OPINION OF ADVOCATE GENERAL COSMAS

delivered on 21 January 1999 *

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I — Introduction

1. By the present reference for a preliminary ruling under Article 177 of the EC Treaty, the Pretura Circondariale di Bologna (District Magistrates' Court, Bologna, Italy) asks the Court whether the prohibition on issuing a summary payment order (*decreto ingiuntivo*) where it is to be served on the defendant outside Italy or territories under Italian sovereignty infringes Articles 34, 59 and 73b of the EC Treaty.

* Original language: Greek.

II — Relevant legislation

A — *Community provisions*

2. Article 34 of the EC Treaty provides as follows:

'1. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.'

3. Article 59 of the Treaty provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...'

4. Article 73b of the Treaty is worded as follows:

'1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

5. In addition, the first paragraph of Article 6 of the Treaty provides:

'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.'

B — *National provisions*

6. The present case concerns the 'procedimento d'ingiunzione' which, as the Court stated in *Hengst Import*,[1] is a summary procedure for the recovery of debts — similar to the 'Mahnverfahren' in German law and the 'ordonnance d'injonction' in French law — allowing a creditor by *ex parte* application to obtain an enforceable court order against the debtor (Articles 633 to 656 of the Italian Code of Civil Procedure, hereinafter 'the Code').

The creditor applies to the court, with his supporting documentary evidence, for the issue of a summary order (*decreto ingiuntivo*) against the debtor requiring payment of the sum claimed or delivery of the goods within a period which is, in principle, 20 days (Article 641 of the Code).[2] The court merely establishes whether the application meets the conditions for admissibility and examines, summarily and *ex parte*, whether it is well founded. If that is the case, the court issues the summary payment order, which it may, subject to Article 642 of the Code, make enforceable on a interim basis.[3] Under the second paragraph of Article 643 of the Code, copies of the order and the application are to be served on the defendant.[4]

7. In this connection, the final paragraph of Article 633 of the Code, the provision relating to the summary procedure which is at issue in the present case, states that 'the order may not be made if service on the defendant pursuant to Article 643 must be

1 — See Case C-474/93 *Hengst Import* v *Campese* [1995] ECR I-2113, paragraph 4 et seq.

2 — That period may be reduced to five days if the applicant shows just cause or be extended to 30 days.

3 — In principle, the order is not automatically enforceable: leave of the court, granted on application by the creditor after expiry of the period for applying to have the order set aside, is necessary to make it enforceable. On application by the creditor, however, the order may be enforced on an interim basis where the claim is based on a bill of exchange, a banker's draft, a cheque, a certificate of stock-market settlement or an instrument made before a notary or other authorised public officer (Article 642(1) of the Code). The court may also make the order enforceable on an interim basis if delay would give rise to a risk of serious harm (Article 642(2) of the Code).

4 — Service of the application and the order is fundamental for the protection of the defendant, as this is how he becomes aware both of the application and of the issue of the summary payment order. For that reason, the third paragraph of Article 643 provides that their joint service marks the start of the proceedings. Moreover, the Court held in *Hengst Import* (cited above in footnote 1, paragraphs 20 and 21) that the application and order served together constitute the 'document which instituted the proceedings or an equivalent document' within the meaning of Article 27(2) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.
Article 644 of the Code provides that a summary payment order is rendered inoperative where it is not served within 60 days from the court's decision in the case of service on Italian territory and 90 days in all other cases. As the Commission points out, now that no territories outside Italy are subject to Italian sovereignty, it is difficult to see precisely when that 90-day period would apply, given the prohibition at issue contained in the last paragraph of Article 633 (see point 7 below).
Following the abovementioned joint service, the defendant may apply to have the order for payment set aside. Article 641 of the Code provides for a period of 40 days from service (the court may, for certain reasons, vary the period to between 10 and 60 days) within which the defendant may make that application. Pursuant to Article 650 of the Code, the defendant may also apply to have the order set aside after the expiry of the period set by the order provided that he proves that he was not aware of the order due to improper service or *force majeure*.
If the debtor applies to have the summary payment order set aside within the prescribed period, the ordinary *inter partes* procedure is followed (Article 645(2) of the Code). If he does not apply or the court finds his application unfounded, the court declares the order enforceable on application by the creditor. It must, however, first order fresh service where it is probable that the debtor was not aware of the order (Article 647(1), *in fine*).

effected outside Italy or the territories under Italian sovereignty'. [5]

III — Facts

8. ED Srl (a company whose registered office is in Funo di Argelato in the Province of Bologna, hereinafter 'the applicant') and Italo Fenocchio (who is resident in Berlin, Germany, hereinafter 'the defendant') entered into a contract for the supply of certain goods by the former to the latter for the sum of ITL 19 933 700. Since the defendant paid only a sum of ITL 100 000 by way of down-payment when the goods were ordered, the applicant, having delivered the goods, applied on 6 October 1996 to the Pretura Circondariale di Bologna, under Article 633 et seq. of the Code, for the issue of a summary order requiring the defendant to pay the balance due of ITL 19 833 700, together with interest and costs.

9. The national court accepted jurisdiction and found that the application complied with all the substantive conditions necessary for it to be held well founded (debt which was certain, liquidated, due and confirmed by documentary evidence). However, since the debtor was resident in Germany, the application and summary payment order had to be served on him in that State; therefore, in accordance with the final paragraph of Article 633 of the Code, as interpreted by the Italian Corte Suprema di Cassazione (Supreme Court of Cassation), [6] the national court had to declare of its own motion that the application was inadmissible.

IV — Question referred for a preliminary ruling

10. Since the national court was uncertain, following a request made by the applicant, whether it should apply the relevant provision of the Code or find that the prohibition on the issue of a summary payment order where the order is to be served abroad infringes the free movement of goods and capital and the freedom to provide services, it stayed the proceedings before it by order of 29 November 1997

5 — Article 633 of the Code lays down in general terms an exhaustive and cumulative list of the conditions for admissibility of an application for issue of a summary payment order; it specifies that such orders are confined to a creditor's claim for a sum of money or a specific quantity of fungibles or a claim pertaining to the delivery of specific chattels, and are subject to the submission of written evidence of the claim, enabling a strong presumption to be drawn and the existence of the claim to be quickly verified. The second and third subparagraphs of the first paragraph of Article 633 specify the particular debts that a debtor may recover through the summary procedure. The second paragraph of Article 633 adds that an order may be issued even where the right is subject to the fulfilment of a counter-obligation or of a condition, provided that the applicant submits evidence enabling it to be presumed that the counter-obligation or condition has been fulfilled.

6 — See the judgments cited by the Italian Government: Judgment No 2376 of 22 June 1957, in *Giustizia Civile*, 1957, I, 1492 and Judgment No 2736 of 1 August 1968, in *Giurisprudenza Italiana*, 1969, I, 1538.

and referred the following question to the Court for a preliminary ruling:

'Must the prohibition on issuing a summary payment order where it is to be served on the defendant outside Italy or the territories under Italian sovereignty, that prohibition being laid down by the last paragraph of Article 633 of the Code of Civil Procedure, be regarded as a restriction or measure having equivalent effect capable of hindering, directly or indirectly, actually or potentially, the free movement of goods, services and capital guaranteed by Articles 34, 59 and 73b of the Treaty of Rome?'

V — Answer to the question referred for a preliminary ruling

A — *Nature of the proceedings before the national court*

11. As the Italian Government points out, the fact that the question is referred for a preliminary ruling by a court adjudicating in proceedings for the issue of a summary payment order, which are not *inter partes*, does not raise an issue as to the admissibility of that question. With regard to the nature of the proceedings before the national court, the Court has already held that the President of an Italian court adjudicating in proceedings for the issue of a summary payment order as provided for by the Code performs a judicial function for the purposes of Article 177 of the Treaty. The submission of a question for a preliminary ruling is not subject to a condition under that article requiring that *inter partes* proceedings take place in the course of which the national court refers the question, although it may be in the interests of the proper administration of justice that there have been such proceedings. [7]

B — *Wording of the question referred for a preliminary ruling*

12. As regards the wording of the question referred for a preliminary ruling, I would recall that, under Article 177 of the Treaty, the Court does not rule on the interpretation or validity of national provisions or their compatibility with Community provisions but provides the national court with all such matters relating to the interpretation of Community law as are necessary to enable that court to rule itself on the compatibility of a provision of national law with Community rules. [8]

7 — See Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12, and the cases cited therein.

8 — In order to underline that it interprets Community and not national law, the Court rephrases questions referred for a preliminary ruling, as is evidenced by the use of expressions such as 'the question submitted must therefore be construed as...' or 'the Court is consequently of the opinion that the national court, in referring [the question] for a preliminary ruling, is seeking in essence to know...'. See, for example, Case 27/74 *Demag* [1974] ECR 1037; Case 152/79 *Lee* [1980] ECR 1495, paragraph 11; Case 22/80 *Boussac* [1980] ECR 3427, paragraph 5; Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 7; and Case C-204/90 *Bachman* [1992] ECR I-249, paragraph 6.

Thus, the question submitted by the national court must be regarded as essentially seeking to establish whether Articles 34, 59 and 73b of the EC Treaty are to be interpreted as precluding a national procedural provision prohibiting the issue of a summary payment order where service on the defendant must be effected outside the territory of a Member State or territories under its sovereignty.

C — *Identifying the relevant provisions of Community law*

13. Following the above two introductory observations, I will now concentrate on the issue of the usefulness which the answer sought by the national court in its request for interpretation of Articles 34, 59 and 73b of the EC Treaty may have for disposing of the main proceedings.

14. Whilst the national court considers that 'logically and legally, the question raised must be resolved before the main issue is disposed of (the grant or the dismissal on grounds of inadmissibility of the application for a summary payment order)', it also expressly states that Articles 34, 59 and 73b of the EC Treaty, whose interpretation is sought, 'are not in this case directly applicable to the dispute before the national court, but must be interpreted in a uniform manner and their effects must be compared with the effects indirectly resulting from the Italian procedural rule'.

(a) Observations submitted by the Commission

15. In its observations, the Commission places particular emphasis on the above comment made by the national court and queries the admissibility of the question submitted with regard to the usefulness of interpreting Articles 34 and 59 of the EC Treaty.

Specifically, the Commission considers not only that those two articles are not directly applicable to the main proceedings but also that their interpretation would offer the national court no additional guidance. First, the possible application of the last paragraph of Article 633 of the Code did not prevent the movement of the goods within the Community, which were supplied by the applicant to the defendant, thus proving, according to the Commission, that the issue of a restriction on exports within the meaning of Article 34 of the EC Treaty does not arise. Second, it would not be of any use to interpret Article 59 of the EC Treaty given that the contract between the parties is for the supply of goods, not services. On the other hand, the Commission maintains that interpretation of Article 73b of the Treaty is useful for disposing of the main proceedings.

16. According to the settled case-law of the Court, the justification for a preliminary reference is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. [9]

17. Having regard to that case-law, the Commission's argument that the possible application of the final paragraph of Article 633 of the Code did not hinder the free movement within the Community of the goods which were supplied by the applicant to the defendant, with the result that the issue of a restriction on exports does not arise, is not convincing.

The question whether a provision of national law, first, falls within the ambit of a Community provision guaranteeing the freedom to export and, second, is compatible with that provision cannot depend on the fortuitous circumstance that the party alleging such an incompatibility delivered the goods.

First, the Court has consistently held [10] that rules which are capable of hindering intra-Community trade even potentially may be considered to be measures having an effect equivalent to quantitative restrictions on the free movement of goods. The view must be taken that, since export trade between Member States is principally based on the conclusion of contracts containing mutual obligations, protection of that trade involves protection of both the supply — through export — of the goods and payment for them. Consequently, any restriction on the ability to obtain payment may affect intra-Community trade even where the supply has been effected, that is to say even where the goods have been exported.

Also, the compatibility of the national provision at issue with Article 34 of the Treaty and its applicability in specific proceedings before the national court depend in principle on objective criteria falling within the general operation of intra-Community trade, and concerning the specific aim pursued by that Community provision as well as the nature of the national provision at issue. [11] On the other hand, they do not depend on the subjective circumstances of a given individual, such as the abovementioned party, which may be due to other reasons and do not necessarily indicate either the specific effects of the national provision on that party or, all the more so, its more general effects on intra-Community trade.

9 — See, for example, Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; and Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29.

10 — See Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

11 — See, for example, Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 24.

As regards that last observation, it must be pointed out, finally, that the admissibility of an application for a summary payment order and therefore the opportunity for the applicant to raise the possible incompatibility of the final paragraph of Article 633 of the Code with Community law appear to depend, according to the Code (the second paragraph of Article 633), on performance of the obligation under the contract and, consequently, on the supply to the defendant of the goods ordered.

It is clear from the foregoing that the supply of the goods by the applicant in the main proceedings cannot lead to the conclusion, first, that there is no restriction on exports, second, that the applicant makes an admission to that effect, or of course, third, that any declaration by the national court that the provision at issue is contrary to Article 34 of the Treaty, and therefore is not to be applied in the present case, would serve no purpose.

18. On the other hand, I agree with the observations submitted by the Commission with regard to Articles 59 and 73b of the Treaty.

19. The contract between the applicant and the defendant indeed relates to an order for goods and not to the provision of services. Given that, as has been pointed out, the Court is not obliged to answer abstract and hypothetical questions, I am of the opinion that interpretation of Article 59 of the Treaty would not be useful for disposing of the main proceedings.

20. On the other hand, the same cannot be said of interpretation of Article 73b of the Treaty, which guarantees the free movement of capital (Article 73b(1)) and of payments (Article 73b(2)) between Member States and between Member States and third countries. Interpretation of that article, and of its second paragraph in particular, is useful in the present case since, as the Commission also argues, it has been found that the term 'payments' in Article 73b(2) includes payments for trade in goods or services [12] and the Italian procedural provision at issue is connected, albeit indirectly, with the enforcement of such payments.

21. Therefore, as regards the observations submitted by the Commission concerning identification of the relevant provisions of Community law, I consider that interpreta-

12 — See Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 17. Moreover, inasmuch as it is accepted that, by repeating almost verbatim the wording of Article 1 of Council Directive 88/361/EEC of 24 June 1998 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), Article 73b merely confirms the principles already established by that directive (see, on that matter, point 10 of the Opinion of Advocate General Tesauro in *Sanz de Lera*, cited above), it must also be accepted that that directive, although repealed by the entry into force of Article 73b, is of great help in defining the 'movement of capital' guaranteed by Article 73b(1) of the Treaty. Under heading VII of Annex I to that directive, credits related to commercial transactions or the provision of services in which a resident of a Member State is participating are listed as movements of capital within the meaning of Article 1 of the directive. The explanatory notes to that annex state that such credits include contractual trade credits (advances or payments by instalment in respect of work in progress or on order and extended payment terms, whether or not involving subscription to a commercial bill).
In addition, as the Commission observes, since the Court has in effect acknowledged that Article 73b(1) has direct effect (see *Sanz de Lera*, paragraph 41 et seq.), the same must be accepted with regard to Article 73b(2), which corresponds to Article 73b(1) in both wording and meaning.

tion of Article 34 as well as of Article 73b of the Treaty may, in principle, be useful for disposing of the main proceedings.

(b) My view on the matter

22. I consider, however, that before determining, as the Commission does, whether or not it is useful to interpret each Treaty article cited in the order for reference, it is necessary to analyse in depth whether those articles may, necessarily indirectly, apply in the main proceedings. Such an analysis shows that the grounds of the order for reference are in essence the product of a jump in logic with regard to the choice of the Community rules within whose scope it is logically correct, but also of practical benefit in disposing of the main proceedings, for the national provision at issue to be brought within. [13]

23. It should be noted that the fact, which has not been disputed, that the procedural provision contained in the last paragraph of Article 633 of the Code is not aimed at regulating trade in goods or the movement of capital and payments between Member States, and could therefore lead only indirectly to a restriction of those fundamental freedoms enshrined in Articles 34 and 73b of the Treaty respectively, cannot in principle prevent that provision from falling within the scope of those articles. Besides, it is well known that, according to the Court, rules capable of affecting intra-Community trade even indirectly or potentially are to be regarded as measures having an equivalent effect to quantitative restrictions on freedom of movement. [14]

24. None the less, the issue can be raised as to whether the provision at issue should be

13 — As regards that jump in logic, it is not without significance that the applicant in the main proceedings referred to Articles 34, 59 and 73b of the Treaty and that there already exists a precedent where an Italian court, ruling in proceedings for a summary payment order, did not apply the final paragraph of Article 633 of the Code, invoking its incompatibility with those Community provisions. See Order No 1500 of the Pretura di Torino of 12 February 1996 in *Jolly Grafica snc* v *T-Direct SL* (*Giurisprudenza Italiana* 1996, I Senz. II Col. 822 to 832). With regard to the Italian courts not applying the provision at issue, see also the judgment of the President of the Tribunale di Trani referred to in *Hengst Import*, cited above at footnote 1 (paragraphs 3 and 8).

14 — See *Dassonville*, cited above in footnote 10. It is also to be noted that the fact that a national measure is not a 'trading rule', the wording characteristically used in *Dassonville*, or does not have as its 'specific object or effect the restriction of patterns of exports', as held by the Court specifically with regard to the measures referred to by Article 34 of the Treaty (see, for example, *Commission* v *Belgium*, cited above in footnote 11, paragraph 24) does not appear to have any bearing on whether it falls in principle within the scope of the provisions of Community law guaranteeing the fundamental freedoms pertaining to intra-Community trade. Those aspects of the national measure concern the substantive examination of whether it is compatible with the fundamental freedoms and not whether it is in principle capable of falling within the scope of the provisions protecting those freedoms. Moreover the Court, applying the rule in *Dassonville* as the major premiss in its judicial reasoning, has agreed to examine as to the substance the interpretation of Article 30 of the Treaty in the light of national procedural rules (see *Krantz*, cited above in footnote 8, a judgment relating to the interpretation of a provision of national law on the right of national authorities to seize goods sold subject to a reservation of title, particularly paragraphs 9 to 12).

brought within the articles referred to in the order for reference where any — necessarily indirect — restriction of the freedoms enshrined in those articles first falls within the field of application of another rule or another principle of Community law. In that case, the Court must consider whether it is more useful for the resolution of the main proceedings to interpret only — or additionally — that rule or principle, even if the national court has not requested it.

25. That view is consistent with the case-law, which states that the Court, in carrying out its task of contributing to the administration of justice in the Member States and in order to provide the referring court with a useful answer, is to interpret all the provisions of Community law which the referring court needs in order to decide the action pending before it. To that end, the Court may of course have to consider Community rules to which the national court has not referred in its question. [15]

26. As is clear from the order for reference, the national court takes the view that the relevant procedural provision in the Code may restrict the free movement of goods, capital and payments in that Italian undertakings could be led to prefer to maintain business relations with other Italian undertakings, possibly excluding customers from another State, since it is only as against Italian customers that they could enjoy the legal protection afforded by the procedure for obtaining summary payment orders. According to the national court, this could undoubtedly undermine the principle of free movement. [16]

Thus, as is clear from both interpretation of the order for reference and the observations submitted to the Court in the present case, the most probable restriction of the free movement of goods and capital is in principle covered by the restriction of judicial protection in disputes arising in the context of the exercise of those fundamental freedoms.

27. This possible restriction of judicial protection falls within the scope of the general principle of Community law that Member States must secure the required judicial protection of the rights which Community nationals derive from the Treaty, a principle which is based on the

15 — See, for example, Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17; Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 10 and 11; and Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9.

16 — The national court considers that 'the following conflicts are possible between the prohibition in the last paragraph of Article 633 and the principle of free movement in relation to the provisions of the Treaty of Rome embodying that principle. (1) The prohibition might constitute a measure equivalent to a quantitative restriction on exports and consequently be prohibited by Article 34 of the Treaty of Rome. (2)... (3) Finally, the summary procedure is also used to protect transfers of capital, being applicable whenever sums of money are owed to a creditor (see the first paragraph of Article 633) and therefore might constitute a measure having an effect equivalent to restrictions on movement of capital, prohibited by Article 73b of the Treaty of Rome'.

constitutional traditions common to the Member States and has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

More specifically, the Court has held that Member States are obliged to ensure effective judicial protection of the rights which Community nationals derive directly from Community rules.[17] It logically follows that this obligation exists not only with regard to substantive claims against the Member State itself, but also with regard to claims against individuals which are connected with the exercise of rights and freedoms directly enshrined in Community law. Indeed, since the possibility of legal protection where a fundamental Community freedom is exercised is the direct consequence of that freedom being enshrined in Community law, a failure by the national legislature to provide for full, effective and timely judicial protection for the resolution of disputes between individuals arising from the exercise of the freedom would remove all the benefit deriving from its enshrinement in Community law.[18]

28. Moreover, the procedure for the issue of a summary payment order does involve the grant of judicial protection. Even if the summary payment order could be viewed simply as an enforceable order, and not as a judgment or a decision equivalent thereto, recourse to the special procedure for issue of a summary payment order in any event constitutes legal recourse for the recovery of a debt by the obtaining of an enforceable court order against the debtor, and therefore, in view of the purpose it serves, entails the grant of judicial protection.

29. Therefore, even if the national court does not make a request tothat effect, it is

17 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17, 18 and 19; Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097, paragraph 14; and Case C-97/91 *Borelli* v *Commission* [1992] ECR I-6313, paragraph 14. The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law. See, for example, Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20.

18 — See Case C-185/97 *Coote* v *Granada Hospitality* [1998] ECR I-5199: 'The principle of effective judicial control laid down in Article 6 of [Council Directive 76/207/EEC of 9 February 1976] would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive' (paragraph 24).

useful and thus expedient to interpret, having regard to the facts of the main proceedings, the general principle of Community law that Member States are to secure the required judicial protection of the rights which Community nationals derive from the Treaty. Specifically, I consider it appropriate that the Court answer the question whether this general principle of Community law is to be interpreted as precluding a domestic procedural provision of a Member State which prohibits the issue of a summary payment order where service on the defendant must be effected outside the territory of that Member State or territories under its sovereignty.

30. Additionally, inasmuch as the Italian procedural provision at issue falls, even if indirectly, within the scope of the free movement of goods and capital and differentiates between the procedural means available to persons trading with residents of Italy and those trading with residents of another Member State, I consider that it is useful to answer the question whether the first paragraph of Article 6 of the Treaty is to be interpreted as precluding a domestic procedural provision of a Member State which prohibits the issue of a summary payment order where service on the defendant must be effected outside the territory of that Member State or territories under its sovereignty.

31. The usefulness of that last question is clear from the recent development of the Court's case-law, the Court having stated: '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. It must therefore be held that a rule of domestic civil procedure [...] 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'. [19]

In other words the Court, changing to some extent its position regarding the 'ancillary' nature of the first paragraph of Article 6 of

19 — See Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661, paragraphs 14 and 15. See also Case C-323/95 *Hayes* [1997] ECR I-1711, paragraphs 16 and 17, and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraphs 17 to 24.

the Treaty,[20] essentially held in the decisions cited above that where Community law guarantees certain freedoms, such as the free movement of goods and the freedom to provide services in the common market, it is the corollary of those freedoms that traders exercising them be able to pursue legal remedies in the courts of the Member State concerned in order to resolve disputes which may arise from their economic activities, and the Member States must guarantee the right to judicial protection in accordance with the principle of procedural equality or, rather, the prohibition of procedural discrimination enshrined by the Treaty.[21]

32. Thus, it is only after the right to judicial protection under Community law and the first paragraph of Article 6 of the Treaty have been interpreted with regard to the main proceedings that it is expedient to examine the scope of Articles 34 and 73b of the Treaty, to which the national court expressly refers.[22]

20 — In Case C-20/92 *Hubbard* [1993] ECR I-3777, which concerned the provision of German law requiring nationals of another Member State to give security for costs, the Court, despite being asked by the referring court to rule also on Article 7 (now Article 6) of the Treaty, based its decision only on the specific rules relating to the freedom to provide services which were relevant in that case, thereby following the suggestion made by Advocate General Darmon, who had relied on the principle *specialia generalibus derogant*.
Commenting on that case in *Data Delecta and Forsberg*, cited above in footnote 19, Advocate General La Pergola observed in his Opinion, which the Court followed, that Article 6 does appear to be *ancillary* in nature in relation to the provisions which are specifically designed to regulate defined situations. He stated: 'In other words, the provision in question covers the system in a general way, but specific rules may derogate from it (provided that they are reasonable and justified).' However, referring to Joined Cases C-92/92 and C-362/92 *Phil Collins and Others* [1993] ECR I-5145, he took the view that in *Data Delecta and Forsberg* 'it should be examined whether the provision of Swedish law directly or only indirectly harms a legal position protected by the Community legal order'. In this respect, he observed that the national provision at issue, likewise imposing an obligation to give security for costs, 'is purely of a procedural nature and, if its prescriptive content is considered, it can be seen that it is not intended as such to regulate activity of a commercial kind or to impose barriers to the free movement of goods. Yet it has an indirect influence on the exercise of that freedom in the sense that it makes it more difficult to resolve disputes arising out of transactions and dealings connected with the free movement of goods'. On that ground, namely the purely indirect relationship between the provision at issue and the free movement of goods, he concluded that the national court correctly relied on Article 6 of the Treaty, which was, moreover, completely autonomous. See the Opinion of Advocate General La Pergola in *Data Delecta and Forsberg*, point 10 et seq.

21 — See *Hayes*, cited above in footnote 19, paragraph 14, and *Phil Collins*, cited above in footnote 20, paragraph 27. It should, however, be pointed out that, regardless of whether Article 6 of the Treaty is ancillary or autonomous, the Court has consistently held that, although rules of procedure are, in the absence of Community regulations, a matter for which national legislatures are responsible, Community law sets limits on their power. One such limit is the prohibition of discrimination against persons to whom Community law gives the right to equal treatment (see Case 186/87 *Cowan* [1989] ECR 195, paragraphs 17, 18 and 19).
Advocate General La Pergola characteristically observed: 'Where a Community national asks the national court having jurisdiction to recognise a claim which he has arising out of the exercise of a right conferred upon him by the Treaty, the exercise of the civil action is inseparably linked with the very freedom enshrined in the Community legal order. The procedural law of the Member States governing the bringing of such actions falls within the ambit of the Community precisely because it becomes an instrument for achieving the objectives laid down by the Treaty.' He added: 'Although Community law generally takes no interest in aspects relating to Member States' procedural rules, the connection between the exercise of Community freedoms and their judicial protection means therefore that even rules laid down in order to regulate the course of the trial must secure Community nationals' right to judicial protection in accordance with the principle of non-discrimination enshrined in the Treaty.' See point 8 of the Opinion of Advocate General La Pergola in *Hayes*, cited above.

22 — It should be noted at this point that, in the present case, the possibility of applying the case-law according to which the Court may consider Community rules which are not expressly cited by the national court (see point 25 above) is consistent with the fact that there is no material in the file indicating that the national court intended to refer a question concerning the interpretation of Articles 34, 59 and 73b only. See, by contrast, Case 247/86 *Alsatel* [1988] ECR 5987, where it was held that the national court had refused by implication to seek from the Court a ruling on the interpretation of a provision which was not cited in the order for reference (paragraph 8 of the judgment).

33. It is in principle appropriate to analyse the scope of those articles because, while interpretation of the right to judicial protection and of the first paragraph of Article 6 of the Treaty is required, it may not necessarily be sufficient. That is because, while the national provision in question may be considered in essence not to deprive the person concerned of all judicial protection or not to amount to discrimination within the meaning of the first paragraph of Article 6, it may, from a purely economic or commercial point of view, discourage the exercise of those fundamental freedoms.

34. On the basis of the above observations and given the issue as to whether the national provision at issue in the main proceedings is compatible with Community law, I shall proceed to interpret the principle of judicial protection (D), the prohibition of discrimination within the meaning of the first paragraph of Article 6 of the EC Treaty (E), Article 34 of the EC Treaty (F) and, last, Article 73b of the EC Treaty (G).

D — *Conferment of judicial protection*

35. The procedure for the issue of a summary payment order is short, simple and inexpensive and an important means of obtaining an enforceable court order for the recovery of debts where recourse to ordinary proceedings is not advantageous. However, the order is issued *ex parte*, that is to say without the defendant being heard. For that reason, it is also provided that the debtor may apply to have the order set aside, so that the procedure complies with the fundamental procedural principles giving both parties a right to a hearing and concerning exercise of the rights of the defence. The advantages of the summary payment order are therefore offset by equally significant disadvantages and, as the French Government observes, are ultimately subject to the defendant not applying to have the order set aside: then the applicant is obliged to revert to ordinary proceedings and satisfaction of his claims may of course take longer than if he had initiated such proceedings at the outset.

Accordingly, the procedure for a summary payment order is a special procedure, which subject to certain conditions, may contribute significantly to the quality of the

judicial protection afforded for the recovery of debts.

36. The creditor may of course pursue his objectives through other means, such as ordinary proceedings. [23] None the less, as the Commission points out, the fact that he is denied recourse to the procedure for a summary payment order significantly restricts the possibility of judicial protection. In certain cases, concerning claims of small and medium-sized businesses, that restriction in effect amounts, as the Commission also observes, to a *denial* of judicial protection.

It is always necessary to assess whether judicial protection is complete, effective and prompt, as it must be, by reference to the economic and social conditions for the administration of justice. Having regard to the Court's expansion of the right to judicial protection under Community law, [24] it is clear that that protection cannot always be equated with ordinary proceedings before the national courts.

Accordingly, a simplified, swift and inexpensive procedure for debt recovery, such as the procedure for a summary payment order, acquires fundamental importance with regard to the conferment of judicial protection where small and medium-sized businesses and small debts are involved. First, it is important for the survival, but also for the economic development in general, of undertakings and private persons that the proceedings for debt recovery are not held up and that a kind of 'obligatory credit', benefiting the debtor whose payment is overdue, is not thereby created. Second, as regards the recovery of multiple, relatively small, debts, such as those arising from the activity of small and medium-sized businesses, it is financially crucial that judicial costs should be low. If costs for actions to recover those debts are disproportionately high, the judicial protection available is of no benefit.

It is thus clear from such considerations, which have for a long time led numerous Member States to adopt special simplified

23 — As the national court mentions, another remedy is established in Italian law which is similar to the summary payment order in that the evidential requirements are the same and it also involves the issue of an order, namely the 'ordinanza anticipatoria' (provisional order) provided for by Article 186b of the Code which, in contrast to the summary payment order, may be issued even against debtors residing abroad. However, the procedure is in any event more onerous than the procedure for a summary payment order, since it involves initiating ordinary proceedings.

24 — For instance, in connection with the grant of interim protection, see by way of example, the judgments in *Factortame*, cited above in footnote 17, and in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen und Zuckerfabrik Soest* [1991] ECR I-415, and the order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46.

procedures for debt recovery [25] and are referred to in the preamble to the Proposal for a European Parliament and Council Directive combating late payment in commercial transactions, [26] that procedures of that kind are the corollary of complete, effective and timely judicial protection, particularly given that the absence of fundamental rights which they often entail (no *inter partes* hearings or exercise of the rights of the defence) is offset by the necessary safety valves such as suspension of the order for payment coupled with the opportunity for the defendant to apply to have the order set aside.

37. While a simplified special procedure for debt recovery, such as the procedure for a summary payment order found in Italian law, has the greatest benefit where it can be used against a debtor residing in another Member State, as proceedings in the Member State where the debtor resides may thus be avoided, such a procedure could raise issues with regard to determining the international jurisdiction of the national courts, particularly in relation to protection of fundamental rights of the debtor under the special procedure. More specifically, as the French Government observed at the hearing, should ordinary proceedings be reverted to following an application by the debtor to have the order set aside, he would have to cross borders and participate in *inter partes* proceedings before a court in a different Member State from that in which he resides. According to the French Government, that does not always safeguard the debtor's rights (language of the proceedings and so forth), particularly in cases, such as those involving a consumer debtor, where the assignment of jurisdiction to the courts of the Member State in which he resides is an important element in the protection of his position under the procedure.

With regard to that observation of the French Government, first, I agree that, in

25 — See, for example, G. Horsmans, *La procédure d'injonction ou le recouvrement simplifié de certaines créances dans les pays du Marché Commun*, Bruylant, Brussels, 1964; H. Prütting, 'Auf dem Weg zu einer Europäischen Zivilprozeßordnung. Dargestellt am Beispiel des Mahnverfahrens', in *Festschrift für Gottfried Baumgärtel, Zum 70. Geburtstag*, 1990, p. 457 et seq.
Even though most Member States — 11 in total — have adopted procedures for the simplified recovery of debts comparable to the procedure for a summary payment order found in Italian law, summary payment order procedures far from apply in all Member States. In some Member States such a procedure is unknown (Denmark, Ireland, the Netherlands since 1992 and the United Kingdom). None the less, as the working group for the approximation of civil procedural law in Europe (under the chairmanship of Professor Storme) underlined in its report, the payment order may be an important means of lightening the burdens with which the judicial system is already contending, given that it is expedient for small uncontested claims to be governed by an appropriate simplified procedure, benefiting financially both the courts and the parties involved. On the views of that working group and its plan for a uniform procedure governing the issue of payment orders in all the Member States, see M. Storme (ed): *Rapprochement du Droit Judiciaire de l'Union Européenne/Approximation of Judiciary Law in the European Union*, Kluwer, Editions Juridiques, Belgium, and Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994, particularly pp. 108, 147, 177 and 207.

26 — See, in particular, the seventh and fourteenth recitals in the preamble to that proposal (98/C 168/09, OJ 1998 C 168, p. 13): 'Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of late payment;... moreover, late payments are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses;... the consequences of late payment can be dissuasive only if they are accompanied by redress procedures which are rapid, effective and inexpensive for the creditor;... in conformity with the principle of non-discrimination contained in Article 6 of the Treaty, these procedures should be available to creditors from all Member States irrespective of their residence'. Thus, the proposal puts forward the adoption of accelerated recovery procedures for undisputed debts (Article 5) and simplified legal procedures for small debts (Article 6).

addition to the protection of the fundamental procedural rights which I have referred to above, possible restrictions or prohibitions on special simplified procedures for debt recovery may also be based on the principles regulating the international jurisdiction of the courts of the Member States as well as on other principles and provisions of Community law, such as those relating to consumer protection. Second, it is to be noted that some of those issues are governed by the Brussels Convention. [27] None the less, inasmuch as there is no systematic Community legislation concerning procedure and, subject to the restrictions imposed by Community law, [28] legislative competence in that regard rests with the Member States, it must be accepted that it is in principle a matter for those Member States, within their autonomy as to procedure, to determine both the organisational details and the prohibitions and restrictions, such as those mentioned above, on those special procedures. However, this does not negate the basic need for special simplified procedures for debt recovery, a need which, as I mentioned above, is in essence connected with conferring complete, effective and timely judicial protection. National legislation can therefore provide for the necessary and appropriate prohibitions or restrictions on those procedures by relying on fundamental rights and the abovementioned Community law principles. However, it cannot prohibit such procedures generally or without justification.

38. It is therefore my view that, in so far as general prohibitions or restrictions on special simplified procedures for debt recovery are not objectively justified on the basis of the need for protection of fundamental procedural rights and of principles of Community law or on the basis of specific Community legislation (laid down by international agreement or by the Community acting independently), they are contrary to the general principle of Community law according to which Member States are to confer the necessary judicial protection of the rights derived by Community nationals from the Treaty.

39. In the present case, the prohibition on summary payment orders established by the final paragraph of Article 633 of the Code constitutes a general prohibition on issuing such an order where it is to be served on the defendant outside Italy, that

27 — It is evident that, as regards its content, the Brussels Convention went beyond the task assigned by Article 220 of the Treaty. As regards judgments, it did not merely facilitate their recognition and enforcement, but also laid down uniform rules on international jurisdiction irrespective of any — in any event subsequent — recognition and enforcement (see K.D. Kerameus, G.D. Kremlis and K.N. Tagaras, *Η Σύμβαση των Βρυξελλών για τη διεθνή δικαιοδοσία και την εκτέλεση αποφάσεων όπως ισχύει στην Ελλάδα. Ερμηνεία κατ' άρθρο*, A.N. Sakkoula, Athens-Kommotini 1989, in particular pp. 2 and 3). The Convention also includes provisions stating that proceedings may be brought against a consumer only in the courts of the Contracting State in which the consumer is domiciled (Articles 13 and 14).
As to the extent to which Member States are bound by the Convention, with regard also to the wording of the fourth indent of Article 220 of the EC Treaty, see Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 20, where the Court stated that the application of national procedural rules cannot impair the effectiveness of the Convention. See also Case C-398/92 *Mund & Fester* [1994] ECR I-467 and the Opinion of Advocate General Tesauro in that case.

28 — See also footnote 21 above.

is to say even where it is to be served in another Member State, and does not appear to be objectively justified, particularly having regard to the context of the main proceedings.

As the national court also states, the reason for the prohibition on issuing a summary payment order where the debtor resides in another State was to avoid the danger of the debtor never becoming aware of the order issued against him or of his becoming aware of it once the prescribed period for applying to have it set aside had expired, and thus being unable to exercise his rights of defence.

Although that reason for the prohibition accorded with the circumstances prevailing when the provision was introduced (1940),[29] it could not be accepted as valid today, as both the national court and the Commission point out. The Community and international,[30] as well as the national,[31] legal framework has been transformed to the point where the method once chosen, in the form of the provision at issue, to ensure that the defendant could exercise his rights of defence in good time is no longer necessary or appropriate for the attainment of that objective.[32] As the

29 — As the Commission states in its written observations and has not been disputed, the provision of the Code governing service abroad initially did not take into account whether the addressee had full knowledge of the document, service being deemed to have taken place on the expiry of the time-limit of 20 days (Article 143 of the Code) from completion of the formalities provided for by Article 142 of the Code, namely sending a copy of the document to be served to the registry of the court with jurisdiction, sending a second copy by post to the defendant and sending a third copy to the State Counsel's Office in order for the latter to arrange for it to be sent to the defendant through the Ministry of Foreign Affairs. As the Commission points out, the service of legal documents abroad was based on a clear — and often false — presumption that the addressee had knowledge of them within the prescribed time-limits.

30 — First, reference must be made to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. As the order for reference also states, Germany, to which the present case relates, ratified that Convention on 27 April 1979. Under Article 15 of the Convention, effective and timely service is dependent on the defendant having actual knowledge of the document.
With regard to enabling ever faster service of documents abroad, it is also worth noting the recent Convention of 26 May 1997 on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (OJ 1997 C 261, p. 1).

31 — As the Commission has stated in its written observations, and has not been disputed, Law No 42 of 6 February 1981 (GURI No 62 of 4 March 1981), which was adopted to bring Italian rules of procedure into line with the Hague Convention and the case-law of the Constitutional Court, ratified the Hague Convention and amended Article 142 of the Code. Specifically, Article 9 of the Law provides that there can be recourse to the presumption of service only where it is impossible to effect service in the manner laid down by international Conventions — in particular the Hague Convention — and Articles 30 and 75 of Presidential Decree No 200/67 of 5 January 1967.

32 — Thus, while the Court in *Hengst Import*, cited above in footnote 1, did not rule on the compatibility of the last paragraph of Article 633 of the Code with the fundamental Community freedoms or the right to judicial protection, it is none the less clear from the grounds of that judgment that service of a summary payment order (*decreto ingiuntivo*) in the Netherlands, that is to say outside Italy, in accordance with the Hague Convention of 15 November 1965 did not deny the defendant the opportunity to exercise his right of defence if he so wished (paragraph 20).
In that case, the Court also held that disregard by the court in which the judgment was given of the final paragraph of Article 633 of the Code is neither one of the grounds for refusing recognition laid down in Article 27 of the Brussels Convention nor one of the situations exhaustively listed in Article 28 of that Convention, in which the court of the State in which recognition is sought is authorised to review the jurisdiction of the State in which the judgment was given (paragraph 25). The foregoing findings led the Court to conclude that the *decreto ingiuntivo* within the meaning of Book IV of the Code (Articles 633 to 656), together with the application instituting the proceedings, must be regarded as 'the document which instituted proceedings or... an equivalent document' for the purposes of Article 27(2) of the Brussels Convention (paragraph 26).

Commission observes, the time-limits for service of the order on the defendant and for the defendant to apply to have it set aside appear sufficient to secure the defendant's rights and to offset the absence of *inter partes* proceedings. [33]

Nor does it appear from the material in the file that, having regard to the present case, the prohibition laid down by the provision at issue is justified under the rules governing the international jurisdiction of the courts of the Member States and the provisions of the Brussels Convention in particular. This is because, as the Italian Government and the Commission stated at the hearing and was not disputed, under Italian law the court with jurisdiction to issue a summary payment order also has jurisdiction over an action brought by way of ordinary proceedings. As was also pointed out by the Commission at the hearing, if the provisions of the Code governing ordinary proceedings comply with the requirements laid down by the Brussels Convention, particularly as regards consumer protection, the same must also apply to proceedings for a summary payment order. Indeed, in its order for reference the national court established its jurisdiction on the basis also of the Brussels Convention and no evidence has emerged or been submitted in the present case disputing that jurisdiction.

40. On the basis of the foregoing considerations, I propose that the Court should hold that the general principle of Community law under which the Member States are to confer the necessary judicial protection of the rights derived from the Treaty by nationals of the Member States of the Community is to be interpreted as precluding a procedural provision of a Member State which prohibits generally a simplified procedure for debt recovery, such as the procedure for the issue of a summary payment order provided for by Article 633 et seq. of the Code, where service on the defendant of the decision made in that procedure, as is the case with service on the defendant of the summary payment order provided for by the Code, must be effected outside the territory of that Member State or territories under its sovereignty.

33 — As pointed out in the order for reference, 'the period (Article 644 of the Code) within which service is to be effected (non-compliance with which renders the summary payment order ineffective) was recently increased to 60 days and could extend to 90 days pursuant to the final paragraph of Article 644 of the Code. When that provision was introduced, it could be applied to the service of summary payment orders in places other than the metropolitan territory, but subject at that time to Italian sovereignty (for example, Eritrea and Somalia). Today, that provision could be applied to service to be effected in Community Member States if the prohibition laid down in the final paragraph of Article 633 of the Code were to be found invalid. Similarly, under the second paragraph of Article 641 of the Code, the court could extend up to 60 days after receipt of the summary payment order the time granted to the debtor to apply to have the summary order set aside and thus commence ordinary proceedings. The procedural time-limits therefore appear to be consistent with allowing the parties to defend themselves, in particular the alleged debtor'.

E — *Discrimination within the meaning of the first paragraph of Article 6 of the EC Treaty*

41. The Court has held that 'in prohibiting "any discrimination on grounds of nation-

ality", Article 6 of the Treaty requires perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member State in question'. [34]

42. The Court's case-law on whether procedural provisions which have an effect, even though indirect, on intra-Community trade in goods and services fall within the scope of the first paragraph of Article 6 of the Treaty [35] has essentially had the effect of equating the procedural situation of a Community national who seeks a remedy in civil proceedings that comes within the ambit of the exercise of the freedoms guaranteed by Community law with that of nationals of the State in whose courts the proceedings are brought. [36]

43. It must, however, be considered that the persons 'in a situation governed by Community law', to follow the wording of the Court, are not only non-nationals but may be nationals of the Member State in question who are exercising the fundamental freedoms guaranteed by Community law. In other words, the first paragraph of Article 6 of the Treaty must be interpreted as requiring absolute equality of procedural treatment, not only as between Community nationals and nationals of the Member State concerned, which is how the Governments which submitted written observations appear to understand equal treatment, but also generally between persons exercising the fundamental freedoms guaranteed by Community law and those who do not. [37]

44. On the basis of the foregoing considerations, it is evident that a provision such as that at issue in the main proceedings constitutes discrimination prohibited by the first paragraph of Article 6 of the Treaty.

45. Although the provision at issue appears at first glance to apply equally to everybody, irrespective of nationality, it none the less entails a covert form of discrimination [38] against persons exercising the fundamental freedoms guaranteed by Community law.

34 — See *Data Delecta and Forsberg*, paragraph 16, *Hayes*, paragraph 18, and *Saldanha and MTS*, paragraph 25 (all cited above in footnote 19).

35 — See point 31 above.

36 — See point 6 of the Opinion of Advocate General La Pergola in *Hayes*, cited above in footnote 19.

37 — This view is consistent with the position adopted by the Court with regard to social security. Specifically, the Court has in essence held that the direct applicability of Articles 48 and 51 of the Treaty means not only that provisions of national law must not discriminate on grounds of nationality, that is to say between nationals of the Member State concerned and nationals of other Member States, but also that provisions of national law must not discriminate between those who have exercised their right to freedom of establishment and those who have not. See Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraphs 38, 40 and 41.

38 — As to the prohibition of covert forms of discrimination, see, for example, *Mund & Fester*, cited above in footnote 27.

Specifically, whereas Italian nationals — as well as nationals of other Member States established in Italy — who trade with persons residing in Italy may have recourse to the procedure for a summary payment order, Italian nationals — as well as nationals of other Member States established in Italy — who, clearly exercising rights and freedoms guaranteed by Community law, enter into business relationships with persons residing in another Member State have no recourse to that procedure, as a result of the final paragraph of Article 633 of the Code.

46. However, that finding does not suffice for it to be concluded that a provision such as that at issue in the main proceedings is incompatible with Article 6 of the Treaty. For that, it would also be necessary for the provision in question not to be justified by objective circumstances. [39]

47. As previously mentioned, [40] the final paragraph of Article 633 of the Code constitutes a general prohibition which, as applied in the main proceedings, does not appear to be justified by objective circumstances. Moreover, it could be argued that the rationale for that provision is outdated and unsuited to Community law as it now stands and to the new reality within the European Union. Procedural discrimination based on the criterion of residence abroad, such as that found in the provision at issue, is incompatible not only generally with the broad mesh of guarantees as to the exercise of the fundamental economic freedoms conferred by Community law, but also, specifically, with the structure of the system of legal protection under Community law, a system which 'implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law'. [41]

48. It must none the less be noted that in *Boussac*, [42] which concerned the prohibition on recourse to a procedure for summary payment orders under German procedural law (the 'Mahnverfahren') in circumstances where a creditor seeks to recover from a debtor established in Germany a debt expressed in a foreign currency, the Court found that 'a distinction based on the currency in which debts are expressed, which applies only to the simplified procedure for recovery of debts, does not amount, even indirectly, to discrimination on grounds of nationality if the parties to the contract are free to select the currency in which the debt is expressed and *if ordinary proceedings remain available* to creditors established on the territory of the

39 — In this connection, see for example *Mund & Fester*, cited above in footnote 27, paragraph 17.

40 — See point 39 above.

41 — See Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44.

42 — Case 22/80 *Boussac* v *Gerstenmeier* [1980] ECR 3427.

other Member States, whatever the currency in which the claim is expressed'. [43]

The fact that in that judgment the availability of ordinary proceedings was considered to be an argument against there being discrimination must, however, be assessed in the context of the judgment. As the Opinion of Advocate General Mayras also indicates, the Court in *Boussac* held that the provision of German procedural law at issue was not incompatible with Article 7 (now Article 6) of the Treaty as the effects of the discrimination which actually arose appeared negligible. Advocate General Mayras then observed that ordinary proceedings in Germany had been simplified and accelerated, that recourse to the procedure for issue of a summary payment order to recover debts expressed in a foreign currency was rare, and finally, that debts expressed in a foreign currency were usually for a larger amount than those expressed in the national currency and consequently, given that the debtor in such cases bore the exchange-rate risk, there was in practice every likelihood of the claim being defended, with all the attendant disadvantages.

Consequently, the reliance placed on the availability of ordinary proceedings is incidental and closely linked to the particular circumstances of *Boussac*, which are absent from the present case. Even if the procedure for a summary payment order were not to be viewed as logically and necessarily following from the guarantee of judicial protection, it is, particularly for small and medium-sized businesses, an important procedure providing swift and inexpensive judicial protection. The significance of the discrimination concerning the availability of that procedure therefore cannot be reduced by the availability of ordinary proceedings. Where provisions of national law lay down special procedures, those procedures must be accorded the significance corresponding to their contribution to the quality of judicial protection provided and be subject to the prohibition of discrimination, even where their existence could not be considered to be an essential requirement in order for that judicial protection to be guaranteed.

49. On the basis of the foregoing considerations, I propose that the Court should interpret the first paragraph of Article 6 of the EC Treaty as precluding a procedural provision of a Member State, such as the final paragraph of Article 633 of the Code, which prohibits generally the issue of a summary payment order if service on the defendant must be effected outside the territory of that Member State or territories under its sovereignty, where the issue of the summary payment order is connected with

43 — Paragraph 13. Emphasis added.

the exercise of the fundamental freedoms guaranteed by Community law.

F — *Article 34 of the EC Treaty*

50. First, it is to be remembered that interpretation of Article 34 of the Treaty is needed in order to establish whether a national provision, such as that at issue in the main proceedings, constitutes a measure having an effect equivalent to a quantitative restriction on the free movement of exports but that restriction does not equate either to the restriction on judicial protection of that freedom or to procedural discrimination caught by the first paragraph of Article 6 of the Treaty.

51. In case-law dating from *Dassonville*,[44] the Court has consistently held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an equivalent effect.

52. As regards the freedom to export in particular, the Court has consistently held that 'Article 34 of the Treaty concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question'.[45]

53. However, in accordance with the case-law cited above, in order to examine whether national measures are compatible

44 — Cited above in footnote 10.

45 — See *Commission* v *Belgium*, cited above in footnote 11, paragraph 24. See also Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 13; Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* [1983] ECR 555, paragraph 12; Case 238/82 *Duphar* [1984] ECR 523, paragraph 25; Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 16; Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 20; and Case C-47/90 *Delhaize* [1992] ECR I-3669, paragraph 12.
As the Court has held, national measures which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular industry which are established within the national territory, without leading to any difference in treatment whatsoever on ground of the nationality of traders and without distinguishing between the domestic trade of the State in question and the export trade, do not amount to such restrictions. See Case 155/80 *Oebel* [1981] ECR 1993, paragraph 16. See also Joined Cases 141/81, 142/81 and 143/81 *Holdijk* [1982] ECR 1299, paragraph 11, and Case 237/82 *Jongeneel Kaas* [1984] ECR 483, paragraphs 22 to 25.

with Article 34 of the Treaty it must be possible to attribute perceptible effects on exports to those measures. [46]

54. To the extent that reference is not made either to the guarantee of judicial protection with regard to the freedom to export or to procedural discrimination affecting that protection, it is in my view difficult to identify perceptible effects on exports that can be attributed to the final paragraph of Article 633 of the Code.

55. That procedural provision does not regulate trade between Member States, nor is its object or immediate effect a specific restriction on exports. As the French Government observes, inasmuch as it prohibits a payment order from being issued, it places Italian exporters at a disadvantage only where the debtor does not fulfil his contractual obligations. At the same time, recourse to ordinary proceedings is always possible, and becomes obligatory where the defendant applies to have the order set aside. Lastly, as the Italian Government observes, it is possible, and standard practice, to specify an address for service in Italy for obligations arising from contracts for the supply of goods.

It is clear from the foregoing that, as the French Government points out, it is difficult to imagine that Italian exporters would discontinue their exports, from which they profit so greatly, because summary payment orders cannot be issued. Thus, as both the French Government and the Austrian Government observe, the restrictive effects which the provision at issue could have on the free movement of goods, and exports in particular, are far too uncertain and indirect to warrant the conclusion that it is liable to hinder trade between Member States. [47]

Since the national provision shows no perceptible effects on exports, it is super-

46 — See points 7 to 11 of the Opinion of Advocate General Darmon in *Krantz*, cited above in footnote 8.

47 — See the similar view taken by the Court in *Krantz*, cited above in footnote 8, at paragraph 11 (a case concerning the interpretation of Article 30 of the Treaty with regard to national legislation authorising the collector of direct taxes to seize goods, other than stocks, found on the premises of a taxpayer although those goods come from and are owned by a supplier established in another Member State), and in Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009, paragraphs 11 and 12 (a case concerning the interpretation of Article 30 of the Treaty with regard to a rule established by the courts of a Member State which imposes an obligation on a parallel importer of a product of a given make to inform purchasers of the policy of certain authorised dealers with regard to the services covered by guarantees).

fluous to examine either whether it favours Italian domestic trade or whether it can be justified on the basis of the exceptions provided for by Article 36 of the Treaty. [48]

In other words, it is evident that the strengthening of those principles and rules of Community law limits appreciably the hitherto predominant pull of the Treaty provisions guaranteeing fundamental economic freedoms. [49]

56. Accordingly, a national provision, such as that at issue in the present case, is incompatible with Article 34 of the Treaty only in that it restricts the judicial protection enjoyed when the freedom to export is exercised and is discriminatory with regard to the treatment of those seeking that protection. However, the foregoing analysis also shows that, as Community law stands today, the scope of both the general principle of judicial protection and of the first paragraph of Article 6 of the EC Treaty, which ensures that procedural discrimination is prohibited, is sufficient to review procedural restrictions indirectly linked to the exercise of fundamental Community freedoms. So far as concerns such restrictions, the relative autonomy of the abovementioned principles and rules of Community law in my view makes it unnecessary to resort directly to the Community provisions guaranteeing each of those freedoms.

It is worth noting that recourse to the abovementioned principles and rules of Community law rather than to Article 34 of the Treaty makes it possible to bypass the delicate issue of the conflict in the present case between, on the one hand, the fact that the restriction placed on judicial protection of the freedom to export and on the principle prohibiting procedural discrimination against those seeking such protection substantively restricts that freedom and, on the other hand, the case-law which holds that Article 34 of the Treaty applies only to measures specifically restricting patterns of exports. [50] Both the judicial protection and the prohibition of discrimination may be incidental to the protection of exports, but they are inseparably linked to it, even where their infringement does

48 — It should none the less be noted that, as the Italian Government points out, since exports are essentially not restricted there is no question of the Italian market benefiting, and that the national provision — interpreted literally or teleologically — does not appear to fall within the scope of Article 36 of the Treaty.

49 — That pull, initially founded on the exclusively economic orientation of the Community, had become stronger and stronger. Advocate General Darmon stated in his Opinion in *Krantz*, cited above in footnote 8 (point 16): 'The very broad definition of a "measure having equivalent effect" formulated in the *Dassonville* judgment has since 1974 served as a constant point of reference for subsequent judgments on the subject. The inherent breadth of that definition and the Court's concern, apparent in its judgments, not to reduce its scope fully explain why businessmen have attempted to have a wide variety of measures treated as measures having equivalent effect to quantitative restrictions on imports, where such an effect — however indirect and tenuous — cannot be altogether ruled out.'

50 — See point 52 above.

not arise from measures specifically concerning patterns of exports.

G — *Article 73b of the EC Treaty*

57. It could be argued, following the Commission, that the prohibition of recourse to the procedure for issue of a summary payment order constitutes an obstacle to securing the enforceable court order necessary for the recovery of a debt arising in intra-Community trade and that that obstacle is not justified either objectively by the principle of proportionality or having regard to the measures permitted by Article 73d of the Treaty. It may also reasonably be argued that the restrictive effects which the provision at issue could have on the free movement of capital and payments are less hypothetical and indirect than the effects it would have on the free movement of goods. However, as is clear from the observations of the Commission itself, in the present case all those possible restrictions are covered by either the right to judicial protection or the procedural equality guaranteed by the first paragraph of Article 6 of the EC Treaty.

58. Thus, the observations made with regard to the interpretation of Article 34 of the Treaty apply *mutatis mutandis* to the interpretation of Article 73b. To the extent that reference is not made, as regards Article 73b, either to the guarantee of judicial protection for the freedom to export or to procedural discrimination in relation to that protection, it is, in my view, difficult to identify clear effects of the last paragraph of Article 633 of the Code on the free movement of capital and payments. [51] On the basis of the arguments referred to, and given the interpretation of Article 34 of the Treaty, the restrictive effects which the provision at issue could have are far too uncertain and indirect to warrant the conclusion that it is liable to block or hinder significantly the movement of capital and payments between Member States.

59. It is my view therefore that, as with Article 34 of the Treaty, direct recourse to Article 73b of the Treaty is superfluous given that interpretation of the right to judicial protection and of the first paragraph of Article 6 of the EC Treaty is sufficient to determine whether a national provision such as that at issue in the main proceedings is compatible with Community law.

51 — As noted with regard to the interpretation of Article 34 of the Treaty, it is logical to identify clear effects of the provision at issue on the movement of capital and payments before examining whether that provision is compatible with Article 73b of the Treaty, having regard to the exceptions provided for by Article 73d. In any event, as the Commission also observes, the provision at issue cannot fall within the scope of Article 73d of the Treaty, irrespective of whether that article is interpreted literally or teleologically.

VI — Conclusion

60. In view of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Pretura Circondariale di Bologna as follows:

(1) The general principle of Community law under which the Member States are to confer the necessary judicial protection of the rights derived from the Treaty by Community nationals is to be interpreted as precluding a procedural provision of a Member State which prohibits generally a simplified procedure for debt recovery, such as the procedure for the issue of a summary payment order provided for by Article 633 et seq. of the Italian Code of Civil Procedure, where the decision made in that procedure must be served on the defendant outside the territory of that Member State or territories under its sovereignty.

(2) The first paragraph of Article 6 of the EC Treaty is to be interpreted as precluding a procedural provision of a Member State, such as the final paragraph of Article 633 of the Italian Code of Civil Procedure, which prohibits generally the issue of a summary payment order if service on the defendant must be effected outside the territory of that Member State or territories under its sovereignty, where the issue of the summary payment order is connected with the exercise of the fundamental freedoms guaranteed by Community law.