsible professional to whom they may entrust the defence of their particular interests. The *avocat* is not responsible for asserting the interest of official power.

At least, when he is charged with this task it is as a member of an independent profession, selected by the State to defend the public interests, or when he belongs to a body attached to the public administration, as is the case with the *Avvocati dello Stato* in Italy. But in this second case they no longer pursue an independent activity; consequently their position does not depend on Article 55 but on Article 48 (4) of the Treaty.

As for the activity called postulation [1], which in France was until quite recently entrusted to *avoués*, who were officers of the court and holders of their offices (officiers ministériels, titulaires de leurs charges) and were appointed by the Government (a situation which still exists as regards the *avoués* of the Cours d'Appel and the *avocats* of the Conseil d'État and the Cour de Cassation), it has no object other than to allow the proceedings to follow their due course; it does not confer on the *avocat* any privilege outside the general law.

The dock brief (Commission d'office), does not, any more than legal aid, arise from the exercise of official authority. It is on the contrary a responsibility or obligation imposed on *avocats* in the interest of the defense in court of the rights of individuals.

There remains the membership of a local or national professional body, the Council of which has the power to decide on applications for admission to the roll, the power to issue internal regulations and disciplinary power.

But these prerogatives of the professional body are not possessed by the *avocats*. The prerogatives belong to the organ made responsible by law for the administration of the profession and it is known that in this respect the organization of other professions is not different in many countries of the Common Market, whether it be doctors, pharmacists, veterinary surgeons, architects or even accountants.

While it is true that the corporate organs therefore have, to the extent that the national law confers it on them, certain prerogatives outside the general law, only those professionals who are members of the said organs, and are generally elected by their peers, can be regarded as connected with the exercise of the authority of the organs.

The question therefore arises as to whether, as a member of the Council of the professional body of his Bar, an *avocat* occasionally exercises an activity coming under Article 55.

On the other hand, the sole fact of being inscribed on the rolls certainly does not have this result.

I do not think that for *avocats* to elect the president or members of the Council of the professional body can be regarded as being connected with the exercise of official authority.

1 — Translator's note. The conduct of the written procedure, and certain limited aspects of oral procedure before certain courts.

It is different when an *avocat* is called upon to make up a tribunal, as is provided for in particular by the Belgian Code judiciaire and the law of other Member States. But is this a matter of the activity of the *avocat* as such? By taking a seat on the Bench alongside the judges, the *avocat* is no longer acting as such. He becomes for the time being a judge and it is in this capacity, as a member of the court, that he is connected with the exercise of official authority.

Let us therefore admit that the nomination of *avocats* to complete a tribunal must be reserved to nationals, just as it was reserved in France for example to male *avocats* at the time when women were not yet admitted as judges.

In any event, if it is considered as an activity within the meaning of Article 55, this occasional connexion with judicial power — and not just assisting it — is not the exclusive prerogative of *avocats:* in certain countries business people are called upon to sit in commercial courts and workers and employers in labour courts; likewise in France landed proprietors and tenant farmers and farmers paying rent in kind sit in equal numbers on the courts dealing with rural leases.

In the same way it does not appear to me possible to consider that the capacity, which some national laws recognize, for *avocats* to be directly elevated to the Bench after having acquired a certain experience in the practice of their profession constitutes an activity connected with the exercise of official authority, since in the event of his being appointed a judge, the *avocat* loses his quality of being a member of a profession.

In short, who does not see how much the profession of *avocat* is the antithesis of the exercise of official authority?

One of the essential characteristics of this profession is, as is known, its independence: independence of the *avocat* himself and independence of the professional body to which he belongs *vis-à-vis* the executive power; and who would think, in any Member State of a Community based on law, of questioning this independence highly proclaimed and jealously preserved by the Bars?

Although in the practice of their noble task *avocats* thus bring an irreplaceable contribution to the service of justice, and although by reason of this they are subject to exacting duties, to strict professional rules and to sometimes onerous obligations, this does not in any way alter the fact that they are a profession, subject in consequence to the principle of freedom of establishment laid down by Article 52 of the Treaty of Rome, to which Article 55 makes only a very limited exception.

I therefore submit that you should rule:

1. that Article 52 of the Treaty establishing the European Economic Community has, as regards the prohibition on any discrimination based on nationality, direct effects in the relations between Member States and their subjects and gives rise to rights in favour of individuals which the national courts are bound to safeguard;

2. that under Article 55 of the Treaty only those activities which are connected, even occasionally, with the exercise of official authority and which involve the implementation of prerogatives of official power outside the general law

can be excluded from freedom of establishment, the attainment of which constitutes the essential objective of Article 52; the fact that such activities can be pursued within the framework of a profession such as that of *avocat* is not capable of excluding this profession from the scope of Article 52, at least in so far as they are separable from its normal practice.