OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 12 July 2001 [1]

I — Facts of the case, relevant legislation and questions referred

1. The Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) (Austria) has sought from the Court under Article 234 EC a ruling as to how Article 104(5) of the Rules of Procedure of the Court of Justice (hereinafter 'the Rules of Procedure') is to be interpreted where a Member State has not laid down any special national provisions on the award of the costs entailed by a reference for a preliminary ruling, but instead awards the successful party a lump-sum reimbursement of expenses which is based on national proceedings and is not sufficient to cover the actual costs incurred in making a reference for a preliminary ruling to the Court.

2. The first paragraph of Article 104(5) of the Rules of Procedure, in the codified version of 6 March 1999, [2] reads: '[i]t shall be for the national court to decide as to the costs of the reference'.

3. In its judgment in Case C-350/96, [3] the Court answered questions referred for a preliminary ruling by the Austrian Verwaltungsgerichtshof (Administrative Court) in proceedings between Clean Car Autoservice GesmbH (hereinafter 'the claimant') and the Landeshauptmann von Wien (Prime Minister of Vienna Land), who had rejected an application by the claimant to register a trade on the ground that it had appointed as manager a person who did not reside in Austria. In paragraph 2 of the operative part of the judgment, the Court held:

'Article 48 of the Treaty precludes a Member State from providing that the owner of an undertaking exercising a trade on the territory of that State may not appoint as manager a person not resident there'.

1 — Original language: Dutch.

2 — OJ 1999 C 65, p. 1. Following the amendments to the Rules of Procedure of 16 May 2000 (OJ 2000 L 122, p. 43), Article 104(5) is now Article 104(6). The new numbering is used below.

3 — *Clean Car Autoservice* [1998] ECR I-2521.

4. In paragraph 44 of the judgment in Case C-350/96 the Court held, with regard to costs:

'Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court'.

5. By judgment of the Verwaltungsgerichtshof of 24 June 1998, the national decision was annulled on the ground that it was unlawful and the claimant was awarded ATS 12 860 by way of reimbursement of expenses.

6. It appears from the documents before the Court that the decision of the Verwaltungsgerichtshof on the apportionment of costs was based on the 1985 Verwaltungsgerichtshofgesetz (Law on the Administrative Court) (VwGG)[4] and the 1994 Verordnung des Bundeskanzlers über die Pauschalierung der Aufwandersätze im Verfahren vor dem Verwaltungsgerichtshof[5] (Decree of the Federal Chancellor concerning the lump-sum determination of amounts to be reimbursed in respect of expenses incurred in proceedings before the Verwaltungsgerichtshof (hereinafter 'the Decree').

7. In proceedings before the Verwaltungsgerichtshof the successful party is entitled to reimbursement of its expenses only in so far as this is provided for in Paragraphs 47 to 60 of the VwGG. In the event that Paragraphs 47 to 60 of the VwGG contain no specific rules, Paragraph 58 of the VwGG provides that each party is to bear its own costs. The VwGG contains rules on certain fixed legal costs and other expenses attracting a lump-sum reimbursement defined in greater detail in the Decree. It was on that basis that the claimant was awarded the sum of ATS 12 860. The VwGG and the Decree contain no specific rules on costs incurred in connection with references for a preliminary ruling to the Court of Justice.

8. By application lodged at the Landesgericht für Zivilrechtssachen Wien on 18 February 1999, the claimant claimed from the City of Vienna and the Republic of Austria (hereinafter 'the defendants') payment of compensation on account of State liability in the sum of ATS 60 000 together with interest of 5% from 8 May 1998, that is to say the costs it had incurred in the course of the reference for a preliminary ruling which led to the Court's judgment in Case C-350/96. In a supplementary pleading of 17 May 1999, the claimant relied in support of its claim on the doctrine of State liability for infringement of Community law.

9. Then, by order of 26 November 1999, lodged at the Court Registry on 9 December 1999, the Landesgericht für Zivilrechts-

4 — BGBl. 1985/10.
5 — BGBl. 1994/416.

sachen Wien referred the following question to the Court for a preliminary ruling:

'Where, as in the present case, a Member State (Austria) has not prescribed any national rules enabling national courts to decide and to award or, as the case may be, to apportion, in relation to the parties to the proceedings, the costs of a reference for a preliminary ruling, how is Article 104(5) of the Rules of Procedure of the Court of Justice of the European Communities to be interpreted?'

10. The claimant (Clean Car Autoservice GesmbH), the defendants (the City of Vienna and the Republic of Austria), the Government of the Republic of Austria and the Commission have submitted written observations. The hearing was held on 10 May 2001.

II — Admissibility

11. The defendants have raised the question of the admissibility of the reference. The City of Vienna submits that there is no connection between the interpretation of Community law requested and the facts or the subject-matter of the main proceedings. A more detailed interpretation of Article 104(6) of the Rules of Procedure is not necessary to enable the national court to give judgment on the claimant's claim for compensation of 18 February 1999. The Court did not allow the request to extend the grounds of the application contained in the supplementary pleading of 17 May 1999, so that the interpretation of that provision is immaterial for that reason also. Furthermore, Article 104(6) of the Rules of Procedure is nothing more than a rule conferring jurisdiction. It does not govern either whether a right to reimbursement of costs exists or what the amount of any such reimbursement should be. The Republic of Austria submits further that, in its judgment in Case C-350/96, the Court of Justice did not give a ruling on the claimant's costs but left that decision to the national court. Since the Verwaltungsgerichtshof has in the meantime awarded the claimant a sum by way of reimbursement of expenses, the reference for a preliminary ruling on the interpretation of Article 104(6) of the Rules of Procedure no longer has any purpose.

12. According to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which assumes responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. One exceptional circumstance relevant here in which the Court of Justice can refuse to rule on a question from a national court is where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose. [6]

6 — See, most recently, the judgment in Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraphs 30 and 31.

13. In my view, that is not the case here. It is clear from the order for reference that the Landesgericht is faced with an actual dispute on the reimbursement of costs incurred in the course of a reference for a preliminary ruling to the Court of Justice. Since Article 104(6) refers expressly to the award of such costs, there is a connection with the main action. The contention that that provision merely confers jurisdiction is a matter of substance. The fact that the claimant has in the meantime already been awarded a sum by way of reimbursement of expenses is immaterial, since it has brought the main action precisely in order to contest the grounds for, and the amount of, that award on the basis of Article 104(6).

14. In my opinion, therefore, the reference from the Landesgericht is admissible.

III — Substance

A — *Submissions of the parties*

15. The claimant submits to the Court that Article 104(6) of the Rules of Procedure is to be interpreted as meaning that the application of national provisions which, like Austrian law, contain no rules on the award of the costs of a reference for a preliminary ruling is inadmissible. Since it has been established in this case that the Austrian authorities have infringed directly applicable provisions of Community law, the question as to who is to bear the costs of the reference for a preliminary ruling should be answered on the basis of the principles laid down by the Court of Justice [7] and in Austrian law [8] concerning State liability and in the light of the rules on costs contained in Articles 72 and 73 of the Rules of Procedure as interpreted by the Court of Justice.

16. According to the claimant, the relevant Austrian provisions on the award and apportionment of legal costs are not expressly tailored to references for a preliminary ruling under Article 234 EC and, in particular, the rules on the lump-sum reimbursement of costs incurred in proceedings before the Verwaltungsgerichtshof do not satisfy the requirements of Article 104(6) of the Rules of Procedure. It follows that the national rules on costs are insufficient, since they do not take account of the extra costs entailed by a reference for a preliminary ruling under Article 234 EC. The opposite view, it contends, would render Article 104(6) of the Rules of Procedure meaningless in cases where the legislation of a Member State does not provide for the reimbursement of the additional costs incurred in the course of

7 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357.

8 — The plaintiff is referring to Article 23 of the Bundesverfassungsgesetz (Law on the Federal Constitution) and Paragraph 1 of the Amtshaftungsgesetz (Law on the Liability of Officials).

a reference for a preliminary ruling made as a step in the action before the national court.

17. Such an interpretation would, in the claimant's submission, also be contrary to Articles 72 and 73 of the Rules of Procedure, according to which expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the remuneration of agents, advisers or lawyers, are to be regarded as recoverable costs. Furthermore, the application of the Austrian provisions alone would disregard the relevant principles laid down by the Court in regard to the amount of recoverable costs.

18. The defendants and the Austrian Government propose that the Court interpret Article 104(6) of the Rules of Procedure as meaning that reimbursement of the costs of a reference for a preliminary ruling should be governed by the national law applicable in the main action, and that that provision in no way requires the Member State to enact rules entitling the successful party to reimbursement of the costs actually incurred in the course of a reference for a preliminary ruling.

19. The Commission points out that, in accordance with the wording of Article 104(6) of the Rules of Procedure, the decision on the costs of a reference for a preliminary ruling is left to the national court. In making that decision, however, the national court must take account of the settled case-law of the Court to the effect that any discrimination between the rules on the recovery of costs entailed by a reference for a preliminary ruling under Article 234 EC and the rules on costs entailed by a comparable procedural step under national law is to be avoided.

B — *Assessment*

20. It should first be noted that the reference from the national court is confined to the question of the interpretation of Article 104(6) of the Rules of Procedure. However, the issue raised, as also described in the observations submitted, warrants a more detailed reply. The question underlying the reference for a preliminary ruling is essentially to what extent Community law requires Member States to confer on the successful party in the main action a right to reimbursement of the additional costs incurred by him in a reference for a preliminary ruling within the meaning of Article 234 EC. An interpretation of the Rules of Procedure is not sufficient to answer that question, which concerns the procedural autonomy enjoyed by Member States. Regard must also be had, therefore, to the case-law of the Court of Justice which limits that autonomy.

21. On the other hand, the Court's answer to the question referred by the Landesgericht must, in my view, remain within the

framework defined by the reference. Procedural law and a claim for reimbursement of the additional costs entailed by a reference for a preliminary ruling must not immediately be treated in the same way as liability law and a claim for compensation for the damage caused to an individual as a result of the fact that a Member State has infringed a directly applicable provision of Community law. It is of course conceivable that such claims might overlap, inasmuch as the claim for reimbursement of additional costs forms part of a broader action for damages brought against the State for infringement of directly applicable provisions of Community law. At the hearing the claimant pointed out that the national proceedings related primarily to the claim for reimbursement of legal costs and only secondarily — in the event that the court does not allow the claim for full reimbursement of the costs — to a claim for compensation. In my view, however understandable the alternative claim may be and however interesting a decision from the Court on that claim may be, the present reference for a preliminary ruling can be confined to those aspects of the case which relate to matters of procedural law and the Court need not give a ruling on the doctrine of State liability. There is nothing in the documents before the Court to show that the claimant, as well as seeking reimbursement of its legal costs, has also brought claims for damages against the Austrian State in connection with the judgment in Case C-350/96. [9] Even more important is the fact that the order for reference contains no indication that the referring court requires a more detailed interpretation of the case-law on the principles governing State liability for infringement of Community law.

22. The Court addressed the question as to who should be ordered to pay the costs of proceedings in the first case referred to it under Article 177 of the EEC Treaty (now Article 234 EC). [10] The solution preferred by Advocate General Lagrange in his Opinion in that case was that each party should bear its own costs. However, the Court decided that, '[w]ith regard to the parties, the proceedings in this case are a step in the main action pending before the Court of Appeal of The Hague. The decision as to costs is therefore a matter for that court'. [11] Since then, the Court has consistently held in proceedings under Article 234 EC that the decision on costs is a matter for the referring court, since the preliminary reference procedure is to be regarded as a step in the main action. That formula has in the meantime been codified in the present Article 104(6) of the Rules of Procedure.

23. It also follows from the Court's settled case-law that, in the absence of provisions of Community law, the national court must base its decision on the apportionment of legal costs on national legislation. In its judgment in *Bollmann* the Court held that,

9 — Counsel for the claimant have calculated the total amount recoverable by way of costs incurred in the reference to the Court for a preliminary ruling in Case C-350/96 to be no less than ATS 435 761 (EUR 31 668). Of that, the Landesgericht has — provisionally — been asked to order the defendants to pay ATS 60 000.

10 — Judgment in Case 13/61 *De Geus en Uitdenbogerd* [1962] ECR 45.

11 — *De Geus en Uitdenbogerd*, p. 54.

as Community law then stood, the recovery of costs and the recoverability of expenses necessarily incurred by the parties to the main action were governed by the provisions of national law applicable to that action. [12] The Community legislature has enacted as little legislation on the award of costs incurred in the course of the main action and the reference for a preliminary ruling as it has, for example, on preclusion or limitation periods or amounts of compensation.

24. In the light of that case-law and the wording of Article 104(6) of the Rules of Procedure, it is, in my view, clear that the decision on the apportionment of the additional costs incurred in a reference for a preliminary ruling must be made by the national court in the context of the main action and on the basis of national procedural law. The question whether there is any entitlement to reimbursement of all expenses must in principle be determined on the basis of that national law.

25. The claimant's submission regarding Articles 72 and 73 of the Rules of Procedure is immaterial in this respect. Article 72 of the Rules of Procedure enshrines the principle that proceedings before the Court of Justice are to be free of charge, except for a few specified expenses. This case, however, relates not to costs charged by the Court but to the legal costs incurred by the claimant in connection with its legal counsel in the preliminary reference procedure. Article 73 of the Rules of Procedure defines the term 'recoverable costs', but that provision is relevant only where the Court itself decides on costs. As stated, in the case of a reference for a preliminary ruling under Article 234 EC, that decision has to be made by the national court in the main action.

26. Under Community law, however, Member States do not have complete freedom in deciding on the award of the costs of a reference for a preliminary ruling under Article 234 EC. According to settled case-law, in the absence of relevant Community rules, it is for the national legal order of each Member State to lay down the rules governing proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law. However, the national legislature is bound by two general principles of Community law aimed at ensuring that the national legal order provides individuals with the means necessary to assert the rights they enjoy under Community law. The first principle states that an action for infringement of Community law must not be treated less favourably than similar actions based on national law (principle of equivalence). According to the second principle, national provisions must not make it impossible in practice to

12 — Judgment in Case 62/72 *Bollmann* v *Hauptzollamt Hamburg-Waltershof* [1973] ECR 269, paragraph 6.

exercise the rights conferred by Community law (principle of effectiveness). [13] In my view, this case-law can also be applied to national proceedings relating to the award of legal costs.

27. The Court leaves it exclusively to the national court to determine whether the preconditions laid down by Community law have been fulfilled in a particular case. However, in order to assist the national court in exercising that jurisdiction, the Court can make available to it other criteria providing objective guidance on the application and interpretation of those two principles.

28. In this case, the examination to be carried out by the national court can, in my view, be confined to the principle of equivalence. It is impossible to determine to what extent rules providing for the lump-sum reimbursement of legal costs might infringe the principle of effectiveness, which the Court has developed primarily in connection with the establishment of time-limits for bringing actions under national law. For that it would have to be proved that — in this case — the rules on costs make it impossible or excessively difficult to exercise freedom of movement for workers. In this case, however, the national court has already annulled the domestic provision found to be in breach of Article 39 EC. Even though it needed to make a reference for a preliminary ruling in order to do so, the fact that additional costs were thus incurred is not in my view sufficient reason to assume that the exercise of the Community right was thereby made impossible or excessively difficult.

29. In assessing whether the principle of equivalence has been observed, the national court must consider whether, under Austrian law, the rules governing the costs of references for preliminary rulings to the Court of Justice are less favourable than those applicable to comparable national procedures. There are two issues involved here. First, the court has to consider what is the appropriate point of comparison, in other words with which national procedure the reference for a preliminary ruling under Article 234 EC is to be compared. In so doing, the national court must examine the essential characteristics of both procedures. [14] It must also determine whether the rules on the reimbursement of the costs of a reference for a preliminary ruling are less favourable than those applicable to a comparable national procedure. This must also be determined by reference to the special features of the provisions concerned. [15]

30. The fact that it can be difficult to select an appropriate point of comparison in a particular case is clear from the differing views of the parties as to how to determine which national procedure is comparable

13 — See, most recently, judgments in Case C-78/98 *Preston and Others* v *Wolverhampton Healthcare NHS Trust and Others* [2000] ECR I-3201, paragraph 31, and Joined Cases C-52/99 and C-53/99 *Office national des pensions (ONP)* v *Camarotto and Vignone* [2001] ECR I-1395, paragraph 21.

14 — See judgment in Case C-326/96 *Levez* v *Jennings* [1998] ECR I-7835, paragraphs 39 and 43, and *Preston*, paragraph 49.

15 — See judgment in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, paragraph 19, and *Levez*, paragraph 44.

with the reference for a preliminary ruling. The Republic of Austria (as defendant) take the view — as does the Commission — that a reference from the Verwaltungsgerichtshof to the Court of Justice for a preliminary ruling under Article 234 EC is clearly comparable with the national procedure whereby the Verwaltungsgerichtshof — by way of a step in the main action — makes an application to the Verfassungsgerichtshof (Constitutional Court) in the course of legislative review proceedings. The claimant, on the other hand, considers that the comparison should be based on the situation in which the Oberster Gerichtshof (Supreme Court) seeks a ruling from the Court of Justice under Article 234 EC on the interpretation of Community law.

31. The parties agree, however, that the Austrian rules on legal costs are complicated. At the hearing, an agent for the Republic of Austria (as defendant) explained that Austrian law contains various provisions on the award of legal costs, the application of which depends on the type of action involved and the court before which it has been brought. In administrative appeal proceedings, for example, each party must in principle pay its own costs. In proceedings before the Verwaltungsgerichtshof, however, different rules apply, which do provide for the reimbursement of costs but only to a limited extent, that is to say on a lump-sum basis. In civil cases in which the claim is not contested (non-contentious proceedings), again, each party must in principle pay its own costs. In civil cases in which the claim is disputed, on the other hand, the general rule under Austrian law is that the court may order the unsuccessful party to pay the full costs of the proceedings.

32. The claimant also argues that the Austrian rules on legal costs infringe the principle of equivalence, since in certain cases they provide for the reimbursement of the legal costs of a reference for a preliminary ruling under Article 234 EC and in other cases not. In my opinion, that view is not tenable. The principle of equivalence does not require Member States to apply in respect of all national proceedings the same rules on the reimbursement of the costs of references for a preliminary ruling to the Court of Justice.

33. In my view, application of the principle of equivalence depends primarily on the nature of the action governed by national law. For each particular action, it is necessary to establish as a point of comparison a national procedure representing a step in the main action which is comparable to the preliminary reference procedure before the Court of Justice. It must then be determined, on the basis of the relevant procedural law, whether the rules on legal costs applicable to references for a preliminary ruling to the Court of Justice are less favourable than those applicable to the comparable national procedure. If, under the rules applicable to the comparable national procedure, each party bears its own costs, those rules can also be applied to the costs incurred in references for a preliminary ruling to the Court of Justice. If the successful party in the main action can claim from the unsuccessful party the additional legal costs associated with the

comparable national procedural step, the same must also apply to the costs incurred in a reference for a preliminary ruling under Article 234 EC.

34. Where national law provides for the lump-sum reimbursement of expenses, the national court must, in my view, when examining whether the relevant procedures are equivalent, bear in mind that the criteria governing the lump-sum reimbursement of expenses incurred in the national procedure may not take into account the additional costs — such as higher travel and subsistence costs — which proceedings before the Court of Justice may entail.

35. As I said earlier, however, it is for the national court, in the light of the circumstances relevant to the case, to make a final ruling on whether the principle of equivalence has been observed.

IV — Conclusion

36. In view of the foregoing, I propose that the Court answer the question from the Landesgericht für Zivilrechtssachen Wien as follows:

Where a national court decides on the costs of a reference for a preliminary ruling under Article 104(6) of the Rules of Procedure of the Court of Justice of the European Communities, that decision must not be less favourable than would be a decision on costs in a comparable national procedure representing a step in the main action.