OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 30 April 2009 [1]

I — Introduction

1. By order of 29 February 2008, received at the Court on 6 March 2008, the Unabhängiger Verwaltungssenat des Landes Vorarlberg (Independent Administrative Tribunal of the Province of Vorarlberg) [2] (Austria) referred to the Court of Justice a question for a preliminary ruling under Article 234 EC concerning the interpretation of Article 12 EC.

2. The referring court essentially wishes to ascertain whether the prohibition of discrimination on grounds of nationality under that provision precludes national legislation which provides that an annual disc for the use of federal toll roads is made available free of charge only to disabled persons who are resident or ordinarily resident in national territory.

3. That issue was raised in the context of proceedings brought by Mr Gottwald, a severely disabled German national, against a fine imposed on him for having driven a vehicle on an Austrian toll road without having paid the toll due.

II — Legal framework

4. Pursuant to Paragraph 10(1) of the Bundesstraßen-Mautgesetz 2002 (Law concerning Tolls on Federal Roads) ('the Bundesstraßen-Mautgesetz'), in the version applicable at the material time, the use of stretches of toll road by single track motor vehicles (that is to say, motorcycles and so forth) and by multi-track motor vehicles with a maximum permissible total weight not exceeding 3.5 tonnes is subject to a time-dependent toll.

5. Under Paragraph 11(1) of the Bundesstraßen-Mautgesetz, the time-dependent toll is to be paid prior to use of stretches of toll road by affixing a toll disc to the vehicle.

1 — Original language: English.
2 — 'Unabhängiger Verwaltungssenat'.

6. Under Paragraph 13(2) of the Bundesstraßen-Mautgesetz, the Federal Office for Social Affairs and the Disabled must, upon application, make available to disabled persons resident or ordinarily resident in national territory having at least one registered multi-track motor vehicle with a maximum permissible total weight not exceeding 3.5 tonnes an annual disc for a motor vehicle of the specified category free of charge in so far as such persons possess a disabled pass pursuant to Paragraph 40 of the Bundesbehindertengesetz (Federal Law on Disabled Persons) in which it is entered that they suffer from a permanent and serious lack of ability to walk, that they cannot reasonably use public means of transport because of permanent damage to health or that they are blind.

7. It appears from the submissions of the Austrian Government that the existence of 'ordinary residence' must be determined in accordance with Paragraph 66(2) of the Jurisdiktionsnorm (Law of 1 August 1895 on the allocation of jurisdiction and the territorial jurisdiction of the ordinary courts in civil matters, RGBl. 111).

8. Pursuant to Paragraph 20(1) of the Bundesstraßen-Mautgesetz, drivers of motor vehicles who use stretches of toll road without having duly paid the time-dependent toll due under Paragraph 10 commit an administrative offence and are to be punished by a fine of between EUR 300 and EUR 3 000 (at the material time in this case, between EUR 400 and EUR 4 000).

III — Factual background, procedure and questions referred

9. Mr Arthur Gottwald is a German national resident in Germany who suffers from complete paraplegia with the loss of all functions below the fourth vertebra and is dependent on a wheelchair. He has a German severe-disability identification card.

10. On 26 August 2006 Mr Gottwald, coming from Germany, was intending to begin a holiday of several days in Austria. When driving his vehicle on the A 14 Rheintal Motorway, a toll road, in the direction of Tyrol, near the Wolfurt/Lauterach exit, he was subject to a check under the Bundesstraßen-Mautgesetz, and it was ascertained that no valid toll disc was affixed to his vehicle.

11. Consequently, by penalty decision of the Bezirkshauptmannschaft Bregenz (District Administrative Authority, Bregenz) of 4 December 2006, Mr Gottwald was, having been granted an exceptional mitigation of the penalty pursuant to Paragraph 20 of the Verwaltungsstrafgesetz (Law on Administrative Penalties), fined EUR 200 for having driven a vehicle on the toll road network without having paid the time-dependent toll, prior to use of the toll road, by affixing a toll

disc to the vehicle. The decision stated that he had thereby infringed Paragraph 20(1), in conjunction with Paragraphs 10(1) and 11(1), of the Bundesstraßen-Mautgesetz.

12. In the main proceedings, the Unabhängiger Verwaltungssenat has to decide on the appeal which Mr Gottwald lodged against that decision.

13. It appears from the order for reference that the referring court entertains doubts as to whether Paragraph 13(2) of the Bundesstraßen-Mautgesetz, which provides for a measure assisting disabled persons resident in Austria, is compatible with the prohibition of discrimination on grounds of nationality laid down in Article 12 EC.

14. The referring court notes in that regard that to restrict an exemption from the toll disc, for which payment is due, to disabled persons who are resident or ordinarily resident in national territory constitutes in principle indirect discrimination on the grounds of nationality within the meaning of that provision which can be justified if the unequal treatment is founded on objective considerations that are independent of the nationality of the persons concerned and if the unequal treatment is proportionate to the objective which is thereby legitimately pursued.

15. According to the referring court, Article 12 EC is applicable either due to the fact that Mr Gottwald wished to begin a holiday in Austria and therefore went to another Member State in order to receive a service [3] or, in any event, on the grounds that the situation at issue is governed by the provisions of Title V of the Treaty on the common transport policy.

16. Against that background, the Unabhängiger Verwaltungssenat decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 12 EC to be interpreted as precluding the application of a provision of national law which provides that an annual disc in respect of a motor vehicle for the use of federal toll roads is made available free of charge only to those persons with a defined disability who are resident or ordinarily resident in national territory?'

3 — In that regard, reference is made to Case 186/87 *Cowan* [1989] ECR 195.

IV — Legal analysis

A — *Admissibility*

1. Main submissions of the parties

17. In the present proceedings, observations have been submitted by Mr Gottwald, the Austrian Government and the Commission. All of those parties were also represented at the hearing on 12 March 2007.

18. According to the Austrian Government, the admissibility of the present reference for a preliminary ruling is at least doubtful.

19. It essentially submits in that regard that irrespective of the question whether the residence requirement as regards the granting of a disc free of charge is in conformity with Community law, Mr Gottwald had to be fined on the ground that he had in any event infringed the obligation, laid down in Paragraph 11(1) of the Bundesstraßen-Mautgesetz, to affix a toll disc to the vehicle prior to use of the toll road.

20. The exceptional procedure provided for under Paragraph 13(2) of the Bundesstraßen-Mautgesetz, with which the question referred is concerned and according to which, upon application and if certain requirements are met, an annual disc is made available free of charge to disabled persons, is as such not at issue in the main proceedings.

21. The referring court notes in that context that Mr Gottwald has never applied in order to obtain such a disc.

22. It appears therefore in the view of the Austrian Government that the question referred bears no relation to the actual facts of the case and that the answer of the Court may be of a purely hypothetical nature, so that the reference should be regarded as inadmissible pursuant to the case-law of the Court.

23. According to the Commission, by contrast, the reference is admissible. It emphasises in that regard that it is in principle for the national court to determine whether a question of Community law is relevant to the main proceedings before the national court. The referring court has expressly stated in the order for reference that that is the case here. Moreover, it appears not to be excluded that the answer of the Court may at least lead to a further mitigation of the fine in the main proceedings, which is, in the light of the rather

generous case-law of the Court as regards admissibility of references, enough to show that the question at issue is not purely hypothetical.

24. Mr Gottwald notes that although, formally speaking, an application for the issuing of a disc free of charge could have been made, such an application would have been unsuccessful.

2. Appraisal

25. It must be recalled, first of all, that, according to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume 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. [4]

26. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling. [5]

27. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [6]

28. That is, however, in my view not the case here.

29. Even though it is true that Mr Gottwald did not apply for a free disc and assuming that a disabled person could be, as the Austrian Government submitted, fined on the ground alone that no disc was affixed to the vehicle prior to use of the toll road in spite of his being entitled to a disc free of charge, the fact remains that it is far from established that the referring court would be prevented in the main proceedings from drawing any conse-

4 — See, inter alia, Case C-545/07 *Apis-Hristovich* [2009] ECR I-1627, paragraph 28; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 27; and Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 32.

5 — See, inter alia, *Apis-Hristovich*, cited in footnote 4, paragraph 29; *Eckelkamp and Others*, cited in footnote 4, paragraph 27; and *Michaniki*, cited in footnote 4, paragraph 33.

6 — See, inter alia, *Apis-Hristovich*, cited in footnote 4, paragraph 30; *Eckelkamp and Others*, cited in footnote 4, paragraph 28; and *Michaniki*, cited in footnote 4, paragraph 34.

quences from the answer of the Court to the question referred.

30. More particularly, as was also not disputed by the Austrian Government, it cannot be excluded that a finding of the Court to the effect that a national rule such as that at issue, in that it does not allow for the issuing of a disc free of charge in circumstances such as those applying to Mr Gottwald, is in breach of Article 12 EC could be taken into account by the referring court as a further mitigating factor in deciding on Mr Gottwald's appeal.

31. To my mind, the question referred for the preliminary ruling is therefore, in light of the abovementioned case-law, admissible.

B — *Substance*

1. Main submissions of the parties

32. According to Mr Gottwald, Article 12 EC is to be interpreted as precluding national legislation such as that at issue in the main proceedings.

33. He maintains, more particularly, that that article is applicable on the grounds that he has received, as a tourist, a service in the field of transport. A rule such as that at issue also restricts the right to move and reside freely in another Member State pursuant to Article 18 EC.

34. In the view of Mr Gottwald, to the extent that the exemption from the payment of toll for the use of the highway at issue is limited to disabled persons having their residence or ordinary residence in Austria, that measure constitutes indirect discrimination on grounds of nationality which is contrary to Article 12 EC. It is neither necessary nor proportionate. In that respect, the unequal treatment at issue is also disproportionate having regard to the fact that a high percentage of non-residents use regularly Austria's toll roads, a certain proportion of whom may be disabled persons.

35. Mr Gottwald points out, furthermore, that the annual free disc is issued without verification as to whether use is actually made of it by the disabled person concerned. The social aspects of the measure cannot therefore be paramount. There is also already a European parking permit for disabled persons, so that it cannot be maintained that to grant free use of the toll roads to disabled persons regardless of their residence would impose a particular administrative burden on Austria.

36. Mr Gottwald adds that to make available an annual disc free of charge to disabled persons does not constitute a non-contributory social benefit which could be made dependent on the demonstration of a certain degree of integration into the society of the Member State concerned. He notes, finally, that unfortunately no common classification of degrees of handicap currently exists in the Community.

37. By contrast, although the Austrian Government agrees that Article 12 EC is applicable in the present case, it takes the view that that provision does not preclude a national rule such as that at issue.

38. It maintains that the granting, free of charge, of an annual disc to disabled persons constitutes a non-contributory social benefit. As can be inferred from cases such as *Grzelczyk*, [7] entitlement to such benefits may not be made dependent on conditions which are different from those applicable to nationals of the Member State concerned, which is, however, not the case here.

39. As that government emphasised, furthermore, at the hearing, the benefit at issue is not linked to a classic residence requirement, as it is also available to disabled persons who have only 'ordinary residence' as defined under Paragraph 66(2) of the Jurisdiktionsnorm. In determining such ordinary residence, circumstances of a private and/or occupational nature can be taken into account, so that, for example, disabled persons who only pursue a regular occupation in Austria could also be issued a disc free of charge.

40. In so far, however, as the referring court starts from the assumption that that rule constitutes indirect discrimination, such different treatment based on residence is capable of being justified by a legitimate aim such as that of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that State. [8] The requirement of residence or ordinary residence serves the purpose of ensuring that that condition is satisfied and prevents the costs of the measure from exploding. [9]

7 — Case C-184/99 [2001] ECR I-6193.

8 — Reference is made to Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 61.

9 — The Austrian Government specified in that regard at the hearing that those costs would be five times higher than the current costs (approximately EUR 3 million in 2008) if the free disc were to be granted regardless of (ordinary) residence and also to disabled persons who used the toll roads only during a short stay in Austria, as in the case at issue.

41. The Austrian Government points out, next, that the issuing of the annual disc free of charge to disabled persons pursues the objective of facilitating the personal mobility of persons who cannot, due to their disability, rely on public transport. It is, moreover, clear from the fact that only annual discs are made available in this context that the benefit in question is intended to provide support to those who make use of toll roads on a regular and long-term basis and not to those who use Austrian highways only during a short period of time. In that regard, a disabled person resident in Austria who uses a toll road only occasionally or for a short period of time would also have to buy a toll disc.

42. The Commission maintains that the present case falls to be assessed in the light of Article 12 EC which is applicable both because Mr Gottwald availed himself of his right to move and reside freely in another Member State pursuant to Article 18 EC and because he made use, as a tourist, of his freedom to receive services under Article 49 EC. It submits that the levying of a different toll rate depending on the residence of disabled persons who are, that point apart, in identical situations constitutes indirect discrimination on grounds of nationality.

43. However, whereas in its written submissions the Commission took the view that the national measure at issue constituted unjustified discrimination prohibited under Article 12 EC, it concluded at the hearing, on the basis of the clarifications provided by the Austrian Government, that, in view of the objective pursued by the granting of an annual disc free of charge, the concept of ordinary residence and the fact that a disabled person resident in Austria would also have to pay a charge in Mr Gottwald's situation, the Austrian legislation at issue did in fact comply with that article.

2. Appraisal

44. It should be noted, first of all, that a social benefit such as that at issue plainly falls as such within the competence of the Member States. Thus, as far as Community law is concerned, it is in principle — however desirable it may be — for each Member State to decide whether or not to adopt a social measure such as that at issue consisting of the issuing, on certain conditions, of an annual disc free of charge for the benefit of disabled persons or, by the same token, any other measure of that kind such as, for example, whether to make available to disabled persons a free disc having a period of validity of 10 days; Member States have a wide discretion in exercising their powers in matters of social policy. [10]

10 — See in this context Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 23; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 21; and Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 27.

45. In so far, however, as a Member State exercises that competence, it is clear from the case-law of the Court that it must nevertheless do so in accordance with Community law and, in particular, with the Treaty provisions concerning the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States and the fundamental prohibition of discrimination on grounds of nationality. [11]

46. In the circumstances of the present case, it is apparent that Mr Gottwald's journey to Austria was not undertaken with a view to exercising his rights in the context of the freedom of movement for workers, so that it would not be possible for an entitlement to an annual free disc to be claimed, in terms of a 'social advantage', on the basis of the equal treatment prescribed by Article 7(2) of Regulation (EEC) No 1612/68, [12] nor could that benefit be assessed under Regulation (EEC) No 1408/71. [13]

47. As a citizen of the Union, however, Mr Gottwald has in principle, within the scope of the EC Treaty, the right, in so far as he finds himself, that point apart, in an equivalent situation, to equal treatment irrespective of nationality. [14]

48. Accordingly, to the extent that he can avail himself of that right in the present circumstances, the issue that has to be determined in the present case is, in essence, whether the reserving of the grant of an annual disc free of charge to disabled persons who have at least their ordinary residence in the Member State concerned constitutes prohibited discrimination on grounds of nationality or, in other words, having regard to the specific circumstances of the case, whether the reason why a person in Mr Gottwald's situation is denied the grant of that disc is to be attributed to nationality or is, instead, related to another objective factor independent of nationality. [15]

49. I will therefore proceed to examine more closely, first, whether the situation in the main proceedings falls to be examined, as the referring court has suggested, under reference to the prohibition of discrimination on grounds of nationality laid down in Article 12 EC, secondly — and if that is the case —, whether the legislation at issue is liable in principle to constitute discrimination under that article and finally, whether the

11 — See, to that effect, for example *Nerkowska*, cited in footnote 10, paragraph 24; *Tas-Hagen and Tas*, cited in footnote 10, paragraph 22; and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 22.

12 — Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

13 — Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated (OJ, English Special Edition 1971(II), p. 416).

14 — See, in particular, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 23, and *Grzelczyk*, cited in footnote 7, paragraph 31.

15 — It is thus clear that the present case is actually not one of discrimination on grounds of disability, but one of possible (indirect) discrimination on the ground of nationality.

differentiation that is liable to constitute discrimination is, however, based on objective considerations independent of nationality.

50. As regards, first of all, the applicability of Article 12 EC in the present case, it appears from the settled case-law of the Court that a citizen of the Union can in principle avail himself of the right to equal treatment regardless of nationality, as enshrined in that provision, in all situations which fall within the scope *ratione materiae* of Community law. [16]

51. It is also clear from the case-law of the Court that those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States conferred by Article 18 EC. [17]

52. With respect to the present case, it suffices in my view to note that by travelling to another Member State in order to spend time on holiday there, Mr Gottwald plainly made use of his right as a citizen of the Union to move and reside freely in the Member States under Article 18 EC. For that reason alone, the situation at issue in the main proceedings is not merely internal but falls within the scope *ratione materiae* of Community law in which Article 12 EC is applicable.

53. I agree, however, with the Commission that the situation at issue is also governed by Community law due to the fact that, in so far as he travelled to Austria as a tourist in order to spend time on holiday there, Mr Gottwald must be regarded as a recipient of services, and is therefore, as such, able to rely on Article 12 EC in combination with Article 49 EC on the free movement of services. [18]

54. It must therefore be examined whether a social measure such as that at issue complies with the requirements of Article 12 EC in that

16 — See, to that effect, for example Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; *Garcia Avello*, cited in footnote 14, paragraph 23; and *Bidar*, cited in footnote 8, paragraph 36.

17 — See, for example, Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029, paragraph 29; *Garcia Avello*, cited in footnote 14, paragraph 24; *Bidar*, cited in footnote 8, paragraph 33; and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 18.

18 — See, to that effect, *Cowan*, cited in footnote 3, paragraph 15; *Bickel and Franz*, cited in footnote 16, paragraph 15; and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 12. It is, however, in my view appropriate to examine the present case, in accordance with the question referred, with regard to the general prohibition of discrimination laid down in Article 12 EC and not with regard to the specific expression given to that prohibition, as regards the free movement of services, in Article 49 EC, in so far as the use of the toll roads arguably constitutes a means to the enjoyment of the reception of services ultimately intended in the circumstances of the present case rather than the relevant service itself. In other words, the possible discrimination complained of appears to be somewhat incidental to the relevant enjoyment of services. In any event, however, the assessment of the measure at issue which follows applies, mutatis mutandis, also to the specific prohibition of discrimination under Article 49 EC.

the benefit of that measure is reserved to disabled persons having their residence or ordinary residence in the Member State concerned and is thus not available to persons in Mr Gottwald's situation.

55. In that regard, it should be recalled that the Court has consistently held that Article 12 EC forbids not only overt forms of discrimination based on nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [19]

56. That is true both of a residence condition and a condition of ordinary residence, as provided for under Paragraph 13(2) of the Bundesstraßen-Mautgesetz, in so far as those requirements are liable to operate mainly to the detriment of nationals of other Member States. [20]

57. It must therefore be concluded that the national provision at issue in the main proceedings is indeed liable to constitute indirect discrimination on grounds of nationality within the meaning of Article 12 EC.

58. That finding does, however, not in itself suffice to conclude that that provision is incompatible with Article 12 EC. That would not be the case if the provision were to be justified by objective circumstances, that is, more particularly, if it can be shown that it is based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. [21]

59. In my view it does not appear that the national legislation on the issuing of a free disc at issue, in so far as it refers to residence and ordinary residence as a condition and regard being had to the nature and aim of that social measure, could not be said to be objectively justifiable and proportionate. The following should be noted in this context.

60. It should be recalled, first, that the Court has recognised, with regard to various social advantages and benefits, that it may be legitimate to ensure that there is a certain

19 — See, to that effect, for example Case C-398/92 *Mund & Fester* [1994] ECR I-467, paragraph 14, and *Commission* v *Italy*, cited in footnote 18, paragraph 13.

20 — See, to that effect, Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285, paragraph 17; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14; and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 65.

21 — See, to that effect, for example, *Mund & Fester*, cited in footnote 19, paragraph 17; *Bidar*, cited in footnote 8, paragraph 54; *Bickel and Franz*, cited in footnote 16, paragraph 27; and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 29.

link between the recipient of a social benefit or advantage and the Member State concerned, such as — depending on the circumstances and the kind of advantage at issue — a genuine link between the person and the employment market of the Member State concerned, a connection with its society or, more specifically, a certain degree of integration into the society of the Member State concerned. [22]

61. It appears, secondly, from the case-law of the Court that residence may in principle constitute a criterion capable of showing that there is such a connection. Once again, the question whether such a link is legitimate for the purposes of the Court's case-law referred to in the preceding paragraph will depend, among other factors, on the benefit or advantage involved, in particular, whether the residence requirement in its specific form, for example a requirement of residence during a certain length of time, is in compliance with Community law and, more particularly, proportionate. [23]

62. As regards, in that light, the justification and proportionality of the requirements relating to residence attached to the social measure at issue in the present case, it should be recalled that that measure consists of issuing an annual disc free of charge to persons with a certain degree of disability, that is, according to the national provision at issue, to persons in whose disabled pass it is entered that they suffer from a permanent and serious lack of ability to walk, that they cannot reasonably use public means of transport because of permanent damage to health or that they are blind.

63. It is not disputed, and consistent with the nature of the measure as described above, that that measure is intended to assist disabled persons by supporting their mobility and social integration on an annual basis.

64. In that regard, it is, first, in my view in accordance with the nature of such a measure, which seeks to support the mobility of disabled persons by exempting them, subject to certain requirements, from the duty to pay a toll for the use of the toll roads in its territory, to determine entitlement to such a benefit inter alia by reference to a criterion of

22 — See, to that effect, for example Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 55; *Tas-Hagen and Tas*, cited in footnote 10, paragraphs 34 and 35; *Nerkowska*, cited in footnote 10, paragraph 37; *Collins*, cited in footnote 20, paragraph 67; and *Bidar*, cited in footnote 8, paragraph 54.

23 — See in this context for example, *Bidar*, cited in footnote 8, paragraph 59; Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 50 and 58; and *Nerkowska*, cited in footnote 10, paragraphs 39 and 41.

residence capable of showing a certain link to the territory of the State concerned and its society.

65. It should be emphasised, secondly, as was clarified at the hearing, that residence in its usual sense is not regarded as the only connecting link with the Member State concerned which would enable eligible disabled persons to apply for an annual disc free of charge. Pursuant to the concept of ordinary residence as applicable under the national law in question, a sufficient link can also be established by other factors showing a permanent or regular connection to the territory of the Member State concerned, for example by pursuing an occupation or also by private activities of a regular kind in Austria.

66. In this context, it is true that it does not, as such, appear from the requirements set out in Paragraph 13(2) of the Bundesstraßen-Mautgesetz that the issuing of a disc free of charge is made conditional on the length of time or frequency of the use of the toll roads by the applicant, nor, as Mr Gottwald has observed without being contradicted on that point, do any checks appear to be made in that regard in relation to those in possession of such a disc. I am therefore not convinced by the argument, put forward by the Austrian Government, that a disabled person who is resident or ordinarily resident in Austria and who in fact uses the toll roads only occasionally or for a short period of time would in any event also have to buy a disc.

67. However, that does, first, not of itself call into question the fact that, as the Austrian Government has pointed out, the social measure at issue is intended to support disabled persons who need to use toll roads on a relatively regular basis.

68. Secondly, the fact remains, in any event, that that measure consists of the issuing of an *annual* disc free of charge. It appears in my view objectively justified and, having regard to the wide discretion which Member States enjoy in relation to social benefits falling within their competence, [24] not disproportionate to make entitlement to such a disc dependent on there being at least a certain stable link, as evidenced by ordinary residence, between the recipient of the annual

24 — See, to that effect, for example *Tas-Hagen and Tas*, cited in footnote 10, paragraph 36; see also point 44 above.

disc and the Member State in which the toll roads concerned are situated. [25]

69. The issuing of an annual disc free of charge to disabled persons on condition that they be resident or ordinarily resident in the Member State concerned is therefore, in my view, not contrary to the prohibition of discrimination on grounds of nationality laid down by Article 12 EC, without it being necessary in the present case to consider also, as regards persons not having residence or ordinary residence, to what degree difficulties regarding the verification of the required degree of disability in the absence of an Austrian disabled pass might justify denial of the benefit concerned.

70. As regards, in any event, the particular circumstances of the present case, it should be borne in mind, finally, that only those who find themselves in the same situation can claim the same treatment in law, irrespective of their nationality. [26]

71. From that perspective, it must be stated that a disabled person such as Mr Gottwald, who travels to the Member State concerned only in order to spend some time on holiday there and who has thus only a purely temporary link to that Member State, finds himself, with regard to the grant of a social benefit such as the issuing of an annual disc free of charge, intended to support the mobility and social integration of disabled persons on an annual basis, in a situation which is objectively different from that of a disabled person who is resident or, in any event, ordinarily resident in the territory of the Member State concerned and to whom the use of the toll roads may therefore have a substantially different significance as regards his mobility and social integration in that Member State.

72. In the light of the foregoing considerations the question referred should be answered to the effect that Article 12 EC, read in conjunction with Article 18 EC, is to be interpreted as not precluding national legislation such as that at issue in the main proceedings, intended to support the mobility and social integration of disabled persons on an annual basis, which provides that an annual disc in respect of a motor vehicle for the use of federal toll roads is made available free of charge only to those persons with a defined disability who are resident or ordinarily resident in the territory of the Member State concerned, thus including disabled persons pursuing a regular occupation and/or private activity in that Member State.

25 — The justification and proportionality of conditions of residence or ordinary residence would evidently have to be assessed differently if short-term discs were to be issued subject to such requirements.

26 — See in this context Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, paragraphs 34 and 35, and point 47 above (and the case-law cited).

V — Conclusion

73. I therefore propose that the Court should reply as follows to the question referred:

Article 12 EC, read in conjunction with Article 18 EC, is to be interpreted as not precluding national legislation such as that at issue in the main proceedings, intended to support the mobility and social integration of disabled persons on an annual basis, which provides that an annual disc in respect of a motor vehicle for the use of federal toll roads is made available free of charge only to those persons with a defined disability who are resident or ordinarily resident in the territory of the Member State concerned, thus including disabled persons pursuing a regular occupation and/or private activity in that Member State.