3. Article 7 of the EEC Treaty does not preclude a national rule of civil procedure which, whilst affording any creditor established in the territory of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed by taking ordinary legal proceedings before the courts, provides for a simplified procedure for recovery which is not available to a creditor prosecuting a claim for payment of a debt expressed in a foreign currency against a debtor established on national territory.

In Case 22/80

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Amtsgericht [Local Court] Berlin-Schöneberg for a preliminary ruling in the action pending before that court between

BOUSSAC SAINT-FRÈRES S.A., Lille (France),

and

BRIGITTE GERSTENMEIER, Euskirchen (Federal Republic of Germany),

on the interpretation of Article 7 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, P. Pescatore and T. Koopmans (Presidents of Chambers), J. Mertens de Wilmars, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

The Boussac Saint-Frères company (hereinafter referred to as "Boussac") commenced summary proceedings for recovery in the Amtsgericht Berlin-Schöneberg in respect of FF 1 934.52 which it claimed to be owed by Mrs Brigitte Gerstenmeier, a private individual resident in the Federal Republic of Germany.

The court before which the claim has been brought is prevented from allowing it by Article 688 of the Zivilprozeßordnung (the German Code of Civil Procedure, hereinafter referred to as "the ZPO") which, as a result of its being amended by a so-called simplifying law of 3 December 1976, no longer permits summary proceedings for recovery (Mahnverfahren) to be commenced for payment of a debt expressed in foreign currency as against a debtor established in the Federal Republic of Germany. However, that article allows summary proceedings for recovery if the claim expressed in foreign currency is made against a debtor established abroad. Since the court before which the action has been brought is of the opinion that such rules are in substance discriminatory, by an order dated 24 November 1979 it stayed proceedings and requested the Court of Justice to give a preliminary ruling on the question:

"whether that amendment to the German Code of Civil Procedure in relation to creditors from other Member States of the European Economic Community is a discriminatory measure and thus ineffective in relation to such claimants as being contrary to Article 7 of the Treaty establishing the European Economic Community, with the result that they may continue to prosecute claims in a foreign currency against debtors established in the Federal Republic of Germany by means of summary proceedings for recovery".

The order making the reference was received at the Registry of the Court on 14 January 1980.

Boussac, represented by H. Weil, of the Frankfurt Bar, the Government of the Federal Republic of Germany, represented by E. Bülow, acting as Agent, and the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein, acting as Agent, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Boussac, having stressed the advantages of simplicity, speed and economy of the Mahnverfahren (summary proceedings for the recovery of a debt) as compared with ordinary legal proceedings, points

out that, until 1 July 1977, the date when the Law of 3 December 1976 entered into force, a debt could be recovered by the former method without its being necessary to take account either of the currency in which the debt was expressed or of the State in which the debtor was resident, provided that the State in question was party to the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

The amendment to Article 688 of the ZPO is in breach not only of the prohibition of discrimination contained in Article 7 of the EEC Treaty but also of the prohibition derived from the system of the Treaty on the placing of restrictions on an unrestricted system which is already in existence.

That article falls within the field of application of the EEC Treaty, since the restrictions for which it provides have a negative effect on the attainment of several objectives laid down in the provisions of that Treaty, namely a harmonious development of economic activities throughout the Community (Article 2), free movement of goods (Articles 3 (a), 9 *et seq.)* the harmonization of the conditions of competition (Article 3 (f), the liberalization of payment (Article 106) and equal protection of rights for the benefit of all Community nationals (Article 220).

It involves unequal treatment of creditors according to whether their claims are expressed in German or in foreign currency. There is further discrimination between persons whose claims are in foreign currency depending on whether the debtor is established in the Federal Republic of Germany or in another State which is party to the Brussels Convention of 1968.

Although this different treatment is not connected with nationality its effects are however the same as those stemming from discrimination based on nationality. According to the case-law of the Court there is covert discrimination whenever national rules lead to nationals being placed in a better situation than the nationals of the other Member States. This is exactly what the distinction drawn by Article 688 of the ZPO has achieved.

In fact the Mahnverfahren is available to German undertakings which in intra-Community trade (the Member States have all acceded to the Brussels Convention of 1968) make out their invoices in German currency, whereas it cannot be used by undertakings of the other Member States which make out their invoices in their own national currency. It is true that this summary procedure cannot be used either by a German creditor claiming payment from a German debtor of a debt expressed in a foreign currency, but it must not be forgotten that in such a case, which moreover is very rare in normal trade, the transaction is not international. On the other hand, a German creditor can undoubtedly use the Mahnverfahren in order to recover a debt expressed in foreign currency from a debtor established abroad. Consequently, in inter-State trade German undertakings do not labour under any disadvantage whether they make out their invoices in German or in foreign currency, whereas undertakings in the other Member States can make use of the Mahnverfahren only if they make out their invoices in German currency.

With regard to the German Government's explanation that the restriction imposed by Article 688 of the

ZPO is due to the need to apply the techniques of data processing to the summary procedure — which requires a standardization of that procedure excluding debts expressed in foreign currency — Boussac emphasizes that this computerization has not yet been introduced. It goes on to stress that this explanation cannot be accepted in relation to proceedings for the recovery of debts expressed in foreign currency from a foreign debtor established within the Common Market, which are still permitted. The Federal Government in its statement of the reasons for the simplifying amendment has justified the continued existence of this possibility with reference to the need to facilitate the recovery abroad by German undertakings of small or medium-sized debts. But if that argument applies to German undertakings it is difficult to understand why it should not apply to foreign undertakings. In any case the equal right of Community nationals to institute specific legal proceedings should outweigh by a wide margin the interest in rationalizing the handling of the courts' files. It follows that Article 688 of the ZPO in its currently applicable version is not objectively justified.

The article which is criticized is moreover also incompatible with Community law because it represents an unjustified regression in relation to the degree of liberalization previously attained in this field. An examination of a number of provisions of the EEC Treaty shows that the prohibition on the repudiation of measures of liberalization is a principle inherent in that Treaty, even if there is no general express clause to that effect.

Furthermore, the provision in question is at least indirectly in breach of the principle of the liberalization of payments contained in Article 106 of the EEC Treaty in that it forces the foreign creditor, who wishes to have recourse to the simple and inexpensive Mahnverfahren, to make out his invoices for goods delivered and services rendered in German currency, that is to say in a currency other than his national currency.

It cannot be maintained that the creditor may avoid discrimination by converting the debt expressed in foreign currency into a debt expressed in DM. That assertion is not correct, first because the debtor, under the German Civil Code, is entitled to opt to pay in either German or foreign currency, and secondly because the creditor does not have to bear the exchange rate risk between the date when proceedings were commenced and the date of the writ of execution.

Finally, it is not without relevance that the English Court of Appeal in a judgment of 26 November 1974 (*Schorsch Meier GmbH* v *Hennin*, [1975] Q.B. 416, C.A.) held, relying on the EEC Treaty and in particular on Article 106 thereof, that the English courts must henceforth also allow claims for payment of debts expressed in foreign currency. The principles developed by the English court in that judgment, reversing case-law of the United Kingdom which has remained unchanged since the 17th century, must also apply to this case. It should be stressed in this connexion that the breach of Community law represented by Article 688 of the ZPO is all the more serious as the restriction which it contains was introduced after the entry into force of the EEC Treaty

and that discrimination is created as between a claim against a German debtor and a claim against a debtor established in another Member State of the Community.

The *Government of the Federal Republic of Germany* takes the view that the provisions excluding the recovery by means of the Mahnverfahren of debts expressed in foreign currency are not contrary to Community law as the nationality of the claimant is not determinative. Nor is there actual discrimination, for the restriction stems from the need for an adequate procedural organization. Furthermore, it is always open to the creditor to assert his right to recover debts expressed in foreign currency by taking ordinary legal proceedings.

Moreover, recourse to the Mahnverfahren is advantageous only if the defendant does not dispute the claim. However, when a foreign creditor claims payment of a debt without converting it into national currency at the commencement of the proceedings he must in the ordinary course — because of fluctuations in the exchange rates — expect that the action will be defended. There are therefore good grounds for not including in such proceedings debts which have not been converted into national currency.

The amendments made to Article 688 of the ZPO by the Law of 3 December 1976 were prompted by the recommendations of a commission of inquiry which considered whether the Mahnverfahren could usefully be rationalized by computerization. The inquiry showed that the inclusion in a data-processing system of Mahnverfahren claims for payment of debts expressed in foreign currency would be extremely complicated from the technical point of view and furthermore would be too expensive. It was therefore decided to exclude the use of the Mahnverfahren for the recovery of such debts in the Federal Republic. Foreign creditors are not, however, deprived of the opportunity of instituting summary proceedings for recovery, provided that they convert their debts into German currency.

Finally, a clear distinction should be drawn between the provisions of Article 688 (1), which prohibit the recovery by means of the Mahnverfahren of a debt expressed in foreign currency if the debtor is established in the Federal Republic, and those of Article 688 (3) which permit such recovery provided that the debtor is established in another Member State. The latter are in fact merely provisions in implementation of the 1968 Brussels Convention and are designed to ensure that instruments such as the writ of execution which come within the field of application of the said Convention may in fact be issued on national territory. It is apparent in this connexion that both the decision giving leave to enforce a judgment and enforcement within the Community are facilitated if the amount mentioned in the instrument is, from the outset, expressed in the currency of the Member State where it is to be declared to be enforceable and is to be enforced.

Equal treatment as between Member States is guaranteed in this field by the fact that the corresponding instruments based on the decision of a foreign court are declared to be enforceable in the Federal Republic and are then enforced there regardless of whether the amount involved is a specific amount expressed in national currency or in foreign currency.

In short, the Federal Republic is of the opinion that Article 688 of the current version of the ZPO does not make it more difficult for foreign creditors to have recourse to the courts and has not led either intentionally or in fact to discrimination.

The *Commission of the European Communities* takes the view that in this case there is no serious evidence of discrimination based on nationality and therefore of infringement of Article 7 of the EEC Treaty.

The rules contained in Article 688 of the ZPO do not in fact take into account the nationality of the parties but draw a distinction solely on the basis of objective criteria such as the debtor's residence and the currency in which the debt at issue is expressed.

Debtors established in the Federal Republic of Germany may be sued by way of the Mahnverfahren only if the debt at issue is expressed in German currency, no matter what their nationality is, whereas debtors established in other Member States may always be sued by way of that procedure in respect of debts expressed in German and also in foreign currency. It is therefore clear that there can be no question of discrimination based on nationality, since the latter concept plays no part in either case.

The Commission, for the sake of completeness, states that it is also impossible to base an argument against Article 688 of the ZPO on other provisions of the Treaty such as Article 106 or Article 67.

It must first of all be stressed that the rules which are attacked do not in any way prevent the transfer of the amounts which the plaintiff claims from the defendant. In any case, it is pointless to rely in this case on Article 106 (1) of the Treaty, on the one hand because Article 688 of the ZPO does not apply at all to the transfer of currency to another Member State, since the use of the Mahnverfahren for the recovery of debts expressed in foreign currency is also forbidden to creditors residing in the Federal Republic and, on the other hand, because the plaintiff can always endeavour to obtain payment of his debt by commencing ordinary proceedings.

In this case reliance on Article 67, which deals with restrictions on the movement of capital as such, is even less valid than reliance on Article 106.

In short, the Commission submits that the Court should answer the question referred to it by the Amtsgericht Berlin-Schöneberg as follows:

"Provided that general legal remedies are available neither Article 7 of the EEC Treaty nor any other Community law provisions preclude rules limiting recourse to a simplified legal procedure for suing a debtor residing in the Federal Republic of Germany for payment of a debt in cash to debts expressed in national currency".

III — Oral procedure

Boussac, the Government of the Federal Republic of Germany and the Commission of the European Communities presented oral argument at the sitting on 18 June 1980.

The Agent of the Commission acknowledged on this occasion that in Germany, in contrast to what he stated in his written observations, recourse to

normal legal proceedings instead of to the Mahnverfahren entails additional costs.

The Advocate General delivered his opinion at the sitting on 17 September 1980.

Decision

1 By an order dated 24 November 1979, which was received at the Court on 14 January 1980, the Amtsgericht [Local Court] Berlin-Schöneberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the application of Article 7 of the Treaty.

2 A claim by an undertaking established in France, which had sold and delivered some textiles to a trader resident in the Federal Republic of Germany, for payment of the balance of the invoice price relating to that contract by means of the summary procedure known as the "Mahnverfahren" has been brought before the German court. That procedure enables the creditor to obtain an order to pay a specific sum simply and expeditiously. After the claim has been lodged the debtor is not summoned or given notice to appear before the court; he may however raise an objection after he has been served with the summary order to pay (Mahnbescheid) made by the court on the basis of a printed form which the creditor has completed; in the absence of any objection the order to pay is converted on application by the creditor into an order for enforcement (Vollstreckungsbescheid).

3 The Amtsgericht took into account the fact that before 1 July 1977 a claim could be made using that procedure for payment of a debt expressed in national or foreign currency, whilst since the entry into force on that date of the so-called simplifying law of 3 December 1976 that procedure may no longer be used for obtaining payment of a debt from a debtor established on German territory if that debt is expressed in foreign currency, whereas the procedure remains available for obtaining payment of debts expressed in foreign currency from a debtor established abroad.

4 In those circumstances the national court has referred to the Court the question whether that amendment to German procedural law is a measure discriminating against creditors established in other Member States of the Community which is to be regarded as ineffective as far as they are concerned because it infringes Article 7 of the Treaty.

5 Although the Court may not express an opinion in the context of Article 177 of the Treaty on the validity of a national law, it is nevertheless competent, for the purposes of cooperation with the national courts, to extract from the question those aspects of Community law the interpretation of which will enable the national court to resolve the problems with which it is concerned.

6 It is clear from the file on the case that the aim of the simplifying law, which is the cause of the German court's uncertainty, was to rationalize the summary procedure for payment of debts by recourse to computerization. Since a technical study showed that the inclusion of claims expressed in foreign currency in an electronic processing system would cause excessive difficulties, the German authorities decided, in principle, to restrict the field of application of the summary procedure for payment to claims relating to debts expressed in German currency. They nevertheless excepted from that rule claims for the payment of debts expressed in foreign currency against debtors established on the territory of one of the Contracting States parties to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters on the ground that the provisions of that Convention made such an exception necessary.

7 The file on the case also makes it clear that ordinary legal proceedings remain available to creditors who are unable to take advantage of the simplified "Mahnverfahren". Those ordinary proceedings have to be instituted by a creditor who, having obtained an order to pay at the outcome of the "Mahnverfahren", meets with opposition from the debtor.

8 In those circumstances the question referred to the Court by the national court must be understood as asking whether Article 7 of the Treaty precludes a national rule of civil procedure which, whilst affording any creditor

established on the territory of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed by taking ordinary legal proceedings before the courts, provides for a simplified procedure for recovery which is not available to a creditor prosecuting a claim for payment of a debt expressed in a foreign currency against a debtor established on national territory.

9 Article 7 of the Treaty prohibits any discrimination on grounds of nationality within the field of application of the Treaty. That article forbids not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

10 There is no doubt that a national law which subjects access to the courts to conditions relating to the currency in which debts are expressed might in fact place creditors established in the other Member States in a less favourable position than creditors established on national territory and thus constitute a barrier to trade in the common market which would principally affect the nationals of the other Member States.

11 The German Government, which has submitted written observations to the Court, has maintained that a law such as the one at issue in this case cannot be discriminatory, since the distinction based on the currency in which the debt is expressed is justified on objective grounds, the electronic processing provided for by the German legislation with a view to simplifying the "Mahnverfahren" being impossible in the case of debts expressed in foreign currency.

12 That argument is not convincing. Although German legislation makes the "Mahnverfahren" available for obtaining payment of debts expressed in foreign currency from debtors established on the territory of the other Contracting States parties to the Brussels Convention, and although it is an established fact that the implementation of that rule requires such claims made pursuant to the "Mahnverfahren" to be dealt with manually, the need to provide for the electronic processing of all claims subject to that procedure cannot be relied upon in relation to the recovery of debts expressed in foreign currency from debtors established on national territory.

13 However, that consideration is not such as to resolve the problem completely. A distinction based on the currency in which debts are expressed, which applies only to the simplified procedure for recovery of debts, does not amount, even indirectly, to discrimination on grounds of nationality if the parties to the contract are free to select the currency in which the debt is expressed and if ordinary proceedings remain available to creditors established on the territory of the other Member States, whatever the currency in which the claim is expressed.

14 The answer to the question referred to the Court should therefore be that Article 7 of the Treaty does not preclude a national rule of civil procedure which, whilst affording any creditor established on the territory of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed by taking ordinary legal proceedings before the courts, provides for a simplified procedure for recovery which is not available to a creditor prosecuting a claim for payment of a debt expressed in a foreign currency against a debtor established on national territory.

Costs

15 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Amstgericht Berlin-Schöneberg by order of 24 November 1979, hereby rules:

Article 7 of the EEC Treaty does not preclude a national rule of civil procedure which, whilst affording any creditor established in the territory

of a Member State the opportunity to sue for payment of a debt in whatever currency it is expressed by taking ordinary legal proceedings before the courts, provides for a simplified procedure for recovery which is not available to a creditor prosecuting a claim for payment of a debt expressed in a foreign currency against a debtor established on national territory.

Kutscher Pescatore Koopmans

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 29 October 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 17 SEPTEMBER 1980 [1]

Mr President,
Members of the Court,

In the instant reference for a preliminary ruling the main action arises out of the sale by the Boussac Saint-Frères company, the large French textile manufacturer, of its products to its customer Mrs Gerstenmeier, the owner of a retail clothing business in Germany. Since Mrs Gerstenmeier had not paid her bill, which was made out in French francs, in full the creditor company commenced summary proceedings [Mahnverfahren] in the Amtsgericht [Local Court] Berlin-Schöneberg, the court having jurisdiction, for an order to pay.

The court before which those summary proceedings were brought was unable, as the plaintiff wished, to order Mrs Gerstenmeier to pay the outstanding balance, that is, an amount expressed in foreign currency. In fact Article 688 (1) of the Zivilprozessordnung (ZPO — Code of Civil Procedure) restricts the admissibility of such proceedings to payment of a sum expressed in national currency, at least where the debtor is not established in one of the Contracting States parties to the Brussels Convention of 27 September 1968 other than the

1 — Translated from the French.