OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 7 September 2010 [1]

I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 49 EC et seq. in the context of an action brought by a German national against a decision by an Austrian authority imposing an administrative fine on him on the ground that he infringed the national rules on the operation of hot-air balloon flights in Austria.

2. The interest of the present case, which has led the Court to reassign it to the Grand Chamber, ruling on the case with the benefit of an Advocate General's Opinion, and to reopen the oral procedure, resides in ascertaining the rules of primary or secondary European Union law according to which the provision of such transport services should be examined.

1 — Original language: French.

II — Legal framework

A — *Austrian law*

3. Paragraph 102 of the Austrian Law on Aviation (Luftfahrtgesetz), as amended ('the LFG') [2] renders, inter alia, the commercial carriage of passengers, mail and/or cargo by non-power driven aircraft subject to the obligation to obtain, first, a transport licence, as referred to in Paragraph 104 et seq. of the LFG and, second, an operating licence, as provided for in Paragraph 108 of the LFG, issued by the competent Austrian authorities.

4. Under Paragraph 106 of the LFG, the transport licence is to be issued:

(a) if the applicant is a national of a contracting party to the Agreement on the European Economic Area, of 2 May 1992, [3] is resident in Austria, and is reliable and technically competent;

2 — Bundesgesetzblatt No 253/1957 and Bundesgesetzblatt No 83/2008.

3 — OJ 1992 L 1, p. 3.

(b) if the safety of operations is ensured and the financial capacity of the business has been established; and if

(c) insurance cover as provided for in Article 164 of the LFG or in Regulation (EC) No 785/2004 [4] has been contracted for.

5. Paragraph 106 of the LFG also states that if the operator is not a natural person, the undertaking must have its seat in Austria and the majority of the company's share capital must be held by nationals of a contracting party to the Agreement on the European Economic Area.

6. Under Paragraph 108 of the LFG, an operating licence is issued where the air transport undertaking holds a transport licence and air traffic safety is guaranteed.

7. Further, in accordance with Paragraph 169 of the LFG, the commercial carriage of passengers by air without the licences required under Article 102 of the LFG is subject to a fine of not less than EUR 3 630.

B — *German law*

8. Under the second subparagraph of Paragraph 20(1) of the Law on Air Transport (Luftverkehrsgesetz), [5] an operating licence is required for the commercial carriage of passengers or cargo by balloon. As regards the conditions of issue, emphasis is placed on the need for transport operators to be reliable.

9. Under Paragraph 20(2) of that law, special provisions may be attached to operating licences. An operating licence is to be refused where the facts suggest that a threat to public safety or public policy exists, particularly if the applicant or other persons responsible for transportation are untrustworthy. It is to be refused in the absence of evidence of the financial means required for safe commercial operation, or corresponding guarantees. An operating licence may also be refused if aircraft are to be used which are not entered in

4 — Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators (OJ 2004 L 138, p. 1).

5 — Bundesgesetzblatt 2007, I p. 698.

the German aircraft register or which are not wholly owned by the applicant. Registers of States governed by the aviation law of the European Community are deemed to be equivalent to the German aircraft register.

III — The main proceedings and the questions referred

10. Mr Neukirchinger, who resides in Passau (Germany), operates a hot-air balloon flight company in Germany. On 2 March 1999, the German authorities issued him with a permit to undertake outdoor off-aerodrome launches of manned free balloon flights at unspecified locations outside densely populated areas. That permit specifies detailed obligations concerning the operation of the balloon flights and the characteristics of the balloon. Mr Neukirchinger subsequently became managing director of Bayernhimmel Ballonfahrt GmbH, a company established in Germany, which obtained an operating licence issued by the German authorities on 15 April 2003.

11. On 19 June 2007, Mr Neukirchinger undertook a balloon flight from Wies (Austria), in the course of which an air 'baptism' took place.

12. On 22 January 2008, the Bezirkshauptmannschaft Grieskirchen (Local Authority of the Austrian district of Grieskirchen) issued an administrative penal order against Mr Neukirchinger and fined him EUR 3 630, also imposing a term of 181 days imprisonment in default of payment. The Bezirkshauptmannschaft Grieskirchen found that the commercial flight undertaken on 19 June 2007 infringed Paragraph 169 of the LFG, since it had been made without the licences provided for in Paragraph 102 of the LFG.

13. In his appeal brought against that order before the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the Province of Upper Austria), Mr Neukirchinger claimed, inter alia, that requiring transport and operating licences for the operation of balloon flights infringed the fundamental freedoms provided for by the EC Treaty and that an Austrian balloon flight undertaking did not need to obtain such licences again in Germany if it already held licences issued in Austria.

14. Since it considers that hot-air balloon flights do not constitute transport services and noting that the operation of non-power driven aircraft has not been harmonised at Community level, the Unabhängiger Verwaltungssenat des Landes Oberösterreich stayed

the proceedings and referred the following three questions to the Court for a preliminary ruling:

1. Is Article 49 [EC] et seq. to be interpreted as precluding a national provision which requires a person who is established in another Member State and who is licensed, pursuant to the legal order of that Member State, to operate commercial balloon flights (in Germany), to have a company seat or place of residence in Austria in order to be able to operate balloon flights in Austria …?

2. Is Article 49 [EC] et seq. to be interpreted as precluding a national provision under which the holder of a licence to operate commercial balloon flights who is established in another Member State and is recognised under the legal order of that Member State is required to obtain a further licence for the operation of balloon flights in another Member State, in the case where the conditions applying to that licence prove to be identical in substance to those of the licence already granted to the holder in the country of origin, albeit with the additional proviso that the applicant for the licence must have its company seat or place of residence in national territory (in this case, in Austria)?

3. Are the provisions of Paragraph 102, in conjunction with Paragraphs 104 and 106 [of the LFG] incompatible with Article 49 [EC] if a licence-holder established in Germany is subject to administrative penal proceedings in Austria for operating pursuant to his licence and, as a result, his access to the market is hindered, the background hereto being that under Paragraph 106(1) [of the LFG] it is impossible to obtain such a licence or an operating licence without establishing a separate place of business and/or residence, and without re-registering in Austria a hot-air balloon that is already registered in Germany?

IV — Procedure before the Court of Justice

15. In accordance with Article 23 of the Statute of the Court of Justice, written observations have been submitted by the Republic of Austria, the Republic of Poland and the Commission of the European Communities.

16. By decision of 1 September 2009, the Court assigned the case to the Second Chamber. Since none of the interested persons and bodies referred to in Article 23 of Statute of the Court of Justice applied to submit oral arguments, the Court decided to rule without

holding a hearing. Furthermore, it decided that the case would be determined without an Opinion of the Advocate General.

17. On 4 February 2010, the Second Chamber decided, pursuant to Article 44(4) of the Rules of Procedure of the Court of Justice, to refer the case before it back to the Court which reassigned it to the Grand Chamber and decided that an Opinion of Advocate General would be appropriate.

18. On 21 April 2010, the Grand Chamber ordered the reopening of the oral procedure, inviting the interested persons and bodies referred to in Article 23 of the Statute of the Court of Justice to express their views as to which rule of primary or secondary European Union law may, in the light of Article 51(1) EC, apply to the freedom to provide a service consisting in the carriage by air of passengers in a hot-air balloon for commercial purposes.

19. Mr Neukirchinger, the Republic of Austria, the EFTA Surveillance Authority and the European Commission presented oral arguments on that question at the hearing which was held on 15 June 2010.

V — Analysis

20. I would point out that the LFG essentially makes the carriage of passengers and/or cargo by hot-air balloon by a service provider established in another Member State subject to the condition that he hold Austrian transport and operating licences, the issue of which, in particular, requires the service provider to have a residence or, in the case of a legal person, a company seat in Austria.

21. The main difficulty in the present case lies in determining whether hot-air balloon flights with passengers for commercial purposes come under the provisions of the EC Treaty on the freedom to provide services (Article 49 EC et seq.) or whether that activity falls within the scope of the EC Treaty provisions on the common transport policy (Articles 70 EC to 80 EC).

22. Adhering to a general definition of transport, which consists in carrying one or more persons and/or goods from one place to another with the aid of vehicles, there may be some doubt as to whether hot-air balloons should be classified as a means of transport. In particular, it is well known that, because of

their dependence on winds and, despite the technical progress made, it can be guaranteed only approximately that balloons will arrive at their intended destination. [6]

23. Accordingly, it could also be suggested that, because of the overall marginal character of balloon flights, such flights are closer to tourist services than to the commercial passenger and/or cargo transport market. In that regard, I would observe that, in its recent judgment in *Presidente del Consiglio dei Ministri*, the Court examined the discriminatory character of a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on undertakings whose tax domicile is outside the territory of the region, in the light only of Articles 49 EC and 50 EC, [7] recalling its case-law to the effect that those articles also include the freedom of the persons for whom the services are intended, including tourists, to enjoy the services. [8] In the present case, it should be noted that, during the flight which is the subject-matter of the main proceedings, undertaken from a meadow located in an Austrian village, there was an air baptism described as 'traditional' by the referring court. It would therefore not be inconceivable to consider the service provided as intended essentially to meet recreational needs, which could be capable of bringing it within the scope of Articles 49 EC and 50 EC.

24. Although the order for reference does not indicate any such grounds, the foregoing considerations may also explain why the referring court is asking the Court for an interpretation of Article 49 EC.

25. However, three reasons suggest to me that the services provided in the main proceedings fall within the area of air transport.

26. First of all, as was pointed out, respectively, by Mr Neukirchinger before the referring court and by the EFTA Surveillance

6 — In one of his first adventure novels, *Five weeks in a balloon*, Jules Verne, mentioning, in the words of an article in the *Daily Telegraph*, the African journey awaiting one of his heroes, Samuel Fergusson, reported bombastically: 'this intrepid discoverer proposes to traverse all Africa from east to west in a balloon. If we are well informed, the point of departure for this surprising journey is to be the island of Zanzibar, upon the eastern coast. As for the point of arrival, it is reserved for Providence alone to designate' (Verne, J., *Cinq semaines en ballon, voyage de découverte en Afrique par trois anglais*, Bibliothèque d'éducation et de récréation, Hetzel et Cie, Paris, 1863, p. 8).

7 — Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraphs 20 to 28.

8 — Ibid., paragraph 25 (and cited case-law).

Authority at the hearing before the Court, hot-air balloons are classified as aircraft under the Convention on International Civil Aviation, signed at Chicago on 7 December 1944. [9] Furthermore, it is also common ground, as the Commission stated in its written observations, that, at the time of the facts in the main proceedings, those aircraft were also subject to the technical and safety rules laid down by Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [10] and to the conditions set out in Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, [11] the first citations in the preamble to which make explicit reference to Article 80(2) EC, which permits the Council of the European Union to lay down appropriate provisions for air transport in the chapter of the Treaty on transport.

27. It would therefore be inconsistent, in my opinion, to take the view that commercial hot-air balloon flights fall partly under air transport and, therefore, within the scope of the Treaty provisions on the common transport policy, and partly under the general Treaty provisions on freedom to provide services.

28. Secondly, as is clear from the order for reference, the activity carried on by the applicant in the main proceedings, which is described by the referring court as 'the commercial carriage of passengers in a hot-air balloon', is governed, both in Germany and in Austria, by the respective air traffic laws of those Member States and by the competent national aeronautical authorities.

29. Lastly, the facts of the main proceedings are different from those in *Presidente del Consiglio dei Ministri*, cited above. Whereas, in that case, the regional tax on stopovers

9 — *United Nations Treaty Series*, vol. 1, p. 295. Annex 2 to that Convention, which concerns 'Rules of the Air', specifies that balloons are classified as aircraft. In its written observations, the Commission defines a hot-air balloon as follows: 'a non-power driven aircraft which rises into the air by virtue of lift and is manoeuvred by using wind currents'.

10 — OJ 2002 L 240, p. 1. It should be noted that Commission Regulation (EC) No 2042/2003 of 20 November 2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (OJ 2003 L 31, p. 1), adopted on the basis of Regulation No 1592/2002, gave aircraft a broad definition as 'any machine that can derive support in the atmosphere from the reactions of the air other than reactions of the air against the earth's surface'.

11 — OJ 2004 L 138, p. 1.

applied only to operators of means of transport and not to the transport services themselves [12] – which explains why the Court examined the links between that tax and the general Treaty provisions on freedom to provide services [13] – the requirements under the LFG clearly concern air transport services provided by hot-air balloon.

30. I therefore consider that commercial hot-air balloon flights such as those undertaken by the applicant in the main proceedings fall within the area of air transport.

31. However, under Article 51(1) EC, the freedom to provide services in the field of transport is governed by the provisions of the title of the EC Treaty relating to transport, which include Article 80(2) EC.

32. The Court has inferred from a combined reading of those provisions that, in the transport sector, the initial objective of progressively abolishing restrictions on the freedom to provide services should have been attained in the framework of the common transport policy. [14]

33. As far as air transport services are concerned, the final step of their liberalisation within the Community was taken with the adoption of three Council Regulations dated 23 July 1992, commonly known as the 'third aviation package', on the basis of Article 84(2) of the EEC Treaty (subsequently Article 84(2) of the EC Treaty and which itself, following amendment, became Article 80(2) EC). [15] Those measures followed the adoption of the first and second 'aviation packages' in the months of December 1987 and June 1990 respectively.

34. It should be noted, however, that under Article 1(2) of Regulation No 2407/92 on licensing of air carriers – which forms an integral part of the third aviation package and which was in force at the time of the facts in the main proceedings – the carriage by air of passengers, mail and/or cargo, *performed by non-power-driven aircraft, are not subject to*

12 — See paragraph 24 in *Presidente del Consiglio dei Ministri*.

13 — Ibid., paragraphs 25 and 26.

14 — See Case C-49/89 *Corsica Ferries (France)* [1989] ECR 4441, paragraph 11 and cited case-law.

15 — Namely Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8) and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15).

the regulation. That same article adds that 'in respect of these operations, national law concerning operating licences, if any, and Community and national law concerning the air operator's certificate (AOC) shall apply'. [16]

35. The services provided with the aid of such an aircraft, like those provided by the applicant in the main proceedings, are not therefore covered by the third aviation package except, to a certain extent, as regards the issue of the air operator's certificate.

36. That, it seems, is the reason why the Commission proposes that the questions referred be answered from the perspective of Article 54 EC and indeed the general provisions of the Treaty, drawing inspiration from paragraph 26 of the judgment of 11 January 2007 in *Commission* v *Greece*. [17]

37. In that paragraph of that judgment – which concerned the compatibility with Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [18] of national legislation allowing only vessels flying the Greek flag to provide towage services on the open sea – the Court ruled that 'it follows from Article 51(1) EC, read in conjunction with Article 80(2) EC, that services falling within the sea transport sector, but not within the scope of Regulation No 3577/92 or other rules adopted on the basis of Article 80(2) EC, *remain governed by the legislation of Member States, in compliance with Article 54 EC and other general provisions of the Treaty*'. [19]

38. It might be tempting, at this stage in the analysis, simply to apply the findings made in that judgment to the present case and thus to ascertain whether the conditions laid down by the LFG comply with Article 54 EC and/or the other general provisions of the Treaty, including in this instance Article 12 EC, which prohibits discrimination on grounds of nationality.

39. However it is necessary, first, to examine the objection raised at the hearing by the Republic of Austria to the effect that Article 54 EC cannot apply in the field of transport, since that provision, like Article 49 EC,

16 — Article 2(d) of Regulation No 2407/92 defines the air operator's certificate (AOC) as follows: 'a document issued to an undertaking or a group of undertakings by the competent authorities of the Member States which affirms that the operator in question has the technical ability and organisation to secure the safe operation of aircraft for the aviation activities specified in the certificate'.

17 — Case C-251/04 *Commission* v *Greece* [2007] ECR I-67.

18 — Regulation (EEC) No 3577/92 of 7 December 1992, OJ 1992 L 364, p. 7.

19 — My italics.

is contained in Chapter 3 of Title III of Part Three of the EC Treaty, which, under Article 51(1) EC, does not govern the freedom to provide services in that field.

40. I would point out that, under Article 54 EC, 'as long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49 [EC]'.

41. The position occupied by Article 54 EC in the scheme of the EC Treaty supports the argument put forward by the Republic of Austria that that provision does not govern services in the fields of sea or air transport, like the other provisions comprising Chapter 3 of Title III of Part Three of the EC Treaty.

42. Nevertheless, two factors lead me strongly to qualify that assessment.

43. First of all, as I have already stressed, in the abovementioned judgment in *Commission* v *Greece*, the Court made the exercise of the Member States' residual competence in a field coming under sea transport, which is not covered by the provisions of European Union secondary law, subject to compliance with Article 54 EC and *other* general provisions of the Treaty, thus implying, it would appear, that that article has general application and is not confined to services coming under Chapter 3 of Title III of Part Three of the EC Treaty.

44. Second, as the Commission pointed out at the hearing, since, unlike other transitional provisions, Article 54 EC was not repealed when the EC Treaty was amended and the unchanged content of that article now appears in Article 61 of the Treaty on the Functioning of the European Union (TFEU), that provision must be able to retain a practical effect. However, whilst it is clear that, since the end of the transitional period, the restrictions on the free movement of services have been abolished and Article 54 EC has therefore now become irrelevant as regards services coming under Chapter 3 of Title III of Part Three of the EC Treaty, [20] it may, in contrast, retain a residual function in the field of transport. Since the full implementation of freedom to provide services in that field must be realised by means of legislative action at Union level within the framework of the chapter on transport, as long as such measures have not been adopted or have been only

20 — This would seem to follow from the judgment in Case 39/75 *Coenen and Others* [1975] ECR 1547, paragraph 8.

partially adopted, the restrictions on freedom to provide services in the field of transport have not yet therefore been eliminated. The obligation set out in Article 54 EC may therefore retain its practical effect.

45. That provision would appear to have a double meaning, mixing both the principle of national treatment and the most-favoured-nation clause. [21] By tolerating only the application of 'non-discriminatory' restrictions, Article 54 EC therefore prohibits all discriminatory measures based on nationality or residence. It also means that, pending the elimination of other restrictions on the provision of services, Member States must accord all service providers from other Member States the least restrictive treatment which could be accorded to any one of them. In other words, as far as those indistinctly applicable restrictions are concerned, that provision does not require the Member States to accord service providers the treatment which they accord to their own nationals, but, as it were, takes the form of a most-favoured-nation clause.

46. If the Court were to concur with that analysis, the answer to the first question asked by the referring court would be simple. There is no doubt that national legislation which makes the provision of services by a legal person established in another Member State subject to the condition that that person have a company seat or residence in national territory constitutes a flagrant infringement of Article 54 EC. Moreover, in its written observations, the Republic of Austria does not seek at all to justify such a difference in treatment and states that an amendment of the LFG to eliminate that condition is to be put forward as part of the next revision of that law.

47. On the other hand, the answer to the second question seems to raise more difficulties, apart from, of course, as regards the part of that question relating to the condition of having a residence or a company seat, which

21 — That double meaning has been highlighted by several authors: see, in particular, Draetta, U., 'Commento all'art. 65', in Quadri, R. and others (eds), *Trattato istitutivo della C.E.E. Commentario*, Giuffrè, Milan, 1965, vol. I, pp. 493-494; Truchot, L., in Léger, P. (ed.), *Commentaire Article par Article des traités UE et CE*, Helbing Liechtehahn, Dalloz, Bruylant, 1st ed., Paris, 2000, p. 477. It should, however, be mentioned that some legal writers infer only the prohibition of discrimination from reading that provision (see, for example, Van den Bogaert, S., *Practical Regulation of the Mobility of Sportsmen in the EU post Bosman*, Kluwer Law International, The Hague, 2005, p. 122), or the simple reiteration of the application of national treatment (see, inter alia, Lugato, M., 'Commento agli articoli 49-55', in Tizzano, A. (ed.), *Commentario ai Trattati dell'Unione europea e della Comunità europea*, Giuffrè, Milan, 2004, p. 415), whilst, on the other hand, another line of legal doctrine considers that Article 54 EC includes only a most-favoured-nation clause (see, inter alia, Goldman, B. and others (eds), *Droit commercial européen*, Dalloz, 5th ed., Paris, 1994, p. 273).

should already have been covered in the answer to the first question.

48. Narrowed down in that way, the second question must make it possible to ascertain whether the obligation laid down by a national law, like the LFG, on any operator of hot-air balloon flights to hold both a transport licence and an operating licence is contrary to Article 54 EC, even if that operator has obtained, in the Member State in which he is established, licences in relation to which the conditions of issue are identical or equivalent to those required in the Member State in which the services are provided.

49. In that regard, it is common ground that, apart from the condition of having a residence or company seat in national territory, the obligation, imposed on service providers operating in Austria, to hold the two above-mentioned licences applies without distinction based on nationality or residence.

50. Consequently, Article 54 EC does not, in principle, preclude such a requirement, since the elimination of restrictions under that provision must, where necessary, be effected within the framework of the measures adopted on the basis of the provisions in the chapter of the Treaty on transport.

51. The question may arise, however, whether *in the context of a procedure for the issue of such licences* that assessment should be qualified.

52. With regard to the obligation laid down by Paragraphs 102 and 106 of the LFG to hold *a transport licence*, the conditions governing the issue of such a licence – except, I reiterate, the requirement to have a place of residence or a company seat in Austria – which concern proof of sufficient technical and financial capacity, compliance with safety rules and evidence that insurance has been contracted for in relation to the operating risks, would appear, at least to some extent, to have already been the subject of an approximation of the laws of the Member States at Community level.

53. It should be recalled that whilst, in principle, Article 1(2) of Regulation No 2407/92 excludes from its scope carriage by air performed by non-power-driven aircraft, it nevertheless states that 'in respect of these operations... Community and national law concerning the air operator's certificate (AOC) shall apply' and Article 2(d) of that

regulation defines the AOC as 'a document issued to an undertaking or a group of undertakings by the competent authorities of the Member States which affirms that the operator in question has the professional ability and organisation to secure the safe operation of aircraft for the aviation activities specified in the certificate'. Furthermore, as the Republic of Austria and the Commission have noted, the technical and safety rules laid down in Regulation No 1592/2002 of the European Parliament and of the Council, including those adopted on the basis of that regulation, in particular in relation to airworthiness certification, [22] apply to hot-air balloons. In addition, as far as evidence of coverage of operating risks is concerned, Paragraph 106 of the LFG refers explicitly to Regulation (EC) No 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators.

54. In those circumstances, I consider that the authorities of a Member State which completely refused to take into consideration a transport licence issued by the Member State in which the service provider was established, even though such a document attested, at least in part, that the service provider satisfied the conditions mentioned in the preceding point of this Opinion, would infringe Article 54 EC and the relevant provisions of the abovementioned regulations. Such a refusal would, in the final analysis and *de facto*, be based only on the place of the company seat or the place of establishment of the service provider and would, therefore, be prohibited by Article 54 EC. [23]

55. That assessment must also in my view be extended to the obligation to hold an *operating licence*, the issue of which would appear to be entirely dependent on obtaining a transport licence in accordance with Article 108(2) of the LFG and not contingent on the holder of the transport licence having to fulfil any conditions supplementary to those imposed on him in order to obtain the transport licence. [24]

56. I would add that that approach does not ultimately seem to be very far from that advocated in the written observations of the

22 — Commission Regulation (EC) No 1702/2003 of 24 September 2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations, OJ 2003 L 243, p. 6.

23 — According to case-law, the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result. See, inter alia, Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 92 and the case-law cited.

24 — Neither the order for reference nor the observations submitted by the Republic of Austria indicate any supplementary conditions.

Republic of Austria, where it considers that, *since the procedure for the issue of the licence takes account of the justifications and guarantees already given by the applicant in his Member State of origin,* the licence requirement is justified. [25]

57. I would point out, however, that the main proceedings do not concern the refusal by the competent Austrian authorities to issue transport and operating licences to a service provider without having taken into consideration the licence(s) obtained by the service provider in the Member State in which he is established, but proceedings seeking to sanction an infringement of the LFG for the unlawful operation of hot-air balloon flights, *in the absence* of the two licences required by that law.

58. The second question asked by the referring court actually seeks to ascertain whether there should be, at Community level, full mutual recognition of transport and operating licences issued in the Member States to hot-air balloon transport operators, where the conditions imposed for the issue of those licences are deemed equivalent.

25 — Paragraph 60 of the observations. It should be noted, however, that those observations concerned the interpretation of Article 49 EC and not of Article 54 EC.

59. In the light of the above considerations, that question must be answered in the negative. Article 54 EC cannot impose such obligations on the Member States without encroaching on the competence of the European Union's political institutions to implement the freedom to provide services in the field of the common transport policy.

60. In any event, the answer to that question would not be different, in my view, were the Court were to hold it necessary to examine the compatibility of a national law like the LFG in the light not of Article 54 EC, but Article 12 EC, which prohibits, within the scope of application of the Treaty, any discrimination on grounds of nationality.

61. In the first place, I consider that there are no insurmountable obstacles to the applicability of Article 12 EC to a situation such as that in the main proceedings.

62. In my view, such an approach follows inter alia from the interpretation of paragraph 26 of the abovementioned judgment in *Commission* v *Greece*.

63. It should, however, lead the Court to go beyond the solution adopted in *Corsica Ferries (France)*, relating to sea transport services.

64. I would point out that, in that case, the Court heard the question whether it was contrary to Article 59 of the EEC Treaty (subsequently Article 59 EC, which itself became, after amendment, Article 49 EC) to introduce a differentiated tax, collected in 1981 and 1982, depending on whether the ships in question plied between Corsica and mainland France or between Corsica and ports in another State. After stating that freedom to provide services in the transport sector was governed by the provisions of the title relating to transport and not by Article 59 et seq. of the EEC Treaty, [26] and that, under Article 84(2) of the EEC Treaty, the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea transport, [27] the Court held that, during the period at issue in the main proceedings (1981 and 1982), freedom to provide services in maritime transport had not yet been implemented, but had entered into force only in 1987 following the adoption of Regulation (EEC) No 4055/86, [28] which meant that the Member States were entitled to apply provisions such as those at issue in the main proceedings. [29]

65. However, it should be noted that the Court did not examine the rules in question in that case in the light of the general provisions of the Treaty, in particular Article 7 of the EEC Treaty (subsequently Article 6 of the EC Treaty, which itself became, following amendment, Article 12 EC), as its Advocate General had suggested. [30] In the view of the Advocate General, it was 'immediately clear' that in the circumstances of that case reference could not be made to the prohibition of discrimination on grounds of nationality laid down in Article 7 of the EEC Treaty since, in the light of the exclusion of transport from the scope of the general provisions of the Treaty relating to freedom to provide services which are intended to apply and realise that prohibition, it would be contrary to the overall structure of those rules to rely on it. In other words, the Advocate General appeared to fear that applying Article 7 of the EEC Treaty to the case before the Court would, essentially, amount to circumventing the non-application of the general rules on freedom to provide services to transport as provided for under Article 61

26 — *Corsica Ferries (France)*, paragraph 11.

27 — Ibid., paragraph 12.

28 — Council Regulation No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 1986 L 378, p. 1.

29 — *Corsica Ferries (France)*, paragraphs 13 and 14.

30 — See points 12 and 13 of the Opinion of Advocate General Lenz delivered in Case C-49/89 *Corsica Ferries (France)*.

of the EEC Treaty (subsequently Article 61 EC, which itself became, following amendment, Article 51 EC), inasmuch as the principle set out in Article 7 of the EEC Treaty was implemented, in the field of the provision of services, by Article 59 of the EEC Treaty. [31]

66. I am not certain that the view can be taken that the silence of the judgment in *Corsica Ferries (France)* on that issue must be understood as agreement with the proposal made by Advocate General Lenz. Whilst it is true that the general principle of non-discrimination, as expressed in Article 12 EC, [32] was in fact implemented, in the field of freedom to provide services, by Article 49 EC, it is well known that that provision is not confined to eliminating discriminatory measures, but applies, more broadly, to 'restrictions', that is to say any measure which impedes or renders less attractive the exercise of the freedom to provide services. [33] The distinction between, on the one hand, the general provisions of the Treaty, including Article 12 EC, and, on the other, Article 49 EC, is also apparent from the overall interpretation which must be given to the Court's case-law. Thus, according to that case-law, whilst the objectives pursued by Article 49 EC must be achieved, as regards transport, in the common transport policy [34] and, even though sea and air transport, so long as the Council has not decided otherwise, are excluded from the rules of the Treaty relating to the common transport policy, they remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty. [35] It is hard to imagine that that case-law intended to exclude such a fundamental provision as Article 12 EC from the reference to the general rules of the Treaty.

67. That being the case, concerning, in the second place, the interpretation of Article 12 EC in the context of a case such as that in the main proceedings, the prohibition laid down in that provision undoubtedly precludes a Member State from making the activity of a service provider established in another Member State subject to the condition that the service provider have a company seat or residence in the territory of the first Member

31 — See, in particular, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17, and Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 26.

32 — With regard to the value of the general prohibition under Article 12 EC, see Case C-115/08 *ČEZ*, paragraphs 89 and 91.

33 — See, inter alia, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-264/99 *Commission* v *Italy* [2000] ECR I-4417, paragraph 9; and Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 62 and the case-law cited.

34 — See, inter alia, Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraph 62, and Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 37.

35 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 32. See also Joined Cases 209/84 to 213/84 *Asjes and Others*, paragraph 45.

State. [36] Furthermore, I would point out that, in its written observations, the Republic of Austria did not attempt at all to justify such discrimination.

68. On the other hand, the scope of the principle of non-discrimination on grounds of nationality under Article 12 EC cannot extend as far as requiring of the Member States the mutual recognition of transport and operating licences issued in other Member States, even though those licences attest that the service providers have complied with equivalent guarantees, as the referring court asks in its second question. A contrary solution would tend to give Article 12 EC an identical or even broader scope than Article 49 EC, [37] and would, therefore, circumvent the non-applicability of that provision in the field of transport. Moreover, as I stated in point 59 of this Opinion with regard to Article 54 EC, adopting an interpretation of the scope of Article 12 EC which went beyond even that of Article 49 EC would result in the Court encroaching on the competence of the European Union's political institutions to implement the freedom to provide services in the field of the common transport policy.

69. I therefore suggest that the Court answer the first and second questions referred for a preliminary ruling respectively to the effect that, first, Article 54 EC or, where applicable, Article 12 EC preclude the legislation of a Member State from requiring, for the operation of commercial hot-air balloon flights in its territory, that a service provider established in another Member State have a company seat or residence in the first Member State and, second – except in relation to the condition of having a residence or company seat in national territory – neither Article 54 EC nor Article 12 EC preclude a Member State from requiring that a service provider who holds licences to operate commercial hot-air balloon flights issued in the Member State in which he is established obtain new licences in the Member State in the territory of which the services are provided, on the condition that, when issuing those licences, the competent authorities of that Member State take into consideration the guarantees

36 — See, in this regard, Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 28.

37 — I would point out that, with regard to the compatibility with Article 49 EC of an authorisation procedure prior to the exercise of the provision of services in a Member State, the Court has ruled that the conditions to be satisfied in order to obtain such authorisation may not duplicate the equivalent statutory conditions which have already been satisfied in the State of establishment. See Case C-496/01 *Commission* v *France* [2004] ECR I-2351, paragraph 71 and the case-law cited.

already given by the applicant in the Member State in which he is established.

70. As regards the third question referred for a preliminary ruling, the referring court, essentially, [38] asks about the possible incompatibility with the Treaty of the penalties imposed on a service provider established in another Member State who has carried on his activity in Austria without holding the transport and operating licences required by the LFG.

71. In that regard, I would point out, first and foremost, that on a reading of the provisions of the LFG, the requirement of having a residence or company seat in Austria constitutes a condition for obtaining such licences. However, since I consider that condition to be incompatible with Article 54 EC or, where applicable, with Article 12 EC, the applicant in the main proceedings, who is established in Germany, could never, in any event, have obtained such licences without taking up his professional domicile in Austria.

72. Consequently, and in so far as it is not clear from the documents before the Court that the calculation of the level of the fines imposed and *a fortiori* the calculation of the alternative penalty have taken into account, in a proportionate manner, the various conditions for the issue of the licences which have been breached, the national court should, in accordance with case-law, disapply administrative penalties imposed for failure to complete an administrative formality, where the completion of that formality was rendered impossible by the Member State concerned, in infringement of Union law. [39]

73. I therefore propose that the third question referred for a preliminary ruling be answered to the effect that administrative penalties imposed on a service provider operating commercial hot-air balloon flights and established in a Member State, on the ground that that service provider does not hold the transport and operating licences required by the national legislation of the Member State where the services are provided, which makes their issue subject to the condition of having a company seat or residence in the latter Member State, in contravention of Article 54 EC or, where applicable, Article 12 EC, must remain disapplied.

38 — In the wording of its third question referred for a preliminary ruling, the referring court highlights a condition which would appear to be supplementary to the issue of the licences required by the LFG, namely that the service provider must register in Austria the hot-air balloon used for the commercial carriage of passengers in the territory of that Member State. However, that condition does not seem to stem from the wording of the national rules at issue in the main proceedings and is not evident from the documents in the case. In addition, the condition was not the subject of the two preceding questions referred for a preliminary ruling, and its compatibility with the provisions of the Treaty was also not raised by the referring court in its order for reference. I therefore consider an examination of that condition, which has also not been requested by the referring court, to be unnecessary.

39 — See, with regard to criminal penalties, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 69.

VI — Conclusion

74. In the light of the foregoing considerations, I propose that the questions asked by Unabhängiger Verwaltungssenat des Landes Oberösterreich be answered as follows:

1. Article 54 EC or, where applicable, Article 12 EC preclude the legislation of a Member State from requiring, for the operation of commercial hot-air balloon flights in its territory, that a service provider established in another Member State have a company seat or residence in the first Member State;

2. Except in relation to the condition of having a residence or a company seat in national territory, neither Article 54 EC nor Article 12 EC preclude a Member State from requiring that a service provider, who holds licences to operate commercial hot-air balloon flights issued in the Member State in which he is established, obtain new licences in the Member State in the territory of which the services are provided, on the condition that, when issuing those licences, the competent authorities of that Member State take into consideration the guarantees already given by the applicant in the Member State in which he is established;

3. Administrative penalties imposed on a service provider operating commercial hot-air balloon flights and established in a Member State, on the ground that that service provider does not hold the transport and operating licences required by the national legislation of the Member State where the services are provided, which makes their issue subject to the condition of having a company seat or residence in the latter Member State, in contravention of Article 54 EC or, where applicable, Article 12 EC, must remain disapplied.