OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 4 December 1997 *

I — Introduction

1. This case concerns Austrian rules requiring managers of certain businesses to reside in Austria. It raises the preliminary question of the entitlement of employers to invoke in national proceedings the Community-law rights of workers (*inter alios*, the manager), as well as an issue of indirect discrimination, and of its possible justification by reference to the need to ensure the effective notification and execution of administrative sanctions.

II — Legal and factual context

2. Trade activity in Austria is regulated by the Gewerbeordnung 1994 (Trade code, hereinafter 'the GewO 1994'). Paragraph 5(1) of the GewO 1994 provides that trades be exercised on the basis of the application to register the trade in question, pursuant to Paragraph 339. That paragraph provides for applications to be submitted to the district administrative authority. Pursuant to Paragraph 340 of the GewO 1994, this authority examines the application to ensure that the statutory conditions for the exercise of the trade applied for are fulfilled by the applicant at the location concerned, failing which exercise of the trade shall be prohibited by a decision based on such a finding.

3. Among the statutory conditions for exercise of a trade, Paragraph 9(1) of the GewO 1994 states that legal persons, commercial-law partnerships and registered civil partnerships may exercise a trade, but must have appointed a manager or tenant, and refers further to Paragraph 39 of the GewO 1994.

4. Paragraph 39 of the GewO 1994 provides as follows:

'(1) The owner may for the exercise of his trade appoint a manager who is responsible to the owner for the proper exer-

* Original language: English.

cise of the trade and to the authorities (Paragraph 333) for compliance with the provisions of the law on trades; he must appoint a manager if he is not resident in Austria.

(2) The manager must satisfy the personal requirements prescribed for the exercise of the trade, be resident in Austria, and be in a position to act accordingly in the business. In the case of a trade for which the production of proof of qualification is prescribed, the manager of a legal person, to be appointed in accordance with Paragraph 9(1), must also:

1. belong to the statutory representative organ of the legal person or

2. be a worker employed in the business for at least half the normal weekly working hours and subject to full compulsory insurance in accordance with the provisions of social security law.

The manager of an owner who is not resident in Austria, to be appointed under subparagraph 1 for the exercise of a trade for which the production of proof of qualifications is prescribed, must be a worker employed in the business for at least half the normal weekly working hours and subject to full compulsory insurance in accordance with the provisions of social security law. The provisions of Paragraph 39(2), in force until the coming into force of Federal law BGBl. No 29/1993, shall continue until 31 December 1998 to apply to persons who have been appointed as manager by 1 July 1993.

(3) In cases where a manager must be appointed, the owner must make use of a manager who acts in the business accordingly.'

5. Pursuant to Paragraph 370(2) of the GewO 1994, any fines regarding the conduct of a trade are to be imposed on the manager, where a manager has been notified or approved.

6. Fortress Immobilien Entwicklungs Ges.m.b.H., now Clean Car Autoservice Ges.m.b.H. (hereinafter 'Clean Car'), a company established in Austria, applied on 13 June 1995 to the Magistrat der Stadt Wien

(Vienna City Council), District Office for Districts 13 and 14, to register the trade of 'maintenance and care of motor vehicles (service station) excluding all artisanal activity'. It notified the appointment of Mr Rudolf Henssen as manager. It stated that Mr Henssen, a German national, was looking for accommodation in Austria, so that evidence of Austrian residence would be produced later. It appears that Mr Henssen has since moved to Vienna. The District Office for District No 23 of Vienna decided on 20 July 1995 to prohibit the exercise of the trade applied for, as the nominated manager resided in Berlin and, thus, did not comply with the conditions in Paragraph 39(2) of the GewO 1994 that he reside in Austria and be in a position to act in the business.

7. On 10 August 1995, Clean Car commenced an administrative appeal before the Landeshauptmann von Wien (Prime Minister of Vienna). It submitted that Mr Henssen now resided in Vienna, and that, in any event, residence anywhere in the European Union should be deemed to satisfy the residence criterion. The Landeshauptmann rejected the appeal on 2 November 1995, on the basis that the material time was the date of application, when the manager was not yet an Austrian resident.

8. On 21 December 1995, Clean Car introduced a complaint (Beschwerde) against this decision before the Verwaltungsgerichtshof, Wien (the Administrative Court, Vienna, hereinafter 'the national court'), on the basis that its arguments based on European Community law had been ignored. Clean Car referred in particular to Articles 6 and 48 of the Treaty establishing the European Community (hereinafter 'the Treaty') and to the prohibition of covert discrimination, and asserted that Mr Henssen was an employee of the company and, therefore, a worker.

III — Questions

9. In order to be able to give judgment in the case, the national court considered it necessary to refer the following questions for a preliminary ruling pursuant to Article 177 of the Treaty:

'1. Are Article 48 of the EC Treaty and Articles 1 and 3 of Regulation No 1612/68 [1] to be interpreted as meaning that employers in the host State also derive therefrom the right to employ workers who are nationals of another Member State without being bound by conditions which — even if they

1 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ, English Special Edition, First Series 1968 (II), p. 475 (hereinafter 'the Regulation').

do not depend on nationality — are typically linked with nationality?

2. If employers of the host State have the right stated in Question 1: Are Article 48 of the EC Treaty and Articles 1 and 3 of Regulation No 1612/68 to be interpreted as meaning that a provision such as Paragraph 39(2) of the Gewerbeordnung 1994, under which the owner of a trade may appoint as a manager for trade law purposes only a person whose residence is in the host State (Austria), is consistent therewith?'

10. The national court indicated that the first question essentially relates to the possibility of an employer relying upon provisions which are couched in terms of workers' rights. It also suggested that account be taken, in answering the second question, of the fact that the manager is responsible to the authorities for the observance of the provisions of Austrian trade law.

IV — Observations

11. Written observations were submitted by Clean Car, the Landeshauptmann von Wien, the Republic of Austria and the Commission of the European Communities. Oral observations were submitted by the Commission.

12. Clean Car argues that an interpretation of Article 48 of the Treaty and of Articles 1 and 3 of Regulation No 1612/68 which did not grant employers the right to engage workers without their having to comply with conditions which are typically connected with having the nationality of a particular State would undermine the right of free movement. The potential derogations provided for in Article 48(3) of the Treaty should be interpreted restrictively [2] and are not relevant to the present case. In particular, the public policy justification would be applicable only if a worker from another Member State were engaged in work which was itself contrary to public policy. Clean Car adds that the requirement that a manager be in a position to act effectively in a business could, in certain locations, be more easily satisfied by a frontier worker resident in a contiguous part of Germany than by a person residing in a distant part of Austria.

13. The Landeshauptmann von Wien accepts that employers may derive rights from Article 48 of the Treaty and from Articles 1 and 3 of Regulation No 1612/68, but maintains that the restriction at issue in the present case is justified by reference to considerations of general interest. He emphasises

2 — Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

that a manager is responsible to the Austrian authorities, on behalf of the owner of the business, for the observance of all applicable legal provisions, and is liable to administrative sanctions for any breach thereof. He must therefore reside where such sanctions can be notified to him and, if necessary, executed. The amended version of Paragraph 39(2) of the GewO 1994, applicable from 1 July 1996 (but not to the facts of this case), provides that the manager must live in Austria, in so far as the notification and execution of any sanctions imposed is not guaranteed pursuant to an international agreement. The Landeshauptmann von Wien compares Paragraph 39(2) of the GewO 1994 with Article 38(2) of the Rules of Procedure of the Court, which requires that applications to the Court state an address for service in the place where the Court has its seat and the name of the person who is authorised and has expressed willingness to accept service. The function of manager, moreover, is not limited to accepting service of administrative or other documents, but extends to personal responsibility for the conduct of the business.

14. The Austrian Government submits, by reference to the case-law of the Court, that an employer does not, as such, fall within the personal scope of application of Article 48 of the Treaty. [3] This entails a negative answer to the first question, thereby removing any need to answer the second.

15. In the alternative, the Austrian Government argues that the material provisions of Paragraph 39(2) of the GewO 1994 are justified by reference to considerations of the general interest. [4] Service of notice of sanctions and their execution in other Member States of the European Union are possible only in very limited circumstances, other than pursuant to bilateral accords. In these circumstances, consideration of Articles 1 and 3 of Regulation No 1612/68 is superfluous, as they merely implement Article 48 of the Treaty.

16. The Commission states that Article 48 of the Treaty and Regulation No 1612/68 grant rights to employees, not employers. It, therefore, seeks to establish whether Mr Henssen is a worker within the meaning of those provisions, as defined in the Court's judgment in *Lawrie-Blum* v *Land Baden-Württemberg*. [5] In that case, the Court stated that an employment relationship is defined in accordance with objective criteria by reference to the rights and duties of the persons concerned, and that its essential feature is that for a certain period of time a person performs services for and under the direction of another person in return for remuneration. [6] As the manager of a business is subject to the board of the company and to the general meeting of the shareholders, who appoint him to perform certain administrative tasks on their behalf and at their direction, and as he probably has a contract of employment

3 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 9 of the judgment; Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 16 et seq.; Case C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 25.

4 — Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraph 29 et seq. of the judgment; Case C-279/93 *Schumacker* [1995] ECR I-225; and *Asscher* v *Staatssecretaris van Financiën*, cited above.

5 — Cited in footnote 3 above.

6 — Loc. cit., paragraph 17 of the judgment.

with the company, and as he cannot be deemed, in the case of a limited company, to be an independent service-provider within the meaning of Article 52 unless he owns all the shares in the company, the Commission concludes that a manager in circumstances such as those of the present proceedings is a worker within the meaning of Article 48 of the Treaty.

17. The Commission adds that the principal effect of the residence rule in Paragraph 39(2) of the GewO 1994 is to exclude non-Austrians. Furthermore, it prevents businesses from appointing managers responsible for their activities in more than one Member State. The Commission submits, furthermore, that Article 48(3) of the Treaty is not applicable in the present case. While it is possible to justify national rules which are not directly discriminatory by reference to considerations of the general interest, [7] and there is a general interest in securing the effective service and execution of administrative sanctions in the case of non-compliance by a business with the applicable law, the Commission submits that the Austrian rules are disproportionately restrictive of the freedom guaranteed by Article 48 of the Treaty. It would be sufficient to oblige the manager to have a professional address in Austria, which could be that of the company itself where it is established in Austria, or to require the company to furnish, by agreement with the authorities, a suitable guarantee regarding possible future administrative sanctions.

V — Analysis

Question 1

18. The national court has not raised a question regarding whether Mr Henssen is a worker within the meaning of Community law. In fact, it refers to a manager as an employee in its order for reference, a view which implicitly underlies both the first and the second questions. The Court has indicated that employees are to be treated as workers for the purposes of Community law. [8] It is also well established that Article 48 of the Treaty gives rise to rights which are directly effective before national courts. [9] The issue raised by the first question is whether an employer, rather than an employee, can invoke before national courts rights deriving from Article 48 of the Treaty and Articles 1 and 3 of the Regulation. Since the latter provisions 'merely clarify and give effect to the rights already conferred by Article 48', [10] the answer to the first question must be sought in that article.

7 — *Bachmann* v *Belgium*, cited in footnote 4 above, paragraph 21 et seq. of the judgment; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, paragraph 19 et seq.

8 — *Lawrie-Blum* v *Land Baden Württemberg*, cited in footnote 3 above, paragraph 17 of the judgment.

9 — See, for example, Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405.

10 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 6 of the judgment.

19. Austria has argued that employers do not fall within the personal scope of application of Article 48 of the Treaty. The cases which it cites [11] establish the definition of a worker and of the employment relationship on which that status depends, and state that the rights of freedom of movement are 'linked' to that status. [12] However, those decisions do not address, nor do they exclude, either expressly or by implication, the extension of the benefit of Community-law provisions on freedom of movement of workers to persons other than workers who, none the less, have a material connection with a person who has that status. Nor can any such inference be drawn from the texts of the relevant Treaty and legislative provisions. For example, Article 49 of the Treaty is the legal basis for the Regulation, including its provisions on rights relating to the residence, housing, employment and education of members of workers' families, irrespective of their nationality.

20. Article 48(3) of the Treaty is couched in terms of rights which are, of their nature, attributed to workers: to accept offers of employment, to move freely for this purpose, and to stay in a Member State for the purpose of employment. Article 1 of the Regulation, similarly, speaks of the right of any Member State national, irrespective of his place of residence, to take up and pursue activity as an employed person in another Member State, with the same priority as its own nationals. Article 48(1) and (2), on the other hand, does not expressly identify any particular beneficiary of freedom of movement of workers, which 'shall be secured in the Community by the end of the transitional period at the latest', and which 'shall entail 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'. In the same vein, Article 3 of the Regulation simply states that national legal, regulatory or administrative provisions or administrative practices 'shall not apply' where they limit application for, offers of, or the taking up and pursuit of employment, or subject these to conditions not applicable in respect of their own nationals or which, though applicable irrespective of nationality, have as their exclusive or principal aim or effect to keep nationals of other Member States away from the employment offered.

21. It would add greatly to the effectiveness of these rights and prohibitions if they could also be invoked by economic actors other than workers, whose freedom of access to workers from Member States other than their own is restricted. For example, the right of workers under Article 48(3) of the Treaty to accept offers of employment actually made, could be set at nought if employers were not free to challenge national restrictions on the making of such offers. It must also be borne in mind that, while freedom of movement of workers may be conceived of, in part, in terms of workers' *personal* rights, and is strengthened by their efforts to secure such rights, *inter alia* before national courts, it ultimately serves an objective of general interest, provided for in Article 3(c) of the Treaty: the establishment

11 — See the citations in footnote 3 above.

12 — See, in particular, *Levin* v *Staatssecretaris van Justitie*, cited in footnote 3 above, paragraph 9 of the judgment.

of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons.

22. The Court has already directly addressed the entitlement of employers to invoke what are normally characterised as workers' rights in *The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte *Agegate*. [13] That case concerned the interpretation of Articles 55 and 56 of the Act of Accession of the Kingdom of Spain to the Communities, on freedom of movement of workers. The Court was asked if provisions of Community law precluded the laying down in United Kingdom law of conditions regarding the nationality, residence and social security contributions of crew members for the grant of fishing licences which excluded most Spanish nationals, and whether such provisions could be relied upon in national courts by the owner of a fishing vessel with a partly Spanish crew. The Court stated that the concept of 'worker' in Article 55 of the Act of Accession was identical to that in Article 48 of the Treaty [14] and that the crew members were not ineligible to be treated as workers by reason of the manner in which they were paid. The Court ruled, furthermore, that the derogation in Article 56(1) of the Act of Accession from the immediate application of Article 48 of the Treaty as between Spain and the existing Member States must be interpreted restrictively. [15] In particular, it could not be interpreted as permitting the introduction of new restrictions, such as some of the conditions in the United Kingdom law at issue. [16] In response to the question of the entitlement of the shipowner and employer to invoke these provisions, the Court responded simply that all of the provisions in question had direct effect and that they could, consequently, be relied upon by individuals before a national court. [17]

23. In *Merci Convenzionali Porto di Genova*, the Court found that, even within the framework of Article 90, the provisions of Article 48 have direct effect and give rise for interested parties to rights which the national courts must protect. [18] In that case, the interested party was an importer who complained of the fact that its own ship's crew was not permitted to unload a cargo at the port of Genoa because such dock work was reserved to an undertaking whose workers were required to be of Italian nationality. Furthermore, in the field of sexual equality in the workplace, which is probably also conceived of primarily in terms of *workers'* rights, the Court implicitly accepted in *Stoeckel* [19] the right of an employer to invoke, in his defence to a prosecution under national labour rules prohibiting nightwork, the directly effective provisions of Council Directive 76/207/EEC on the implementa-

13 — Case C-3/87 [1989] ECR I-4459.

14 — Loc. cit., paragraph 34 of the judgment.

15 — Loc. cit., paragraph 39 of the judgment; see also Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085.

16 — *The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte *Agegate*, cited in footnote 13 above, paragraph 40 of the judgment.

17 — Loc. cit., paragraph 42 of the judgment.

18 — Case C-179/90 [1991] ECR I-5889, paragraph 23 and operative part of the judgment.

19 — Case C-345/89 [1991] ECR I-4047.

tion of the principle of equal treatment for men and women. [20]

24. The extension to employers and other interested parties of the right to invoke Community-law provisions on freedom of movement of workers is also consistent with the case-law of the Court regarding the personal scope of other internal-market freedoms. In *Luisi and Carbone* v *Ministero del Tesoro* [21] and in *Cowan* v *Trésor Public*, [22] the Court found that the Treaty provisions on services, which speak only of the freedom to *provide* services, can also be relied upon by the recipients of services, because this is a necessary corollary thereof, [23] and had in fact been expressly envisaged from the outset. [24] Indeed, in *Bachmann* v *Belgium*, [25] the Court held, in a case brought by a recipient of insurance services, that the impugned provisions of Belgian tax law constituted a restriction on insurers' freedom to provide services. It is worth noting that Article 59, like Article 48(1) and (2), is couched, not in terms of the rights of any particular class of persons, but in terms of the abolition of restrictions. A broad definition of the persons who derive rights from the provisions of the Treaty on fundamental economic freedoms is not, therefore, inconsistent with the relevant texts. It reflects the Court's statement in *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [26] that the functioning of the common market, which it is the objective of the Treaty to establish, is of direct concern to interested parties in the Community. Thus, interested individuals could derive directly enforceable rights even from a Treaty provision expressed in terms of a prohibition, and their vigilance could amount to an effective supervision of the implementation of Community law in addition to that arising under Articles 169 and 170 of the Treaty. [27]

25. It would be strange if consumers had a directly effective Community-law right to travel to other Member States to avail of tourist or other services, or to shop for goods, [28] but employers did not have an equivalent right to travel to recruit workers in another Member State. It would also be illogical if an employer could not complain of discriminatory limitations of his ability to hire workers abroad, whereas a recruiting agency which he hired to do so could complain before the national courts about such restrictions on its freedom to provide services. [29] Employers have a direct and real economic interest in the effectiveness of

20 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, p. 40.

21 — Joined Cases 286/82 and 26/83 [1984] ECR 377, paragraphs 10 and 16 of the judgment.

22 — Case 186/87 [1989] ECR 195, paragraph 15 of the judgment.

23 — *Luisi and Carbone* v *Ministero del Tesoro*, cited in footnote 21 above, paragraph 10 of the judgment.

24 — Loc. cit., paragraphs 12 to 14 of the judgment.

25 — Cited in footnote 4 above, paragraph 31 of the judgment.

26 — Case 26/62 [1963] ECR 1, p. 12 of the judgment.

27 — Loc. cit., p. 13 of the judgment.

28 — See Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 8 of the judgment.

29 — On the relationship of recruitment activities with the services provisions of the Treaty, see Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 16 of the judgment; see also Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraphs 35 to 40.

Article 48. An employer is an inescapable participant in the exercise by workers of the freedoms guaranteed to them. As interested individuals, employers can play an effective role in the supervision of the achievement of the common market, in addition to that of the Commission pursuant to Article 169 of the Treaty.

26. I conclude, therefore, in response to the first question, that employers in the host State derive from Article 48 of the Treaty the directly effective right to employ workers who are nationals of another Member State without being bound by national rules which discriminate, directly or indirectly, on grounds of the nationality of the workers in question.

Question 2

27. It is contrary to Article 48(2) of the Treaty, as well as to Article 3(1) of the Regulation, for Member States to lay down conditions for employment which are indirectly or covertly discriminatory on grounds of nationality. The Court has observed that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners. [30]

28. It is evident, therefore, that the imposition of a condition that managers appointed by certain companies in Austria be resident in that country may constitute indirect discrimination on grounds of nationality. None the less, such apparent discrimination may be justified by reference to the requirements of the general interest. [31] Two such possible justifications have been mentioned in the present case, both related to the fact that the manager is responsible in Austrian law for the conduct of the business.

29. Regard may be had to the Court's judgment in *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [32] (hereinafter '*Van Binsbergen*'). The Court's analysis of the professional rules imposed by Member States on service-providers established in other Member States can, for certain purposes, be extended to the situation of workers who, though resident in one Member State, occupy positions of responsibility in another. The Court stated:

'[T]aking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — in particular rules relating to organisation, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing

30 — See, for example, *Schumacker*, cited in footnote 4 above, paragraph 28 of the judgment.

31 — See, for example, *Schumacker*, loc. cit., paragraph 39 of the judgment.

32 — Case 33/74 [1974] ECR 1299.

the service would escape from the ambit of those rules being established in another Member State.' [33]

30. The first possible justification in the present case is that the residence requirement ensures compliance with the condition that the manager be in a position to act as such in the business, that is, that he exercise a real rather than a merely formal role. In the light of the manager's responsibility to the authorities for the conduct of the business, this is a legitimate objective, which can be placed in the *Van Binsbergen* category of professional rules on organisation. However, the residence requirement may be, according to the circumstances, either unnecessary for or, more fundamentally, unrelated to the achievement of this aim. It is unnecessary if, as has been suggested, a frontier worker is able to perform his managerial tasks without giving up his residence in a neighbouring Member State. However, at the material time, Mr Henssen appears to have been resident in Berlin. It is more germane to this case to consider how the residence requirement is designed to secure the desired end. It is insufficient if, despite residence in Austria, a manager still does not, or cannot, participate as required in the effective management of the company. It would thus be less restrictive for the national authorities simply to impose directly a condition of effective involvement, if necessary specifying, as is done in respect of certain firms in the GewO 1994, conditions regarding working hours, and to leave it to the manager to decide, in the light of geographical and other circumstances, how to reconcile his residence with this condition.

31. Secondly, it has been argued that it is necessary that the manager reside in Austria for the purpose of the service of notice and execution of administrative sanctions in the case of breach of the rules governing the conduct of the business. This is a legitimate objective. The Member States have an obvious interest in the public and regular conduct of traders registered pursuant to laws such as the GewO 1994 and consequently in maintaining effective rules for their supervision. In my view, such supervision, just as much as fiscal supervision and a number of other established mandatory requirements of general interest, is capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty. [34] In the light of the apparent difficulty in enforcing administrative penalties outside the State's jurisdiction, conditions may be imposed to ensure that managers do not escape the ambit of Austria's rules on professional responsibility by residing outside Austria.

32. It must also be considered, however, whether there are less restrictive ways in which this objective could be achieved. [35] As regards service of notice of sanctions, the Court recognised in *Van Binsbergen*, in the context of the need to ensure the observance

33 — Loc. cit., paragraph 12 of the judgment.

34 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, paragraph 8 of the judgment; Case C-250/95 *Futura Participations* v *Administration des Contributions* [1997] ECR I-2471, paragraph 31.

35 — It has not been suggested that managers must reside in Austria in order to permit the exercise of a jurisdiction to impose administrative sanctions in the first place. Thus, the analysis which follows relates solely to the practical problems raised by the notification and execution of such sanctions.

of professional rules of conduct connected with the administration of justice and with respect for professional ethics, the adequacy of a lawyer established in another Member State choosing an address for service in the Member State in question. [36] In the context of the present case, this could conceivably be either at the manager's place of business or, as the Commission has suggested, the seat of the legal person which employs him, if it is established in Austria.

33. However, *Van Binsbergen* concerned a lawyer providing services in a Member State other than his own. The Court was at pains to distinguish the position of persons permanently established. The analogy with services provision is less compelling in the case of the enforcement of substantive professional rules against a worker engaged exclusively in one Member State. Since I am not in doubt that Austria is within its rights in requiring that there be an effective mechanism for the enforcement of administrative sanctions, it needs to be seen whether there is a possible, less restrictive means to this end than the residence requirement. The Court recognised in *Bachmann* v *Belgium* [37] that the difficulties which a Member State's tax authorities might have in enforcing an undertaking by an insurer established in another Member State to pay tax on sums payable to a taxable person residing in the former Member State could justify indirectly discriminatory tax treatment of that person's insurance contributions. However, while accepting that the expense involved would be prohibitive in the circumstances of that case, the Court also stated that '[i]t would certainly be possible in principle for such an undertaking to be accompanied by the deposit by the insurer of a guarantee'. [38]

34. By the same token, it would be less restrictive of the freedom of movement of workers if a foreign-resident prospective manager had the option of furnishing a guarantee or security for compliance with potential administrative sanctions to the Austrian authorities, whether by a deposit, the blocking of a certain sum in a bank account, the nomination of a guarantor, or some other means, in lieu of changing his residence. The material available does not enable a judgment to be made as to whether such financial means would secure the Austrian objective. There may be features of the registered trader's obligations which can only be effectively enforced against a manager liable in person. It is appropriate, therefore, to allow the national court to decide whether, in the light of all circumstances and the objectives of GewO 1994, a financial guarantee would meet the demands of the case. If so, I believe that the Austrian rule is more restrictive than necessary. If not, I believe it would be justified, in the absence of some other means of securing the objective of managerial responsibility.

36 — Cited in footnote 32 above, paragraphs 14 and 16 of the judgment.

37 — Cited in footnote 4 above, paragraph 24 of the judgment.

38 — Loc. cit., paragraph 25 of the judgment.

35. Of course, even the burdensome requirement that a manager provide a guarantee need only be imposed where enforcement of administrative sanctions cannot otherwise be secured in the Member State where he resides. Similarly, an address for service need only be provided where service at his place of residence cannot be ensured. Both of these restrictions could be avoided if notification and enforcement of sanctions were secured through, for example, an international convention. This, indeed, is recognised by the amended version of Paragraph 39 of the GewO 1994, which, as from 1 July 1996, waives the residence requirement for managers where Austria is a party to such a convention with their country of residence. It appears that such a convention has been concluded between Austria and the Federal Republic of Germany, the Member State where Mr Henssen resided at the material time, and that it was applicable at that time. [39] However, that is a matter for investigation by the national court. If such a convention was in force, it follows from the Court's decision in *Wielockx* v *Inspecteur der Directe Belastingen* [40] that the relevant mandatory requirement of general interest — in that case fiscal cohesion — was sufficiently secured by the possibility of resort to its terms. The fact that all Member States may not have concluded such conventions is not a bar to relying upon them to reduce as far as possible the restrictions imposed on freedom of movement of workers, even if there results a difference in the conditions imposed by the host State on the nationals of the various other Member States. Therefore, assuming the effectiveness of the convention in question, the imposition of a requirement of Austrian residence on Mr Henssen constituted a disproportionate measure, whose indirectly discriminatory character cannot be justified in the light of the requirements of the general interest.

VI — Conclusion

36. In the light of the foregoing, I recommend that the Court answer the questions referred by the national court as follows:

(1) Employers in the host State derive from Article 48 of the Treaty the directly effective right to employ workers who are nationals of another Member State

39 — Vertrag zwischen der Republik Österreich und der Bundesrepublik Deutschland über Amts- und Rechtshilfe in Verwaltungssachen, *Bundesgesetzblatt für die Republik Österreich*, 1990, No 526.

40 — Case C-80/94 [1995] ECR I-2493, paragraph 25 of the judgment.

without being bound by national rules which discriminate, directly or indirectly, on grounds of the nationality of the workers in question;

(2) A national rule under which the owner of a business may only appoint as a manager for trade-law purposes a person whose residence is in the host State constitutes indirect discrimination on grounds of nationality;

(3) Such a national rule may be justified by the Member States' interest in securing compliance with national rules or administrative decisions regarding the conduct of a registered trade unless the same objective can be effectively secured by the alternative of a financial guarantee or the terms of an applicable international convention.