JUDGMENT OF THE COURT (Fifth Chamber)

22 June 1999 *

In Case C-412/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretore di Bologna, Italy, for a preliminary ruling in the proceedings pending before that court between

ED Srl

and

Italo Fenocchio

on the interpretation of Articles 34 and 59 of the EC Treaty (now, after amendment, Articles 29 EC and 49 EC) and Article 73b thereof (now Article 56 EC), for the purpose of determining the compatibility with those provisions of a national rule prohibiting the issue of a summary payment order to be served outside national territory,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), D.A.O. Edward, L. Sevón and M. Wathelet, Judges,

Advocate General: G. Cosmas,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Oscar Fiumara, Avvocato dello Stato,

— the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the Austrian Government, by Christine Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by Laura Pignataro and Paolo Stancanelli, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, represented by Oscar Fiumara; the French Government, represented by Régine Loosli-Surrans, *chargé de mission* in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by Paolo Stancanelli, at the hearing on 26 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 21 January 1999,

gives the following

Judgment

1 By order of 29 November 1997, received at the Court on 5 December 1997, the Pretore di Bologna (Magistrates' Court, Bologna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 34 and 59 of that Treaty (now, after amendment, Articles 29 EC and 49 EC) and Article 73b thereof (now Article 56 EC), for the purpose of determining the compatibility with those provisions of a national rule prohibiting the issue of a summary payment order to be served outside national territory.

2 That question has been raised in proceedings for a summary payment order brought by ED Srl (hereinafter 'ED'), a company incorporated under Italian law

whose registered office is in Funo di Argelato, against Mr Fenocchio, who is resident in Berlin, Germany.

3 ED supplied goods to Mr Fenocchio to the value of ITL 19 933 700. Since Mr Fenocchio paid only a sum of ITL 100 000 by way of down-payment and did not pay the balance, ED applied, on 6 October 1997, to the Pretore di Bologna, under Article 633 of the Italian Code of Civil Procedure (hereinafter 'the Code') for the issue of a summary order for payment of the outstanding sum, together with interest and costs.

4 It is not in dispute that the application complied with all the relevant substantive conditions laid down. However, since the debtor was resident in Germany, the order would have had to be served on him in that State. The application accordingly conflicted with the final paragraph of Article 633 of the Code, which provides that 'the order may not be made if service on the defendant pursuant to Article 643 must be effected outside Italy or the territories under Italian sovereignty.'

5 The national court explains that the special procedure for a summary payment order enables an enforceable court order against a debtor to be obtained quickly and cheaply. The procedure involves a summary examination in which the plaintiff must simply prove the debt with appropriate documentary evidence. The order is issued by the judge *ex parte*. The debtor has the right to oppose the order. If he does so, ordinary contentious proceedings between the parties commence.

6 According to the national court, the justification for the prohibition on recourse to that procedure where the debtor resides abroad was originally to avoid the

debtor's never knowing of an order issued against him or not becoming aware of it until after expiry of the period laid down for opposing it, which would prevent the exercise of his right to defend the action. However, while that reason was valid in 1940, when the rule was adopted, it is no longer justified today, when service abroad no longer poses a major problem and the time-limits for opposing an order are sufficiently long. The national court adds that that is particularly true in the case of States which are signatories to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Article 10(a) of which allows service by post.

7 The national court is accordingly uncertain whether the prohibition at issue is compatible with Articles 34 and 59 of the Treaty and Article 73b thereof. Undertakings established in Italy could be led to prefer to maintain business relations with customers operating in that Member State rather than with foreign customers, since it is only as against Italian customers that they may have the special protection and reduced costs afforded by the procedure for obtaining summary payment orders. For that reason, the free movement of goods could be affected, as could the freedom to provide services, since the procedure for obtaining summary payment orders may also be used in the case of debts arising from the supply of services. Where debts relate to sums of money, the prohibition at issue could also amount to interference with the free movement of capital.

8 The national court states, furthermore, that the provision in question has previously been considered in the context of an objection alleging unconstitutionality raised before the Corte Costituzionale (Constitutional Court). In its order dismissing the objection (see Order No 364 of 27 June 1989 *Giurisprudenza Costituzionale* 1990, IV, p. 1161), the Corte Costituzionale held that the Community Treaties did not enable general principles affecting legal proceedings to be identified, this field being governed by the domestic law of the Member States. The prohibition on the issue of a summary payment order which was to be

served abroad was merely a ground excluding the protection conferred by that procedure and did not involve a lack of jurisdiction since ordinary proceedings could still be brought.

9 In those circumstances, the Pretore di Bologna decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Must the prohibition on issuing a summary payment order where it is to be served on the defendant outside Italy or the territories under Italian sovereignty, that prohibition being laid down by the last paragraph of Article 633 of the Code of Civil Procedure, be regarded as a restriction or measure having equivalent effect capable of hindering, directly or indirectly, actually or potentially, the free movement of goods, services and capital guaranteed by Articles 34, 59 and 73b of the Treaty of Rome?'

Article 34 of the Treaty

10 According to the settled case-law of the Court, Article 34 of the Treaty applies to national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question (see, in particular, Case 237/82 *Jongeneel Kaas and Others* v *Netherlands* [1984] ECR 483, paragraph 22).

11 It is true that the effect of the national provision referred to in paragraph 4 above is to subject traders to different procedural rules according to whether they

supply goods within the Member State concerned or export them to other Member States. However, as the French and Austrian Governments have rightly pointed out, the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member States is too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States (see, in a different context, Case C-69/88 *Krantz* v *Ontvanger der Directe Belastingen* [1990] ECR I-583, paragraph 11, Case C-339/89 *Alsthom Atlantique* v *Sulzer* [1991] ECR I-107, paragraphs 14 and 15, and Case C-93/92 *CMC Motorradcenter* v *Baskiciogullari* [1993] ECR I-5009, paragraph 12).

12 As far as this part of the question is concerned, the conclusion must therefore be that Article 34 of the Treaty does not preclude national legislation which excludes recourse to the procedure for obtaining summary payment orders where service on the debtor is to be effected in another Member State of the Community.

Article 59 of the Treaty

13 In this regard, it need only be stated that, as has been pointed out by the Commission and the majority of the Member States which have submitted observations to the Court, the main proceedings have no connection with a supply of services.

14 Consequently, there is no need to answer the part of the question relating to Article 59 of the Treaty.

Article 73b of the Treaty

15 Article 73b(2) of the Treaty provides:

'Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

16 In order to ascertain the scope of that provision, it should be compared with the provision which it replaces, namely the former Article 106(1) of the EEC Treaty (which became Article 73h(1) of the EC Treaty, in turn repealed by the Treaty of Amsterdam). Article 106(1) stated:

'Each Member State undertakes to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the movement of goods, services or capital, and any transfers of capital and earnings, to the extent that the movement of goods, services, capital and persons between Member States has been liberalised pursuant to this Treaty.'

17 Like Article 106 of the EEC Treaty, Article 73b(2) of the EC Treaty is intended to enable a person liable to pay a sum of money in the context of a supply of goods or services to discharge that contractual obligation voluntarily without undue restriction and to enable the creditor freely to receive such a payment. However, that provision is not applicable to the procedural rules which govern an action by a creditor seeking payment of a sum of money from a recalcitrant debtor.

18 The reply to be given to the national court must therefore be that a national procedural provision, such as that in question in the main proceedings, does not constitute a restriction on the freedom to make payments.

Costs

19 The costs incurred by the Italian, French and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Pretore di Bologna by order of 29 November 1997, hereby rules:

1. Article 34 of the EC Treaty (now, after amendment, Article 29 EC) does not preclude national legislation which excludes recourse to the procedure for

obtaining summary payment orders where service on the debtor is to be effected in another Member State of the Community.

2. **A national procedural provision, such as that in question in the main proceedings, does not constitute a restriction on the freedom to make payments.**

Puissochet Jann Edward

Sevón Wathelet

Delivered in open court in Luxembourg on 22 June 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber