OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 6 May 1997 *

I — Introduction

1. In this case, the Court is called upon once again to rule on whether certain national procedural provisions are compatible with the rules of Community law, in particular the principle of non-discrimination laid down in Article 6 of the EC Treaty. The national provisions in question are those of the Austrian legal system which, in this case, require foreign nationals bringing legal proceedings against nationals of the country in which the action has been brought to lodge a sum of money as security for the costs of the legal proceedings (*cautio iudicatum solvi*).

II — The facts of the case

2. Mr Saldanha, who is resident in Florida (USA) and holds both American and British nationality, and MTS Securities Corporation, which has its registered office in the United States of America, are shareholders in Hiross Holding AG (hereinafter 'Hiross'), a company which has its registered office in Austria.

On 27 September 1994, Mr Saldanha, along with MTS, instituted proceedings against Hiross before the Handelsgericht (Commercial Court), Vienna, seeking to prevent internal restructuring transactions within the group controlled by Hiross which would have involved the transfer of shares from certain companies to others within the same group. At the request of the defendant, the Handelsgericht ordered the plaintiffs to lodge the security for costs provided for under Paragraph 57 of the Zivilprozeßordnung (Austrian Code of Civil Procedure, hereinafter 'the ZPO'), since none of the grounds of exemption set out in Paragraph 57(2) was applicable in the case. The appellate court before which Mr Saldanha contested the decision delivered at first instance concerning provision of the security in question held that, under Article 6 of the EC Treaty, the Austrian procedural rule in question did constitute discrimination on grounds of nationality. For the purpose of applying that Treaty provision, the appellate court pointed out, it was immaterial that the plaintiff had dual British and American nationality. Nor was it relevant that the person concerned resided outside the Community: the complete equality which the Treaty established between Austrian nationals and Community nationals had, it ruled, the effect of prohibiting in every case the security at issue, since national law exempted Austrian nationals, even if residing outside Austria, from the obligation to provide it.

3. The Oberster Gerichtshof (Supreme Court), to which a further appeal was made

* Original language: Italian.

against the above appellate decision and before which the matter is now pending, states that, under Paragraph 57(1) of the ZPO, foreigners who bring proceedings before an Austrian court are required to provide, for the benefit of defendants and at the latters' request, security for the legal costs, except where otherwise provided by international treaty or convention. That rule, the national court states, is designed to protect defendants in proceedings before national courts against abusive or vexatious claims made by foreign plaintiffs. Under Paragraph 57(2) of the ZPO, however, there is no obligation to provide such security where the plaintiff is normally resident in Austria or a judicial decision ordering the plaintiff to indemnify the defendant for his legal costs would be enforceable in the State in which the plaintiff is normally resident.

The Oberster Gerichtshof also points out that Austrian nationals who are normally resident or have their domicile abroad are not required to provide the security within the meaning of Paragraph 57 of the ZPO. Consequently, according to that court, the rule of procedural law in question does not draw any distinction according to whether a plaintiff has or has not within the national territory assets capable of forming the subject of enforcement proceedings. According to the Oberster Gerichtshof, the disputed rule has its basis in the desire to safeguard Austrian nationals residing abroad as well as in the desire to take account, for reasons of reciprocity, of the similar rule provided for in this regard by the majority of European legal systems.

4. So far as concerns the application *ratione temporis* of Community-law rules, the Oberster Gerichtshof sets out a number of observations arguing in favour of the application of the Treaty rules to the present dispute, notwithstanding the fact that the dispute arose before Austria acceded to the Community. The Oberster Gerichtshof notes that appellate courts, among which, in this case, the Oberster Gerichtshof itself must be included, are obliged, in the absence of transitional provisions, to take account of binding *ius superveniens* even after the decision at first instance, even though the facts in issue relate to a period prior to the entry into force of that new law. The Oberster Gerichtshof argues that the provisions of the Treaty, and in particular Article 6 thereof, are of such a binding nature. The decision to refer in this case must therefore, it argues, be based on those provisions. Also for the reasons set out above, the Oberster Gerichtshof discounts the possibility that, for the purposes of the decision which it is required to reach, the similar prohibition of discrimination on grounds of nationality laid down in Article 4 of the Agreement on the European Economic Area, to which Austria has been a party since 1 January 1994, may be of relevance.

5. In view of the Community nature of the legal problems arising in the present dispute, the Oberster Gerichtshof in Vienna has considered it necessary to refer the following question to the Court for a preliminary ruling:

'Where proceedings are brought before an Austrian civil court by a British national

who is also a national of the United States of America, who resides in that country (in Florida) and does not have any residence or assets in Austria, against a limited company whose registered office is in Austria, seeking to have that company restrained from selling or otherwise transferring shares in specified subsidiary companies to its Italian subsidiary company, or to subsidiaries of that company with registered offices in Italy, without the approval of a qualified majority of three-quarters of the general meeting of shareholders or, in the alternative, of a simple majority of the general meeting of shareholders, does the fact that he has been ordered by the competent Austrian court (of first instance), on application by the defendant company pursuant to Paragraph 57(1) of the Austrian Code of Civil Procedure, to provide security for costs in a specified sum constitute discrimination on grounds of nationality contrary to the first paragraph of Article 6 of the EC Treaty?'

III — Examination of the case

A. *Admissibility*

6. The question submitted to the Court in this case raises a delicate preliminary problem concerning the application *ratione temporis* of the provisions of the EC Treaty. The Court is being asked to rule on the interpretation of a Treaty provision in relation to facts which occurred at a time when the Republic of Austria, whose procedural provisions are in dispute in this case, did not yet belong to the Community. It is for that reason necessary to consider how the above Community provisions are dealt with in the domestic legal system and, more generally, to examine the criterion governing the application *ratione temporis* of primary Community law.

7. A situation quite similar in several respects to that here under examination was recently considered by the Court in the *Data Delecta* case. [1] The facts giving rise to that dispute before the national court had occurred before the Kingdom of Sweden acceded to the European Communities. The Court, however, addressed the merits of the question submitted to it without having previously examined whether and how the facts in issue came within the scope *ratione temporis* of Community law; in that case, the Court did not provide the national court with any interpretative criteria regarding the exact definition of the temporal context in which Community law produces its effects and did not, therefore, make it clear whether the case in question fell to be resolved according to Community law or according to rules derived from some other legal system. What actually happened in the case was that, in ruling on the merits, the Court of Justice set out the principles of law with which the national court, *in casu* the Swedish Supreme Court, had to comply. This latter court, however, subsequently ruled that the dispute did not come within the scope of the EC Treaty. [2] The result was that the ruling of the Court of Justice was set aside since it had become irrelevant in regard to the dispute before the national court; it ought therefore

1 — Case C-43/95 *Data Delecta and Forsberg* v *MSL Dynamics* [1996] ECR I-4661.

2 — Judgment of the Högsta Domstol of 13 November 1996.

to be said, if one reflects on the case, that that question could not and ought not to have been submitted for a preliminary ruling.

8. The facts of the dispute at present before the Court also occurred prior to the entry into force in Austria of the EC Treaty. In the *Data Delecta* case, the national court making the reference had not specified the reasons in law which could have justified retroactive application of the rules of Community law to the dispute. In the present case, however, the national court making the reference has itself indicated, albeit with a certain amount of doubt, that Community law does apply to facts dating back to a period when Austria did not yet belong to the Community. The reason for this retroactive application of Community law, the national court states, lies in the mandatory nature of Community law, which, as *ius superveniens*, is directly applicable, under Austrian procedural law, to all cases in which final decisions had not yet been delivered by the date on which the EC Treaty entered into force in Austria.

9. This line of argument regarding the application *ratione temporis* of Community law, however, gives rise to perplexity on a number of counts. I, for my part, doubt whether Community law can in itself govern situations arising under different legislation which does not, unless in special circumstances such as those allowing retroactive application of more favourable penal provisions, show sufficient connecting factors with the Community rules which could have been relied on at the period in which those situations arose. In the absence of express provisions to the contrary, the principle *tempus regit actum* governs the temporal effect of Community law. Situations arising at a time when the rules in question were not yet *law* in relation to the facts underlying the dispute do not therefore come within the scope *ratione temporis* of the Treaty. It follows that the abovementioned principle *tempus regit actum* must be uniformly applied within the Community. Otherwise, the regulation of the temporal effects of the Treaty rules could vary, with obvious and unjustified different treatment of similar situations depending on the national legal system called on each particular time to guarantee the provisions of the Community legal system.

10. Another consequence which should be pointed out follows from the foregoing considerations. A Member State may, on the basis of its own independent choice, decide that certain rules of Community law are to be retroactively applicable to situations arising at a period prior to that State's accession to the Community, for the specific purpose of conferring on the persons concerned rights and privileges to which they would not otherwise be entitled under the Treaty. The Community legal system does not, in my view, prohibit national legislatures from adopting such legislation. The problem is that these would, in any event, be internal rules, which certainly do not change their nature simply through the fact of being adopted by reference to Community rules. It is not the Community legal system that imposes these latter rules within the domestic sphere of the State, but rather the national system that has taken them over by confer-

ring on them a temporal effect which they would be lacking in their original legal system. In my view, the Court of Justice would therefore not be competent to rule, in proceedings for a preliminary ruling, on the provisions thus introduced into the domestic legal system, precisely because they are not rules which come within its jurisdiction under Article 177 of the Treaty. [3]

11. The reasoning just outlined cannot in any way be altered by the possible application to this case of the rules set out in the Agreement on the European Economic Area (EEA), [4] which entered into force on 1 January 1994 and to which Austria was a Party on that date. Even if the Court wished to reformulate the question along these lines in order to bring it within the ambit of the corresponding provision in the EEA Agreement (Article 4), the Court would in my view lack jurisdiction to rule on the question submitted to it for a preliminary ruling. The question in this case comes from a national court which, at the time when the facts in issue occurred or at the time subsequently when the main proceedings were instituted, was not competent to address a question to the Court of Justice pursuant to that Agreement. It is true that, under Article 107 of the EEA Agreement and Protocol 34 thereto, [5] an EFTA State may allow a court or tribunal to ask the Court of Justice of the European Communities 'to decide on the interpretation of an EEA rule'. The exercise of that option, however, is expressly made subject to prior performance of the obligation, set out in Article 2 of the above Protocol 34, to notify the Depositary and the Court of Justice of the European Communities to what extent and according to what modalities the protocol is to apply to the courts and tribunals of the State in question. Austria, however, has not exercised that power or satisfied the obligation to which such exercise is subject. Nor can it be argued that the Court gained that jurisdiction as a result of Austria's subsequent accession to the Community. The protocol referred to does not contain any provision to that effect. There is also no reason to assume that the power in question was implicitly authorized by the protocol but left dormant, so to speak, until the country concerned had acceded to the EC.

12. Nor can it be argued that the Court of Justice may substitute itself for the EFTA Court in order to interpret, in its place, provisions of the EEA Agreement which it had no jurisdiction to interpret at the time when the contested facts occurred or when the proceedings were instituted. On this point, moreover, it must be recalled that Article 108 of the EEA Agreement provided for the establishment of an EFTA Court equipped with a jurisdictional remit similar in some respects to that established by Article 177 of the Treaty, to which national courts of countries which are party to the EEA Agreement

3 — See in this regard Case C-346/93 *Kleinwort Benson* [1995] ECR I-615 and the Opinion of Advocate General Tesauro delivered in that case on 31 January 1995. See also the Opinion of Advocate General Jacobs of 17 September 1996 in Cases C-28/95 *Leur-Bloem* [1997] ECR I-4161, I-4165 and C-130/95 *Giloy* [1997] ECR I-4291, I-4294.

4 — OJ 1994 L 1 of 3 January 1994, p. 3.

5 — Protocol 34 on the possibility for courts and tribunals of EFTA States to request the Court of Justice of the European Communities to decide on the interpretation of EEA rules corresponding to EC rules, OJ 1994 L 1 of 3 January 1994, p. 204.

but are not Community Member States may have recourse. [6] At the time when Austria, Finland and Sweden acceded to the Community, an *ad hoc* agreement [7] laid down rules allowing the courts and tribunals of those three Member States, albeit for a short period, to refer cases of the type mentioned to the EFTA Court, even following accession to the Community. In those cases in which the jurisdiction of the EFTA Court is expressly provided for, the national court called on to apply the provisions of the EEA Agreement is certainly not empowered alternatively to raise the question for a preliminary ruling before the Court of Justice rather than before the EFTA Court. There is no such possibility of choice, nor could such a choice have been provided for without running counter to the principle of exclusive jurisdiction which the Court of Justice has, moreover, confirmed even in specific relation to the EEA Agreement. [8]

B. *Merits*

13. In the event that the Court should rule that it does have jurisdiction, I shall set out below some thoughts on the merits of the question submitted for a preliminary ruling.

There is here, in my view, one single real problem, which arises on the basis of this Court's case-law regarding the compatibility of the security for legal costs with the principle of non-discrimination. It is necessary to determine whether the proceedings brought by the plaintiff involve a substantive right protected by the Community legal system or whether the Court is faced with proceedings brought exclusively by reference to the provisions of company law in force at the time within the Austrian legal system.

14. The Commission wishes to place the present case in the context of the provisions of Article 54(3)(g) and the fourth indent of Article 220 of the EC Treaty. For his part, the plaintiff submits that the proceedings relate to the rights provided for by Articles 52 and 54(3)(g) of the Treaty. It seems to me, however, that the proceedings in question cannot have any basis in the rules of Community law, precisely because of the time at which they were instituted, which was prior to Austria's accession to the Community. The only possibility which seems to me to be reasonably well founded is therefore that of bringing the legal proceedings instituted

6 — Article 108 was given effect by the EFTA States when they concluded the *Agreement on the Establishment of a Surveillance Authority and a Court of Justice*. Article 34 of that Agreement provides that: '1. The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. 2. Where such question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion ...'.

7 — *Agreement on transitional Arrangements for a period after the Accession of certain EFTA States to the European Union*. See, in particular, Article 5(1), which provides that: 'After accession, new proceedings may only be instituted before the EFTA Court in cases in which the events giving rise to an action under the EEA Agreement on the Surveillance and Court Agreement occurred before accession and an application is lodged with the EFTA Court within three months after accession ...'.

8 — Opinion 1/92 of 10 April 1992, [1992] ECR I-2821. The clear distinction in the areas of jurisdiction between the EC Court and the EFTA Court, introduced after the adoption of the initial text of the Agreement, in fact made it possible to regard as compatible with the EC Treaty the jurisdictional mechanism created by Article 108 of the EEA Agreement (paragraph 19). The need to comply with Articles 164 and 219 of the Treaty was further clearly underlined by the Court in Opinion 2/94 of 28 March 1996, [1996] ECR I-1759, paragraph 20.

by the plaintiff into relation with the provisions of the EEA Agreement and specifically with those set out in Articles 31 to 35 seeking to eliminate restrictions on freedom of establishment, which also relate to companies, as well as Article 77, dealing with company law, which refers to Annex XXII, which imposes an obligation on EFTA States party to the Agreement to give effect within the EEA to a series of Community directives, with a view to rendering equivalent the guarantees designed to protect the interests of shareholders and others in the corporate context and with a view to regulating specific matters relating to companies, such as secessions, mergers and so forth.

15. In the light of the Court's case-law on the matter, [9] there is also no basis to the arguments set out by the defendant regarding the plaintiff's nationality and the alleged absence of discrimination in the treatment to which he is subject under the Austrian legislation. The Court's case-law is clear on this point: the key factor with regard to exercise of the rights conferred by the Treaty is the fact of being a national of a Community Member State. That criterion must also be valid with regard to the scope *ratione personae* of the EEA Agreement: the fact that the person concerned may have another, non-Community (or non-EEA) nationality neither adds to nor detracts from the rights to which he is entitled under the Community legal order and that established by the EEA Agreement.

16. The other issue in dispute concerns the nature and the effects of the rule of Austrian procedural law underlying the dispute which has been referred to the Court. On this point, for considerations of a general nature regarding the legality under Community law of the security for costs and the criteria permitting application thereof, I refer to the judgments [10] given most recently by the Court on this subject and the Opinions [11] which I delivered in those cases.

The provision in question is also clearly based on a criterion involving discrimination between nationals and non-nationals. An Austrian national is exempted from providing the security even if he is resident outside Austria or does not own sufficient assets within the national territory to satisfy a defendant's claims for reimbursement of legal costs incurred by the latter. The rule is thus in no way designed to protect a party against whom unfounded or vexatious proceedings have been brought, except in those cases where such proceedings have been instituted by a non-national. No special consideration need therefore be paid to the objectives — of ensuring equality or providing guarantees — which the defendant, in my view unjustifiably, attributes to it.

9 — Case C-369/90 *Micheletti and Others* [1992] ECR I-4239.

10 — *Data Delecta*, cited above in footnote 1, and Case C-323/95 *Hayes* v *Kronenberger* [1997] ECR I-1711.

11 — Opinions delivered on 23 May 1996 and 28 January 1997 respectively.

17. In contrast, consideration should be paid to the reasoning set out by the Austrian Government, which argues that the disputed provision of national law is compatible with Community law because it provides an exception for contrary provisions under international treaties or conventions, with the result that Community nationals are exempt from having to provide the security. The same, it need hardly be mentioned, applies with regard to the EEA. This interpretation, in conformity with Community law, put forward by the Austrian Government does not alter, but rather confirms, the conclusion which I have reached: the only difference is that it shifts the obligation to comply with the Community or EEA rule from the legislature, which would be required to repeal or amend the provision contrary to the principle of non-discrimination, to the courts, which would also be required not to apply that provision in order to ensure compliance with the rules in which that principle is set out. What matters, in any event, for the purpose of proceedings which are the subject-matter of a reference to the Court, is that the rules with which it must ensure compliance should be fully and directly applied within the national legal order. The Member State, thus, remains competent in regard to solutions at the constitutional level which it considers appropriate or preferable for the purpose of achieving such a result, on condition that individuals can enjoy effectively and with certainty the rights conferred on them by the Community legal order or that of the EEA. [12] In any event, the national courts are required to take the view that the contested security cannot be applied to or held against a Community or EEA national. [13]

IV — Conclusion

18. On the basis of the foregoing, I propose that the Court reply as follows to the question referred by the Oberster Gerichtshof in Vienna:

The Court does not have jurisdiction to rule on the question submitted for a preliminary ruling by the Oberster Gerichtshof in Vienna, in so far as the facts underlying the dispute pending before that court predate the Republic of Austria's accession to the European Communities and thus fall outside the scope *ratione temporis* of the EC Treaty.

12 — Case 72/85 *Commission* v *Netherlands* [1986] ECR 1219, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, and Case 104/86 *Commission* v *Italy* [1988] ECR 1799.

13 — Case 106/77 *Simmenthal* [1978] ECR 629.

In the alternative, should the Court consider that it does have jurisdiction to rule on the question submitted, I propose that it reply along the following lines:

Article 4 of the Agreement on the European Economic Area precludes nationals of Community Member States or of States party to the EEA Agreement from being required to provide security for the costs of legal proceedings, as provided for under Paragraph 57 of the Austrian Code of Civil Procedure, where Austrian nationals, in similar circumstances, are not required to provide such security.