OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 22 April 2009 [1]

I — Background

1. This case may be characterised as one which turns on the question of reciprocal externalities. On the one side, Austria and, in particular, the Land Oberösterreich believe they are victims of an externality imposed on them by ČEZ and the Czech authorities in installing a nuclear power plant next to the Austrian border without taking into account the risks imposed on those living on the other side of the border. On the other side, ČEZ and the Czech Republic argue that it is the interpretation of Austrian law made by the Austrian Supreme Court that imposes on them an externality by requiring them to close the Czech nuclear power plant simply to protect the interests of Austrian citizens and without taking into account the situation in the Czech Republic. EU law (in the form of EC and EAEC rules) becomes part of such dispute because it is, in fact, being invoked by each of the parties to provide itself with the authority to enforce its own decision on the other. Ideally, instead, the solution to be provided should lead each party to internalise in its own decision the interests of the other as it is such failure that lies at the origin and heart of this case. Unfortunately, in the absence of a complete regulation of such matter by EC and EAEC rules, the Court may find that the extent to which it can provide a fully satisfactory solution to this case is limited. That said, the interpretation I propose of the applicable rules is guided by the goal of making national authorities, insofar as is possible, attentive to the impact of their decisions on the interests of other Member States and their citizens since this goal can be said to be at the core of the project of European integration and to be embedded in its rules.

2. In this case the Court has, for the second time, received questions referred to it under Article 234 EC in the context of litigation between the province of Oberösterreich ('the plaintiff') and the ČEZ nuclear facility in Temelín in the Czech Republic ('the defendant'). The plaintiff owns property on which it has established an agricultural

1 — Original language: English.

college on Austrian territory, situated some 60 km from the defendant's facility. The Temelin plant was authorised by the Czech Government in 1985 and has been fully operational since 2003, following a period of experimental operation beginning in the year 2000.

3. The Temelín facility was the subject of negotiations between Austria and the Czech Republic which culminated in a declaration, annexed to the Treaty of Accession of the Czech Republic to the Union, in which both States declared that they would fulfil the series of bilateral obligations, including safety measures, monitoring free movement rights and the development of energy partnerships, set out in a document known as 'The Conclusions of the Melk Process and Follow-Up' which was concluded in November 2001.

4. Nevertheless, in 2001 the plaintiff and other private property owners brought proceedings before the Landesgericht Linz ('the referring Court') on the basis of Paragraph 364(2) of the Allgemeines bürgerliches Gesetzbuch ('ABGB') seeking to force the defendants to bring an end to the nuisance caused to the defendants' property by alleged radioactive emissions from their Temelín facility.

5. The referring Court states that Paragraph 364(2) of the ABGB permits property owners to require owners of neighbouring property, including property located in another State, to ensure that the use of such neighbouring property does not produce impacts that exceed the normal local levels and does not interfere with the use of land that is customary in the area. Furthermore, in the case of an immediate and concrete threat of nuisance causing irreversible damage a *quia timet* injunction can be obtained to prevent use of the land which poses such a threat. However, if the relevant nuisance is caused by an 'officially authorised installation', the right to seek an injunction is replaced by a right to claim damages.

6. According to the information provided by the referring Court, the Oberster Gerichtshof (Austrian Supreme Court, 'OGH') has ruled that the term 'officially authorised installation', defined in Paragraph 364a of the ABGB does not extend to installations authorised by a foreign authority, on the basis that the relevant article is based 'exclusively on consideration of various national interests' and there was no reason why Austrian law should restrict the property rights of Austrian landowners 'purely in the interests of protecting a foreign economy and public interests in another country'.

7. In a series of very lengthy questions, the Landesgericht Linz seeks the view of this

Court in relation to the compatibility of this interpretation of Paragraph 364a with Community law, in particular Articles 43, 28, 12 and 10 EC. I propose to begin by assessing the issues arising under Article 43 EC which, in my view, can enable the Court to deal with the most important matters arising in this case.

II — Article 43 EC and domestic law with cross-border impact

8. Until now, the jurisprudence in relation to the freedom of establishment has focused on measures imposed by a Member State which are restrictive of the freedom of individuals or undertakings to establish themselves within that Member State in order to engage in economic activity or which restrict the possibilities for individuals or undertakings to leave that Member State in order to establish themselves in another Member State. The same occurs with regard to other free movement provisions. The elimination of entry and exit restrictions into and from a Member State is the focus of the free movement provisions. In the instant case, the Court is faced with a quite different situation in which it is alleged that domestic measures imposed by one State (in this case, Austria) have an impact on the right of establishment within another Member State (in this case, the Czech Republic) which is seeking to sell its products to customers in Member States other than the State which is the source of the measures in question. The Court must therefore decide whether the possible extra-territorial impact of domestic Austrian legislation is in principle capable of constituting a restriction on the right to freedom of establishment in another Member State, namely the Czech Republic.

9. In my view, the answer to this question must be that it is so capable. While it is true that the jurisprudence in relation to freedom of establishment has largely focused on the effects of Member State measures on the ability of a national of another Member State to establish herself or himself within that Member State, developments in Community law in relation to the enforceability of national judgments in other Member States, such as Regulation No 44/2001,[2] have meant that judgments of national courts in relation to matters of national law which have cross-border impact will increasingly be capable of having effects on the right of establishment in another Member State, even with respect to nationals of that State or third Member States. For instance, in relation to the law relating to nuisance, Community law will render the judgments of the courts of State A in respect of nuisances experienced in State A but originating from State B more likely to be enforced by the courts of State B. Thus, the cross-border impact of the decisions of the judicial organs of State A in relation to areas such as nuisance, may, by increasing the exposure of enterprises located in State B to claims for damages or injunctions under the

2 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

law of State A, have the effect of hindering or making less attractive the exercise on the part of nationals of State C their right of establishment within State B. This impact is particularly likely to impact negatively on cross-border situations where enterprises established within State A, but not those established within State B, are capable of benefiting from exemptions reducing their exposure in this regard.

10. In the light of the above, I do not share the position of the Commission, the Land Oberösterreich and the Austrian and Polish Governments that limits the application of the free movement provisions to situations where a State measure is liable to hinder free movement between that State and another Member State. It is my opinion that the rules of free movement aim at eliminating any restriction imposed by a Member State on economic activity in or with another Member State. A cross-border element is required but that cross-border element does not need to involve an actual hindrance of free movement from or to the State imposing the measure. It is sufficient that the extraterritorial application of that State measure may affect economic activity in another Member State or between other Member States. What is relevant is for the cross-border impact of the measure of one Member State to be liable to affect the enjoyment of the internal market advantages by economic operators established in other Member States. If the text of the free movement provisions does not appear clearly to include a situation such as that of the present case this is simply because such circumstances could not have been envisioned at the time when such provisions were drawn up. Indeed, the fact that an Austrian rule and the judicial decision applying it can have such a restrictive effect on the economic activity of another Member State is because of the developments in Community law which now impose the recognition of certain judicial decisions (and the national rules they apply) in other Member States. As such, it would be unacceptable if a Member State could make use of EC rules to enforce in another Member State a measure restricting economic activity in that State while, at the same time, claiming immunity from EC rules with respect to the review of such a measure.

11. The Commission, certainly aware of this underlying problem, reaches the rather paradoxical conclusion that while the present situation does not fall under the scope of application of any of the free movement rules, it falls within the scope of application of Community law by reason of the effects of the national measure on intra-Community trade on goods and services. The Commission invokes in support of this view several judgments of the Court. However, these judgments relate only to situations where the rights in question have effects on intra-Community trade in goods and services

without there being any need to connect them with specific provisions of the different free movement rules. [3] It is therefore because they were liable to restrict all the different free movement provisions that the measures reviewed in those cases fell within the scope of application of Community law and not that they fell within such scope even when they were not covered by any of the free movement provisions. An interpretation such as that proposed by the Commission might only be a source of additional confusion and legal uncertainty. It would amount to saying that, in cases where the restrictive impact on an individual free movement rule may not be enough to trigger its application, it may be enough to trigger the general application of Community law, thus involving both the restriction of the scope of free movement rights and a simultaneous extension of the reach of Community law without clear criteria for doing so. Instead, what is necessary, to keep pace with the development of EC law, is an interpretation of the free movement provisions that covers any national measures which treat cross-border situations less favourable than purely national situations with an impact on the economic activity in another Member State.

12. As I stated in my Opinions in *Alfa Vita* [4] and *Marks and Spencer,* [5] in upholding the rights of free movement, including those protected by both Article 28 EC and Article 43 EC, the Court is required to ensure that '*States do not adopt measures which, in actual fact, lead to cross-border situations being treated less favourably than purely national situations*'. [6] A refusal by the Austrian courts to take account of the administrative authorisations of the authorities of other Member States, for the purposes of limiting the availability of certain remedies in nuisance law, in circumstances where similar authorisations granted by Austrian authorities are recognised, will expose firms such as ČEZ, which have decided to establish themselves in Member States which share a border with Austria, to a greater risk of being the subject of an injunction requiring the abatement of a nuisance than Austrian firms serving the Austrian market. Accordingly, the Austrian Supreme Court's interpretation of Paragraph 364a of the ABGB, as described by the referring court, has the effect of treating cross-border situations less favourably than purely national situations and therefore amounts to a barrier to the right of establishment which requires appropriate justification.

3 — Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 27; Case C-360/00 *Ricordi* [2002] ECR I-5089, paragraph 24; Case C-28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 18; Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661, paragraph 15; Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 17; and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 20.

4 — Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour Marinopoulos* [2006] ECR I-8135.

5 — Case C-446/03 *Marks and Spencer* [2005] ECR I-10837, points 37 to 40.

6 — *Alfa Vita,* point 41, *Marks and Spencer,* points 37 to 40.

Furthermore, given the likelihood that nuclear installations such as that which is the subject of the present case may wish to sell the electricity they produce to customers in other Member States, the greater risk borne by a non-Austrian installation that it may be the subject of an injunction requiring the abatement of a nuisance, will also involve a potential restriction of rights protected by Article 28 EC.

13. It should also be noted that EAEC law has set down rules and standards in relation to the construction and operation of nuclear installations with which the Temelín facility is in full compliance. The Commission has also attempted to address the current problem by relying on those rules in order to establish the application of Community law. However, the EAEC rules are only aimed at regulating the conditions under which a nuclear facility should be authorised to operate and do not aim to regulate possible civil law conflicts between the owners of such facilities and those who may be affected by their operation. As the Commission itself noted at the hearing, the existence of EAEC rules determining the conditions to be complied with by nuclear installations does not, in itself, imply that any national rules which may have an effect on the operations of a nuclear facility are necessarily contrary to Community law. The fact that a particular installation complies with standards set down by governmental authorities does not imply that such an installation will be immune from proceedings in relation to the impact which its activities may have on the civil law rights of others. This principle is seen in many other areas of law. For example, a restaurant which complies with planning and hygiene regulations will not, for this reason, be immune from actions from customers claiming to have suffered food poisoning while dining there or from neighbours offended by the smells produced by the kitchens. Therefore, as shown below, while compliance with the EAEC rules by the Temelín facility may be relevant for other purposes in the present case, it is not in itself enough to exclude the application of the civil law rights of others.

14. Therefore, despite its potentially restrictive effect in relation to Article 43 EC rights, a failure on the part of the Austrian courts to recognise the administrative authorisations of the Czech authorities as granting immunity from injunctions in respect of nuisance claims is not necessarily precluded by Community law. However, an Austrian court, in applying national rules relating to the issuing of injunctions in relation to nuisance proceedings with a cross-border element, must ensure that such a refusal is non-discriminatory in nature and is justified either by one of the public interest grounds set out in Article 30 EC or by one of the overriding requirements laid down by the case law of the Court. [7]

7 — See for example Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57.

15. In accordance with such standards, Austrian courts cannot simply refuse to accord to all non-Austrian administrative authorisations effects similar to those accorded to Austrian administrative authorisations. This is notably the case when Austrian law determines that authorisations issued by Austrian authorities grant immunity from injunctions in respect of nuisance claims. Such an approach will give no weight to a Czech administrative authorisation, even in circumstances where such an authorisation was issued in compliance with standards every bit as exacting as those applied in Austria. Such an indiscriminate policy violates the requirement that the means adopted by a Member State to restrict rights protected by Article 43 EC must not be discriminatory or go beyond what is necessary to attain the objective pursued. [8] Indeed, it may be questioned whether such an approach can truly be said to have as its object the protection of public health or the prevention of nuisance at all given that, as noted above, it will fail to recognise authorisations that are equally protective of these goals as are Austrian authorisations.

16. In balancing the achievement of public policy goals, such as protection of human health and property rights, with the restriction of rights protected by Article 43 EC and other free movement provisions which a refusal to recognise a Czech authorisation will entail, the Austrian court must take account of the fact that Community law specifically authorises the development of nuclear installations and the development of nuclear industries in general. [9] It must also give weight to the fact that the authorisation granted to the Temelín facility by the Czech authorities was granted in accordance with the standards established by the relevant Community law.

17. Furthermore, although the Austrian courts are entitled, when assessing whether to accord recognition to a foreign administrative authorisation, to verify that due account of the interests of Austrian nationals has been taken, in the according of such an authorisation, they must also give weight to the fact that these interests may also have been taken into account as part of the procedures for compliance with the rules set down by the European Union in relation to nuclear safety. In particular the Landesgericht Linz must take account of the fact that the inspections carried out by the Commission in relation to the Temelín facility have included examination of the facility's impact on the populations of Member States other than the Czech Republic. [10]

18. Finally, in assessing the balance of interests in relation to the possibility of the issuing of an injunction in respect of the nuisance

8 — Ibid.

9 — See Articles 1 and 2 EA.

10 — See Commission opinion of 24 November 2005 concerning the plan for the disposal of radioactive waste resulting from modifications at the site of the Temelín Nuclear Power Plant located in the Czech Republic, in accordance with Article 37 of the Euratom Treaty (2005/C 293/08) (OJ 2005 C 29, p. 40).

caused to Austrian property owners by the Temelín facility, the Austrian courts must take account of the benefits to the Czech Republic of the existence of this facility and cannot base its decision solely on domestic interests. As I stated in my Opinion when the litigation between these parties was last before our Court:

'[N]ational courts with jurisdiction to deal with transnational situations under the rules of the [Brussels] Convention have specific obligations arising from the transnational nature of the case …

Such obligations derive, first of all, from the existence of limits on the recognition of decisions that do not respect the public policy of the legal systems involved on which recognition may be sought. To the extent that a judgment deals with a transnational situation, such as one of cross-border nuisance, the decision will not be free of effects in other States and it is in this respect that the issue of recognition of the judgment abroad may arise. The courts of the Contracting State with jurisdiction to hear the case must therefore respect the obligations arising from the consideration of what could be a judgment inconsistent with foreign public policy decisions.' [11]

11 — Opinion in Case C-343/04 *ČEZ* [2006] ECR I-4557, points 93 and 94.

19. In fact, failure of a national court to act in this way may affect the enforceability of its judgment under Regulation No 44/2001. The national court has not sought the guidance of this Court in relation to this regulation as it may apply to the instant case. However, this litigation touches not merely on the issue of the curtailment of free movement rights but also on the recognition of judgments under Regulation No 44/2001. In this respect, it should be noted that the interpretation of Paragraph 364a of the ABGB by the OGH, as stated in the questions referred by the Landesgericht Linz, involves the adoption of an entirely insular and purely domestically-focused approach in relation to a matter with transnational effects. Such a failure to take account of the interests and public policy decisions of other Member States which may be affected by the decision of the Austrian court is not merely inconsistent with Austria's obligations under Article 43 EC, but, as I also warned in my previous Opinion, risks provoking a refusal on the part of the Czech courts to recognise an Austrian judgment in this matter on the basis of Article 34(1) of Regulation No 44/2001 which provides that '[a] judgment shall not be recognised if such recognition is manifestly contrary to the public policy in the Member State in which recognition is sought'.

III — Disputes in relation to the interpretation of Paragraph 364a of the ABGB

20. The Austrian Government disputes the summary of the Austrian Supreme Court's

interpretation of Paragraph 364a of the ABGB given by the Landesgericht Linz. It asserts that a proper interpretation of the jurisprudence of the Supreme Court provides greater scope for the administrative authorisations issued by the authorities of Member States other than Austria to be taken into account. Although this Court can assess the conditions under which a reference to it has been made in order to assess whether it has jurisdiction or to enable it to give an answer, [12] it has no authority to pronounce upon matters of national law. The Court is empowered only to assess the compatibility of such law with Community law and not to assess the validity of rival interpretations of domestic law. The Court has repeatedly stressed the cooperative nature of the reference procedure [13] and the autonomy of national courts in relation to matters of national law. [14] It is therefore incumbent on the Court to answer the questions referred to it by the national court and not to seek to overrule the interpretation of provisions of national law arrived at by the national court in question. In the event that the Landesgericht Linz has misinterpreted the relevant jurisprudence of the Austrian courts it will be for appeal mechanisms within the Austrian legal system, and not this Court, to remedy such a misinterpretation.

IV — Issues in Respect of Articles 10, 12 and 28 EC

21. In the light of the above findings, it is unnecessary to enter into a detailed examination of the issues arising in respect of Articles 10, 12 and 28 EC. This case involves the consideration of the impact of domestic Austrian laws on the economic activities of a nuclear facility located in another Member State. The effect of such laws in rendering less attractive the exercise by this facility of its Article 43 EC rights and the possible justification of such restrictions by the Austrian authorities raise issues that are, in substance, the same as those arising under Article 28 EC. Extensive separate consideration of Article 28 EC is therefore unnecessary for the purposes of answering the questions posed by the referring court.

22. Articles 10 and 12 EC are not stand-alone provisions and can apply only within the field of application of another article of the Treaty. The finding that the interpretation of Paragraph 364a of the ABGB by the OGH, as described by the referring court, would amount to a violation of Article 43 EC makes separate consideration of the issues arising under Articles 10 and 12 EC superfluous. The outcome of my reasoning may well be rather similar to that which would result were I to follow the suggestion of the Commission and to find that the relevant Austrian legislation fell within the field of

12 — Case 16/65 *Schwarze* [1965] ECR 877.

13 — Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 17.

14 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 593.

application of the EC Treaty but was not covered by either Article 28 EC or Article 43 EC. However, for the reasons stated above, I am of the view that the Commission's approach is undesirable.

23. The requirements which my approach places on the Austrian courts all reflect the reality that, in the context of the increasing interaction and interdependence of Member State legal systems which the process of integration has brought about, national authorities will be called on with ever greater frequency to make decisions which will have impacts beyond the borders of their own State. As I noted above, each side in this case has sought to invoke the failure of the authorities in one Member State to take account of the interests of citizens of their own State in order to justify particular actions on the part of the authorities of their own State. This very fact underlines the reality that the process of legal and political integration has meant that national decisions have a broader reach and impact than before. This also means that Community law also expands the scope of authority of national powers and the instruments available to protect the interests of their citizens. The corollary of this increased closeness and increased power is increased responsibility. Such responsibility requires that national authorities take account of the full range of those who will be affected by their decisions. Community institutions must ensure that Community law does not become a vehicle through which the institutions of one Member State try to impose their will upon other Member States or ignore the rights and interests of those in other Member States affected by their decisions. This would run contrary to the very purpose of the process of European integration. Ideally, this should be remembered by all parties to the present dispute.

V — Conclusion

24. In the light of these considerations, I am of the opinion that it would be sufficient for the Court to give the following answer to the questions referred to it by the Landesgericht Linz:

A national rule which prevents a national court charged with giving judgment in relation to potential nuisance emanating from an enterprise located in another State, from taking account of an existing administrative authorisation granted to such an

enterprise by the authorities of the State in which the enterprise is located, in circumstances where the national court would take account of an equivalent authorisation granted by the domestic authorities, constitutes an unjustifiable restriction on the rights guaranteed by Article 43 EC.

The administrative authorisations of other Member States may be refused recognition if such a refusal is non-discriminatory in nature and is properly justified on grounds of public policy, public security or public health and provided that proper account is taken of compliance with relevant Community rules and the interests of all affected parties.

In the light of the finding in relation to Article 43 EC, it is unnecessary to assess the compatibility of the relevant national legislation with Articles 10, 12 and 28 EC.