OPINION OF ADVOCATE GENERAL DARMON

delivered on 10 March 1993 *

Mr President,
Members of the Court,

1. The Landgericht (Regional Court) Hamburg asks the Court whether Community law, in particular in so far as it establishes freedom to provide services, precludes a requirement for security to be given for costs as laid down in Paragraph 110(1) of the German Code of Civil Procedure.

2. The parties to the main proceedings are Anthony Hubbard, a solicitor acting as the executor of the will of Mr Karsten, resident in the United Kingdom, and Peter Hamburger, resident in Germany, to whom the deceased had given a power of attorney in respect of his bank accounts. [1]

3. In his capacity as the defendant in the main proceedings, Mr Hamburger relied as against Mr Hubbard on Paragraph 110(1) of the German Code of Civil Procedure, which provides as follows:

'Foreign nationals who bring proceedings must, on application by the defendant, give security for costs and lawyers' fees ...'.

4. Under Paragraph 110(2), only a reciprocity clause would have made it possible for the plaintiff to avoid giving such security. Such a clause is not fully effective in relations between the United Kingdom and Germany, however, notwithstanding the conclusion of two international agreements on the matter to which both States are parties.

5. The first is the German-British Convention on the conduct of legal proceedings of 20 March 1928, [2] brought into force again with effect from 1 January 1953. [3] That convention makes the non-provision of security conditional upon the British plaintiff's being resident in Germany. Mr Hubbard, however, resides in the United Kingdom.

6. The second agreement — the European Convention on Establishment signed in Paris on 13 December 1955 [4] — provides in the chapter on judicial and administrative guarantees that

'No security or deposit of any kind may be required, by reason of their status as aliens or of lack of domicile or residence in the country, from nationals of any Contracting Party, having their domicile or normal residence in the territory of a Party, who may be plaintiffs or third parties before the Courts of any other Party ...', [5]

* Original language: French.

1 — Commission's observations, p. 2 of the French translation.

2 — *Reichsgesetzblatt* II, p. 623.

3 — *Bundesgesetzblatt* II, p. 116.

4 — *Bundesgesetzblatt* 1959 II, p. 998.

5 — Article 9.

but is not applicable in this regard to nationals of the United Kingdom, which gave a reservation in respect of that provision.

7. Since the national court was apparently unable, under either national law or the abovementioned conventions, to decline to apply Paragraph 110(1) of the Code of Civil Procedure, it has asked the Court to examine the compatibility of that provision with Community law.

8. The four questions which it refers to the Court, which are set out in the Report of the Judge-Rapporteur, [6] actually raise two issues. The first is whether the national provision in question satisfies the requirements of the right to freedom to provide services, as defined in Articles 59 and 60 of the Treaty (first question) and, more generally, complies with the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty (third question). The second issue is the potential effect on the application of the Treaty of, on the one hand, the international conventions mentioned above (second question) and, on the other, the connection of the dispute in question with the law of succession (fourth question).

9. I shall begin by considering the first of those issues.

10. It should be recalled at the outset that it is not for the Court, in proceedings pursuant to Article 177 of the Treaty, to make any declaration on the compatibility of rules of national law with Community law, but it may provide the national court with all relevant guidance as to the interpretation of Community law with a view to enabling that court to assess the compatibility of those rules with the provisions of Community law. [7]

11. I shall first consider — once for all — the application of Article 7 of the Treaty. That provision prohibits, within the scope of application of the Treaty, overt and covert discrimination on grounds of nationality. [8]

12. Pursuant to the principle *specialia generalibus derogant*, that article

'applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. [9]

13. The Court stated this in particularly clear-cut terms in the judgment in *Cowan* v *Trésor public*: [10]

'Under Article 7 of the Treaty the prohibition of discrimination applies "within the scope of application of this Treaty" and "without prejudice to any special provisions contained therein". This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given

6 — Paragraph 6.

7 — See, *inter alia*, Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249, paragraph 6.

8 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11.

9 — Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13.

10 — Case C-186/87 *Cowan* v *Trésor public* [1989] ECR 195.

concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the *freedom to provide services*.' [11]

...

... the essential requirements of Article 59 of the Treaty [have become] directly and unconditionally applicable ... [15]

14. If the legislation in question is contrary to Article 59 of the Treaty, it will necessarily be contrary to Article 7. It is therefore in the area of freedom to provide services that this examination should be pursued.

Those essential requirements abolish all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided. [16]

15. In order to do so, it is necessary, according to the reasoning which the Court habitually uses, [12] to establish that the activity in question must be described as a provision of a service, that the national measure concerned restricts the freedom to provide that service and lastly that that restriction is not justified by any general interest.

...

The ... aim of the third paragraph in Article 60 is to enable the provider of the service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of that State.' [17]

16. As to whether the activity in question constitutes the provision of a service within the meaning of Articles 59 and 60 of the Treaty, I would refer to the pragmatic definition and the characteristics of that concept as they emerge from the judgment in *Webb*: [13]

17. Accordingly, that definition must be regarded as covering the task carried out for remuneration in a Member State by a member of a profession established in another Member State which consists in seeking, in the interests of the successors of his deceased client, to obtain possession of the assets which that client held on the territory of the first State.

'According to the wording of the first paragraph of Article 60 of the Treaty the expression "services" means services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons ... [14]

18. In that respect, it is irrelevant whether the provider of services acts 'in his own name', as the national court states, or in the name of the deceased's successors. In the

11 — Paragraph 14, emphasis added.

12 — See, *inter alia*, Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085.

13 — Case 279/80 *Webb* [1981] ECR 3305.

14 — Paragraph 8.

15 — Paragraph 13.

16 — Paragraph 14. See also Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221.

17 — Paragraph 16.

latter case, it would be necessary to take into consideration the status of the latter as recipients of services. [18]

19. If a national provision, as a precautionary measure, obliges the provider or the recipient of the services to deposit a sum on the sole ground that he is neither a national of the State in which the service is provided nor resident in that State, such an obligation, even though it does not radically obstruct the provision of the service, has the effect of delaying the performance of the service and of increasing its cost. It therefore constitutes a restriction on freedom to provide services contrary to Article 59 of the Treaty.

20. Are there, however, any justifications which, in the light of Community law, might validate such a restriction?

21. In that respect, adopting the wording of the judgment in *Webb*, the Court held in *Säger* v *Dennemeyer* [19] that

'as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives'. [20]

22. There the Court essentially lays down two conditions for a possible limitation of the freedom to provide services: first, the existence of 'imperative reasons relating to the public interest' and, secondly, the requirement that the limitation should apply uniformly to all economic operators. Furthermore, that limitation must comply with the principle of proportionality.

23. Nine Member States [21] still recognize *cauto judicatum solvi* or security for costs, although the extent to which it is binding on the courts may vary. Thus in German law the court is obliged to require security for costs to be given if the defendant has requested it and the conditions for its imposition are satisfied. In other Member States, on the other hand, such as Spain, Greece, Ireland and the United Kingdom, the court has a discretion to reject an application for security for costs.

18 — In that respect, the Court has held that 'the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions ...' (Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 16). See also *Cowan* v *Trésor public*, paragraph 15. Consequently, whether it is the provider of services himself or the successors in title who act on the territory of another Member State through the intermediary of the provider, the situation resulting from a provision such as the one under consideration is equally restrictive: either the successors must give security or they must restrict their choice to a provider of services who is a national of the State in which the court is situated.

19 — Cited in footnote 16.

20 — Paragraph 15. It would note that, although this form of words is the one that the Court commonly uses to explain the justification for an obstacle to the freedom to provide services, it has also held — in particular in *Bond van Adverteerders* — that in certain cases that justification may be based on grounds of public policy within the meaning of Article 56 of the Treaty.

21 — Portugal does not recognize any requirement to give security for costs, France repealed it by Law No 75-596 of 9 July 1975 and Italy, for its part, has declared it unconstitutional.

24. The *raison d'être* for such security is the intention to guarantee the payment of the costs and expenses of proceedings brought by a foreigner. This age-old rule aims at guaranteeing the solvency of such a plaintiff and to ensure his continuing representation before the court.

25. Suppose that an action is brought by a foreign plaintiff. The court before which the action is brought dismisses his action. In the event that the plaintiff is insolvent or in bad faith, his opponent must be able at least to recover his costs without having to bring potentially difficult and costly proceedings in foreign courts.

26. Although the rule regarding security for costs continues to feature in the majority of the Member States, the device is generally regarded by academic writers as obsolete and in the process of disappearing.

27. Do the reasons put forward to justify its existence, that is to say, principally preventing the risk of insolvency, constitute 'imperative reasons relating to the public interest', or do other, less discriminatory, means exist which afford sufficient guarantees?

28. I am inclined to take the view that security for costs arises from an image of a foreigner which cannot apply to Community nationals, who, within a single market, must be able to move and carry out their activities without restriction. [22] The guarantee which it is supposed to secure for the defendant loses most of its *raison d'être* where national means of enforcement are available to every Community national and especially where the Brussels Convention ensures that in civil and commercial matters the formalities governing the recognition and enforcement of judicial decisions are simplified. Rather than securing protection for the defendant, there is a serious risk that security for costs will be used for the purposes of delaying the proceedings, enabling the defendant to postpone any defence on the substance and increase the number of procedural issues raised. It seems difficult, moreover, to consider that it is based on imperative reasons relating to the public interest. [23]

29. I would also point out that in a case which was likewise concerned with a question of procedure, but also with discrimination on grounds of residence — only persons established on the national territory were entitled to act as legal representatives before certain courts —, the Court held that the requirement of residence in the Member State could not be justified by a general interest. [24]

30. Lastly, I would note that, in a recent decision of 17 November 1992, [25] the Oberlandesgericht (Higher Regional Court) München rejected of its own motion the application of Paragraph 110 of the Code of Civil Procedure on the ground that it did not comply with the prohibition of discrimination on grounds of nationality set out in Article 7 of the Treaty.

22 — Belgian law dispenses Community nationals from having to give security for costs where matters covered by the Treaty are concerned.

23 — See paragraph 14 of the judgment in Case C-288/89 *Collectieve Antennevoorziening Gouda* v *Commissariaat voor de Media* [1991] ECR I-4007, which sets out a number of overriding reasons relating to the public interest recognized by the Court.

24 — Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299.

25 — RIW 1993, Heft 2, p. 150, at 151.

31. The second series of questions referred by the national court seeks to establish the effect on the above-mentioned Community provisions of, first, international conventions and, secondly, the connection of the transaction at issue with a branch of private law, namely the law of succession, which has no apparent link with the scope of application of the Treaty.

32. As regards the effect of international agreements concluded between Member States, I would note that, apart from the fact that they are alleged to be inapplicable in this case, [26] it follows from the case-law of the Court that they may not in any way jeopardize the implementation of Community principles as fundamental as the freedom to provide services.

33. In the judgment in *Frilli*, [27] where the absence of a reciprocal agreement between Belgium and Italy had been put forward as grounds for refusing to grant entitlement to a minimum pension, the Court ruled that:

'The grant of such a benefit to a foreign worker who fulfils these conditions cannot depend on the existence of a reciprocal agreement with the Member State of which that worker is a national.'

34. Furthermore, in *Cowan* v *Trésor public*, the Court, citing *Frilli*, held that

'the right to equal treatment laid down in Community law may not be made dependent on the existence of a reciprocal agreement between the relevant Member State and the country of which the person is a national'. [28]

35. Consequently, the exercise of the right to freedom to provide services cannot be made dependent on agreements concluded outside the Treaty by the Member States. Even where those agreements might be applicable they cannot validate any restriction whatsoever on intra-Community trade. As the Court held in *Conegate*, [29] Article 234 of the Treaty must be interpreted as meaning that

'[a] greements concluded prior to the entry into force of the Treaty may not ... be relied upon in relations between Member States in order to justify restrictions on trade within the Community'.

36. As regards the second point — the effect of Community law on a dispute coming within the law of succession —, the lessons from the case-law of the Court are unambiguous. The Court has, on several occasions, rejected the classical argument, relied upon in order to oust the application of Community law, that the domestic law relates to a matter with which the Treaty is not concerned.

37. In the *Casagrande* judgment, [30] which was concerned with education and training policy, the Court dismissed the argument that this sphere came within the exclusive

26 — Commission's submissions, p. 3 of the French translation.

27 — Case 1/72 *Frilli* v *Belgian State* [1972] ECR 457.

28 — Paragraph 12.

29 — Case 121/85 *Conegate* v *HM Customs and Excise* [1986] ECR 1007, paragraph 25.

30 — Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 773.

competence of the Member States. [31] In the judgment in *Casati*, [32] the Court also held that criminal legislation and the rules of criminal procedure remained within the competence of the Member States, but that

'it is clear from a consistent line of cases decided by the Court that Community law ... sets certain limits ... as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons'. [33]

38. The Court likewise makes sure, in a sphere which has not been harmonized, such as that of direct taxation, that the national rules comply with the principle of equal treatment laid down in Community law. [34]

39. Lastly, the Court has held generally that:

'The effectiveness of Community law cannot vary according to the various branches of national law which it may affect'. [35]

40. The fact that a dispute comes within the law of succession therefore has no effect on the application of the principle of freedom to provide services.

41. Accordingly, I propose that the Court should rule that:

(1) It is contrary to Articles 59 and 60 of the EEC Treaty for national rules to require a Community national who, in his capacity as a provider of services, has brought proceedings before a court of a Member State to be put under an obligation, if the defendant so requests, to provide security designed to ensure the repayment of the costs and lawyers' fees, before the defendant enters an appearance, on the sole ground that the plaintiff is a foreign national.

(2) The application by a Member State to a Community national carrying out his activities on the territory of another Member State of the principles of non-discrimination and freedom to provide services may not be affected by the existence of reciprocal international agreements concluded with that State and may not depend on the branches of national law in which the provider of services carries out that activity.

31 — Paragraph 6.

32 — Case 203/80 *Casati* [1981] ECR 2595.

33 — Paragraph 27. See, to the same effect, paragraph 19 of the judgment in *Cowan* v *Trésor public*.

34 — See paragraph 24 of the judgment in Case 270/83 *Commission* v *France* [1986] ECR 273.

35 — Case 82/71 *Pubblico Ministero* v *SAIL* [1972] ECR 119, paragraph 5.