JUDGMENT OF THE COURT (Sixth Chamber)
23 January 1997 *

In Case C-29/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Eerste Aanleg te Antwerpen (Belgium) for a preliminary ruling in the proceedings pending before that court between

Eckehard Pastoors,

Trans-Cap GmbH

and

Belgian State

on the interpretation of Article 6 of the EC Treaty and the general principle of equality laid down by Community law,

THE COURT (Sixth Chamber),

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

* Language of the case: Dutch.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Pastoors and Trans-Cap GmbH, by Rudolf Brugmans and Sigrid Verstreken, of the Antwerp Bar,

— the Belgian Government, by Jan Devadder, Director of Administration at the Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent, assisted by Carl Raymaekers, of the Antwerp Bar,

— the French Government, by Edwige Belliard, Deputy Director in the Legal Department of the Ministry of Foreign Affairs, and Anne de Bourgoing, on secondment to the same department, acting as Agents,

— the Swedish Government, by Lotty Nordling, Rättschef, acting as Agent,

— the Commission of the European Communities, by Marc van der Woude, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Pastoors and Trans-Cap GmbH, represented by Rudolf Brugmans, of the Belgian Government, represented by Carl Raymaekers, of the French Government, represented by Anne de Bourgoing, and of

the Commission, represented by Berend Jan Drijber, of its Legal Service, acting as Agent, at the hearing on 4 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 3 October 1996,

gives the following

Judgment

1 By order of 31 January 1995, received at the Court on 8 February 1995, the Rechtbank van Eerste Aanleg te Antwerpen (Court of First Instance, Antwerp) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 6 of the Treaty and the general principle of equality laid down by Community law.

2 That question was raised in proceedings between, on the one hand, a German road transport company, Trans-Cap GmbH ('Trans-Cap'), and one of its drivers, Mr Pastoors, who resides in Germany, and on the other, the Belgian State, concerning the legality of a requirement to pay a sum of money upon discovery that certain road transport offences had been committed.

3 On 20 December 1985, with a view to improving working conditions and road safety, and harmonizing conditions of competition in the road transport sector, the Council adopted Regulation (EEC) No 3820/85 on the harmonization of certain social legislation relating to road transport (OJ 1985 L 370, p. 1) and Regulation (EEC) No 3821/85 on recording equipment in road transport (OJ 1985 L 370, p. 8).

4 Article 17 of Regulation No 3820/85 and Article 19 of Regulation No 3821/85 require, in identical terms, that Member States adopt such laws, regulations or administrative provisions as may be necessary for the implementation of those regulations, concerning *inter alia* the organization of, procedure for and means of control and the penalties to be imposed in case of breach. Member States are also required to assist each other in applying the regulations and in checking compliance therewith.

5 On the same date, namely 20 December 1985, the Council and the Representatives of the Governments of the Member States, meeting within the Council, adopted a resolution (OJ 1985 C 348, p. 1; 'the resolution') to improve the implementation of the social regulations in road transport, namely Regulations Nos 3820/85 and 3821/85. The final recital in the preamble to that resolution stresses the need 'to ensure homogeneous and effective implementation of the regulations in question by Member States, in particular in order to avoid distortions of the conditions of competition between transport undertakings'. In addition, point 2(b) of the resolution requires Member States to adopt effective means of prosecuting non-resident drivers committing breaches on the territory of a Member State and of recovering fines imposed on such drivers, under the international or national law in force.

6 Finally, Council Directive 88/599/EEC of 23 November 1988 on standard checking procedures for the implementation of Regulations (EEC) Nos 3820/85 and 3821/85 (OJ 1988 L 325, p. 55) provides in Article 3(3) that 'Roadside checks shall be carried out without discrimination of vehicles and drivers, whether resident or not.'

7 In implementation of the obligations arising from the above legislation, the Kingdom of Belgium, by Law of 6 May 1985 (*Belgisch Staatsblad* of 13 August 1985), added an Article 11b to the Law of 1 August 1960 on the paid transport of goods

by motor vehicles. The detailed rules for applying the new provision were laid down by the Royal Decree of 12 July 1989 on the levying and lodging by way of deposit of a sum of money upon discovery of certain road transport offences (*Belgisch Staatsblad* of 20 July 1989).

8 Under those provisions, where breaches of Regulations Nos 3820/85 and 3821/85 are found, and no third party is thereby affected, the offender apprehended has the option of either paying BFR 10 000 per breach forthwith (immediate levying), which normally extinguishes prosecution, or, in default, allowing the criminal proceedings provided for by law to take their course against him. The latter option is, however, subject to the further condition that, where the offender apprehended has no official or permanent residence in Belgium, he is required to lodge by way of deposit the sum of BFR 15 000 per breach to cover the amount of any fine and legal costs, in default of which his vehicle is impounded at his risk and expense.

9 On 29 November 1991, the Gendarmerie of the Port of Antwerp carried out an inspection of the lorry driven by Mr Pastoors and owned by Trans-Cap. During that inspection, eleven breaches of Regulations Nos 3820/85 and 3821/85 were discovered. Having consulted his employer, Mr Pastoors opted for the system of immediate payment and accordingly paid a total of BFR 110 000 for the eleven offences with which he was charged.

10 Mr Pastoors and Trans-Cap thereupon brought an action before the Rechtbank van Eerste Aanleg, demanding that the Belgian State reimburse the sum paid and provide compensation for the non-material damage suffered. They argued in support of their claim that the enforcement system established by the Belgian legislation was contrary, first, to the right guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention on Human Rights'), which requires that their case be heard by an independent tribunal, and secondly, to Article 6 of the EC Treaty.

11 The Rechtbank van Eerste Aanleg found no infringement of Article 6 of the Convention on Human Rights. Nor did it find any infringement of Article 6 of the EC Treaty or of the general principle of equality, since the different treatment of non-residents could be objectively justified by taking into account the difficulties encountered in criminal proceedings, both as regards the investigation of the case and the enforcement of court decisions, where the persons concerned have no residence in the territory of the Member State where the offence was committed.

12 However, 'for reasons of legal certainty', the Rechtbank van Eerste Aanleg decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Should the prohibition on discrimination contained in Article 6 of the EC Treaty or the general principle of equality enshrined in Community law be interpreted as precluding the national legislation of a Member State, adopted in implementation of Council Regulations Nos 3820/85 and 3821/85, from providing for a system of penalties whereby natural or legal persons charged with infringements of that legislation are given the choice between

(a) immediate payment of a given sum, in this case BFR 10 000, per infringement, whereupon prosecution is as a rule discontinued,

or

(b) continuation against them of normal criminal proceedings,

subject to the proviso, however, that, in the event of the second of those options being chosen, it is only defendants having no place of residence or fixed abode in Belgium who are obliged, whether or not they are nationals of another Member State, to lodge a sum — in this case BFR 15 000 — by way of deposit in respect of each offence with which they are charged, to cover any fines or legal costs which they may be ordered to pay, and subject to the impounding of the vehicle driven by the accused until such time as the deposit is lodged?'

13 In its question, the national court essentially asks whether Article 6 of the Treaty precludes national legislation adopted in implementation of Regulations Nos 3820/85 and 3821/85 which, in cases of infringement, imposes only on non-residents who opt for continuation of normal criminal proceedings against them rather than for immediate payment of the prescribed fine the obligation to lodge by way of security in respect of each offence a fixed sum higher than that provided for in the case of immediate payment, in default of which their vehicle is impounded.

14 Article 6 of the Treaty, which is a specific expression of the general principle of equality, prohibits any discrimination on grounds of nationality.

15 In this case, the national legislation in question does not directly discriminate on grounds of nationality, since the obligation to lodge a sum of money by way of security is imposed on any offender who is not resident in Belgium, irrespective of nationality.

16 However, as the Court has consistently held, the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result (Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427, paragraph 9; Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, paragraph 13).

17 The Court has also held that a national rule which draws a distinction on the basis of residence, in that non-residents are denied certain benefits which are, conversely, granted to persons residing within national territory, is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners, and thus to constitute indirect discrimination by reason of nationality (Case C-279/93 *Finanzamt Köln* v *Schumacker* [1995] ECR I-225, paragraphs 28 and 29).

18 It is undisputed in this case that the national legislation at issue only very rarely affects Belgian nationals who have no official or habitual residence in Belgium, and has the same practical result as discrimination on grounds of nationality.

19 That finding, however, is not sufficient under the Court's case-law for such legislation to be held to be incompatible with Article 6 of the Treaty. For that, it would also be necessary for the legislation in question to be incapable of being justified by objective circumstances (Case C-398/92 *Mund & Fester* v *Hatrex Internationaal Transport* [1994] ECR I-467, paragraphs 16 and 17).

20 The Belgian Government maintains in that regard that the difference in treatment between nationals and non-nationals is objectively justified in this case by the fact that the legal position of non-residents is different as regards prospects for enforcement of judicial decisions, and by the fact that criminal proceedings against non-residents are more complex and involve greater costs.

21 It is indeed the case that the harmonization and cooperation brought about at Community level in civil and commercial matters by the Brussels Convention of 27 September 1968, concerning the jurisdiction of the courts and the enforcement of judgments in those areas, do not cover criminal matters, and that there is no analogous convention between the Kingdom of Belgium and the Federal Republic

of Germany to secure the enforcement of court decisions in criminal matters. There is therefore a real risk that enforcement of a judgment against a non-resident would be impossible or, at least, considerably more difficult and onerous.

22 That situation therefore objectively justifies a difference in treatment between resident and non-resident offenders, the obligation imposed on the latter to pay a sum by way of security being appropriate to prevent them from avoiding an effective penalty simply by declaring that they do not consent to the immediate levying of the fine and opting for the continuation of normal criminal proceedings.

23 Such difference of treatment is, moreover, in conformity with point 2(b) of the resolution.

24 Under the Court's case-law, however, where a Community regulation does not lay down any specific penalty for infringement but refers to national provisions, Member States retain a discretion as to the choice of penalties, which must in any event be effective, dissuasive and proportionate (Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 11). Those penalties must thus be appropriate and necessary to achieve the aim pursued, without going beyond what is essential in order to attain it (Case 299/86 *Drexl* [1988] ECR 1213, paragraph 18).

25 The national rule applicable in the main proceedings imposes the obligation to lodge the sum of BFR 15 000 by way of security for payment of the fine and any legal costs only on non-residents who opt for the continuation of normal criminal proceedings. That sum, which is 50% higher than that payable where immediate payment extinguishing prosecution is chosen, is demanded separately for each infringement with which the offender is charged. However, where various infringements are simultaneously found to exist and are mentioned in the same document,

they do not each form the subject-matter of distinct criminal proceedings, since they all give rise to a single set of proceedings against the offender. Thus, a national measure such as that at issue in the main proceedings, which requires the payment of such sums, in default of which the vehicle is impounded in the case of non-resident offenders, appears to be excessive.

26 Accordingly, national legislation of the kind at issue in the main proceedings is manifestly disproportionate, and thus prohibited by Article 6 of the Treaty.

27 In the light of the above, there is no need to examine whether national legislation of that kind is compatible with a principle of Community law corresponding to Article 6 of the Convention on Human Rights.

28 The answer to the question raised must therefore be that Article 6 of the Treaty precludes national legislation adopted in implementation of Council Regulations Nos 3820/85 and 3821/85 which, in cases of infringement, imposes only on non-residents who opt for continuation of normal criminal proceedings against them rather than for immediate payment of the prescribed fine the obligation to lodge by way of security in respect of each offence a fixed sum higher than that provided for in the case of immediate payment, in default of which their vehicle is impounded.

Costs

29 The costs incurred by the Belgian, French and Swedish 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 Rechtbank van Eerste Aanleg te Antwerpen by order of 31 January 1995, hereby rules:

Article 6 of the EC Treaty precludes national legislation adopted in implementation of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport and of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport which, in cases of infringement, imposes only on non-residents who opt for continuation of normal criminal proceedings against them rather than for immediate payment of the prescribed fine the obligation to lodge by way of security in respect of each offence a fixed sum higher than that provided for in the case of immediate payment, in default of which their vehicle is impounded.

Mancini Murray Kakouris

Kapteyn Hirsch

Delivered in open court in Luxembourg on 23 January 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber