# JUDGMENT OF THE COURT (Sixth Chamber)
20 March 1997 *

In Case C-323/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Saarländisches Oberlandesgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

**David Charles Hayes** and

**Jeanette Karen Hayes**

and

**Kronenberger GmbH**, in liquidation,

on the interpretation of the first paragraph of Article 6 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, P. J. G. Kapteyn (Rapporteur), G. Hirsch and H. Ragnemalm, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr and Mrs Hayes, by Peter Dörrenbacher, Rechtsanwalt, St. Ingbert,

— Kronenberger GmbH, by Peter Schmidt, Rechtsanwalt, Dillingen,

— the Swedish Government, by Lotty Nordling, Rättschef in the External Trade Department of the Ministry of Foreign Affairs, Kristina Holmgren and Cecilia Renfors, Hovrättsassessorer in the Legal Service of that ministry, acting as Agents,

— the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, and David Lloyd Jones, Barrister, acting as Agents;

— Commission of the European Communities, by John Forman, Legal Adviser, and Günter Wilms, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 January 1997,

gives the following

## Judgment

1 By order of 6 October 1995, received at the Court on 16 October 1995, the Saarländisches Oberlandesgericht (Saarland Higher Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of the first paragraph of Article 6 of that Treaty.

2 That question was raised in proceedings brought for payment for the supply of goods by Mr and Mrs Hayes, a partnership under English civil law, against Kronenberger GmbH, a German company in liquidation ('Kronenberger').

3 As respondent in the proceedings before the Saarländisches Oberlandesgericht, Kronenberger asked Mr and Mrs Hayes to furnish security for costs under Paragraph 101(1) of the Zivilprozeßordnung (German Code of Civil Procedure, 'ZPO').

4 According to that provision, foreign nationals who act as plaintiffs in proceedings brought before German courts must, upon application by the defendant, give security for costs and lawyers' fees. Paragraph 110(2)(1) of the ZPO provides, however, that this obligation does not apply where the plaintiff is a national of a State which does not require such security to be given by German nationals.

5 In this regard, the Saarländisches Oberlandesgericht observes that whilst courts in the United Kingdom tend no longer to require nationals of Member States of the European Union to furnish security for costs, this does not amount to a consistent practice guaranteeing the reciprocity required by Paragraph 110(2)(1) of the ZPO.

6 In addition, Article 14 of the German-British Convention of 20 March 1928 on the conduct of legal proceedings, which re-entered into force on 1 January 1953 (*BGBl.* 1953, II, p. 116), provides that nationals of Contracting Parties are not to be compelled to give security for costs only if they are resident in the country in which they bring an action.

7 Lastly, the European Convention on Establishment of 13 December 1955 (*BGBl.* 1959, II, p. 998) exempts from the requirement to give security for costs all nationals of Contracting States, provided only that they have their domicile or normal residence in one of the Contracting States. That rule, however, does not apply to nationals of the United Kingdom, which has made a reservation under Article 27 of the Convention.

8 Mr and Mrs Hayes, who are British nationals and have no residence or assets in Germany, are not eligible to benefit by the exemptions provided for by those conventions.

9 In those circumstances, the Saarländisches Oberlandesgericht stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Where British nationals possessing no residence or assets in Germany have brought proceedings before a German civil court against a limited liability company established in Germany for payment of the purchase price of goods supplied, and are required by the competent German court, on application by the defendant, to furnish security for costs pursuant to Paragraph 110 of the German Zivil-

prozeßordnung (Code of Civil Procedure), does that constitute discrimination on grounds of nationality contrary to the first paragraph of Article 7 of the EEC Treaty?'

10 By its question, the national court seeks to ascertain whether the first paragraph of Article 6 of the EC Treaty (formerly Article 7 of the EEC Treaty) precludes a Member State from requiring security for costs to be furnished by a national of another Member State having neither a residence nor assets in that State who has brought an action in one of its civil courts against one of its nationals except where the plaintiff's Member State does not require security for costs to be furnished by nationals of the Member State in question, where that requirement may not be imposed on its own nationals who have neither assets nor a residence in that country.

**Scope of application of the first paragraph of Article 6 of the Treaty**

11 It should be noted *in limine* that the first paragraph of Article 6 of the Treaty provides that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

12 It must therefore first be considered whether a provision of a Member State requiring nationals of another Member State to furnish security for costs when intending to bring judicial proceedings against one of its nationals or a company established in that country, where its own nationals are not subject to that requirement, falls within the scope of application of the Treaty.

13 It has been consistently held that, whilst, in the absence of Community legislation, it is for the internal legal order of each Member State to lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which

individuals derive from Community law, Community law nevertheless imposes limits on that competence (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 42). Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law (Case 186/87 *Cowan* [1989] ECR 195, paragraph 19).

14 It must be held that a national procedural rule, such as the one described above, is liable to affect the economic activity of traders from other Member States on the market of the State in question. Although it is, as such, not intended to regulate an activity of a commercial nature, it has the effect of placing such traders in a less advantageous position than nationals of that State as regards access to its courts. Since Community law guarantees such traders free movement of goods and services in the common market, it is a corollary of those freedoms that they must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State (C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661, paragraph 13).

15 In Case C-20/92 *Hubbard* [1993] ECR I-3777, the Court ruled that Articles 59 and 60 of the EC Treaty preclude a Member State from requiring security for costs to be given under a provision such as Paragraph 110 of the ZPO by a member of a profession established in another Member State who brings an action before one of its courts, on the sole ground that he is a national of another Member State.

16 It is important to note however that, as the Court held in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 27, and more recently in *Data Delecta and Forsberg*, at paragraph 14, national legislative

provisions which fall within the scope of application of the Treaty are, by reason of their effects on intra-Community trade in goods and services, necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 6 of the Treaty, without there being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.

17 It must therefore be held that a rule of domestic civil procedure, such as the one at issue in the main proceedings, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of non-discrimination laid down by that article in so far as it has an effect, even though indirect, on trade in goods and services between Member States. Such an effect is liable to arise in particular where security for costs is required where proceedings are brought to recover payment for the supply of goods (*Data Delecta and Forsberg*, paragraph 15).

**Discrimination within the meaning of the first paragraph of Article 6 of the Treaty**

18 In so far as it prohibits 'any discrimination on grounds of nationality', Article 6 of the Treaty requires persons in a situation governed by Community law and nationals of the Member State concerned to be treated absolutely equally.

19 A provision such as the one at issue in the main proceedings obviously entails direct discrimination on the basis of nationality. Under that provision, a Member State does not require its own nationals to furnish security even if they have no assets or residence in that State.

20 Kronenberger and the Swedish Government consider, however, that the principle of non-discrimination does not preclude a requirement for foreign plaintiffs to furnish security where any order for judicial costs cannot be enforced in the country of the plaintiff's domicile. In that event, it is argued, the security is designed to avoid a foreign plaintiff being able to bring judicial proceedings without running any financial risk should he lose his case.

21 The Swedish Government goes on to argue that whilst it is true that, within their spheres of application, the Conventions of 27 September 1968 (OJ 1978 L 304, p. 36, 'the Brussels Convention') and 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9, 'the Lugano Convention') make it less necessary for there to be rules requiring security for judicial costs to be furnished, the public interest requires such rules to be maintained all the same since at present there is no general system for enforcement of judgments of one Member State in another.

22 Those arguments cannot be accepted.

23 Admittedly, some Member States are not yet parties to the Brussels Convention (Republic of Austria, Republic of Finland and Kingdom of Sweden) or the Lugano Convention (Kingdom of Belgium and Hellenic Republic) and, until such time as all Member States have acceded to one or other of those Conventions, enforcement of judgments in civil and commercial matters will not be secured throughout the Community. As a result, as between some Member States there is a real risk that it will be impossible or, at least, considerably more difficult and more expensive to enforce an order for costs made in a Member State against non-residents (see for the enforcement of judgments in criminal cases, which is not covered by those conventions, Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285, I-287, paragraph 21).

24 However, without its being necessary to consider whether that situation might warrant the imposition of security for costs on non-residents where such a risk exists, suffice it to say that, in so far as the provision at issue imposes different treatment depending on the plaintiff's nationality, it does not comply with the principle of proportionality. On the one hand, it cannot secure repayment of judicial costs in every trans-frontier case, since security cannot be imposed on a German plaintiff not residing in Germany and having no assets there. On the other, it is disproportionate to the objective pursued in that a non-German plaintiff who resides and has assets in Germany could also be required to furnish security.

25 The answer to the national court's question must therefore be that Article 6 of the Treaty must be interpreted as precluding a Member State from requiring security for costs to be furnished by a national of another Member State who has brought an action in one of its civil courts against one of its nationals where that requirement may not be imposed on its own nationals who have neither assets nor a residence in that country, in a situation where the action is connected with the exercise of fundamental freedoms guaranteed by Community law.

## Costs

26 The costs incurred by the Swedish and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Saarländisches Oberlandesgericht, by order of 6 October 1995, hereby rules:

**Article 6 of the EC Treaty must be interpreted as precluding a Member State from requiring security for costs to be furnished by a national of another Member State who has brought an action in one of its civil courts against one of its nationals where that requirement may not be imposed on its own nationals who have neither assets nor a residence in that country, in a situation where the action is connected with the exercise of fundamental freedoms guaranteed by Community law.**

Mancini Murray Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 20 March 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber