OPINION OF ADVOCATE GENERAL MISCHO

delivered on 10 December 1998 *

1. In this case, the Verwaltungsgerichtshof (Administrative Court of Appeal), Austria, has referred two questions for a preliminary ruling. By the first, the Austrian court seeks an interpretation of the Community provisions relating to the free provision of services in relation to a ban imposed on an Austrian company prohibiting it from hiring out more than a specific quota of moorings to boat owners resident outside Austria. The second question is whether the principle of the primacy of Community law also applies in relation to an individual administrative decision.

Background to the main proceedings

2. The Landschaftsschutzgesetz (Countryside Preservation Law) of the Land of Vorarlberg provides, in the first sentence of Paragraph 4(1), that any alteration to the countryside around lakes or in a strip of land 500 metres from the shoreline, calculated at mean water level, is to be prohibited.

3. According to Paragraph 4(2) of that Law, the administrative authority may grant derogations from the rule in subparagraph (1) where it is guaranteed that such alterations will not impair the interests of countryside preservation and, in particular, will not obstruct views over lakes or where those alterations are necessary for reasons of public safety.

4. The company ABC-Charter Gesellschaft mbH rented certain plots of land situated in the shore area of the Bodensee (Lake Constance) where it was allowed to build 200 moorings for boats.

5. Upon an application from that company, the Bezirkshauptmannschaft (District Administrative Authority), Bregenz, addressed a 'Bescheid' to it on 9 August 1990, that is to say an individual administrative decision, point 2 of which provides:

'With effect from 1 January 1996 a maximum of 60 boats owned by persons resident abroad may be accommodated in the harbour. Until that time the proportion of boats owned by persons resident abroad shall be continuously

* Original language: French.

reduced. No new allocation of moorings to boat owners resident abroad or extension of expired rental contracts with such owners is permitted until the maximum foreigner quota has been achieved. Before the beginning of each boating season a true list of the moorings allocated to persons resident abroad shall be provided to the authority without prior request. This decision will cease to be in force at the end of 31 December 1999. With effect from that date the original countryside preservation decision will once more apply in full.'

6. By decisions of 10 July 1996, the Unabhängiger Verwaltungssenat (Independent Administrative Authority) of the Land Vorarlberg found Mr Ciola, acting as managing director of the company ABC-Boots-Charter Gesellschaft mbH and of the company ABC-Bootswerft Gesellschaft mbH, guilty of having 'allocated', on 25 January 1995 and 12 May 1995, moorings to two boat owners who were resident abroad, namely in the Principality of Liechtenstein and in the Federal Republic of Germany, even though the maximum foreign quota of 60 boats owned by persons resident abroad was exceeded. For each of those offences, a fine of ATS 75 000 was imposed.

7. Mr Ciola had not therefore observed the conditions laid down in point 2 of the decision of 9 August 1990 and had thus committed an administrative infringement within the meaning of Paragraph 34(1)(f) of the Landschaftsschutzgesetz, according to which any person who does not observe the measures contained in decisions adopted pursuant to that Law are guilty of an administrative offence.

8. The Verwaltungsgerichtshof, to which Mr Ciola's appeal against those decisions has been made, considers that 'questions of interpretation of Community law within the meaning of Article 177 of the EC Treaty are raised in connection with its decision in this case' and has referred to the Court the following two questions:

'1. Are the provisions concerning the freedom to provide services to be interpreted as precluding a Member State from prohibiting the operator of a yachting harbour, on pain of criminal prosecution, from hiring out more than a specific quota of moorings to boat owners who are resident in another Member State?

2. Does Community law, in particular the provisions concerning the freedom to provide services in conjunction with Article 5 of the EC Treaty and Article 2 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21; OJ 1995 L 1, p. 1), give the provider of the services referred to in Question 1 above, who is resident in Austria, the right to assert that the prohibition issued in the terms set out in Question 1 in an administrative decision (Bescheid) adopted in

1990 in regard to a specific person should not be applied in decisions of the Austrian courts and authorities adopted after 1 January 1995?'

The first question

9. The Verwaltungsgerichtshof seeks to ascertain whether the provisions of the EC Treaty relating to the freedom to provide services precludes the number of moorings which may be hired out, within a global quota, to boat owners resident in another Member State from itself being limited.

10. For the reasons already largely explained by the national court itself, this question must be answered in the affirmative.

Applicability of Article 59 of the EC Treaty

11. The Verwaltungsgerichtshof rightly recalls that, according to the case-law of the Court, Article 59 of the Treaty 'covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. ... The right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (judgment in Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 30)'.

12. Secondly, it is clear from the judgment in *Luisi and Carbone* [1] — to which the national court also refers — and from the judgment in *Cowan* [2] 'that the freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists, among others, must be regarded as recipients of services'.

13. Indeed, it seems to me that the present case involves, in fact, a provision of services with a dual cross-border element.

14. First of all, Mr Ciola's company provides, through a cross-border hire contract, a service to a boat owner residing in another Member State by making available to him, during the life of the contract, of a mooring

1 — Joined Cases 286/82 and 26/83 [1984] ECR 377.
2 — Case 186/87 [1989] ECR 195, paragraph 15.

for his boat. It can therefore be said that this service 'crosses the frontier' throughout the year.

15. Secondly, the owner himself crosses the Austrian border, once or several times a year, to use the actual benefit he has under the hire contract, namely not having to tow his boat each time from his place of residence to Lake Constance. On those occasions, it is therefore also the recipient of the service who crosses the frontier in order to use a service.

16. The hiring out of moorings to boat owners established in another Member State therefore constitutes a provision of services within the meaning of Article 59 of the Treaty. Indeed, at the hearing this was accepted to be the case by the Land Vorarlberg.

Permissibility of a measure of this kind

17. However, the Land Vorarlberg denies that the restriction arising from the 60 place limit is to be regarded as discriminatory.

18. It points out first of all that the contested decision wrongly uses the term 'foreign quota' because the restriction does not relate to the nationality of boat owners but to their residence.

19. Nor, however, is there any indirect discrimination because, it says, the restriction also affects Austrian citizens residing in another Member State.

20. It must, however, be observed here that the Court has already held, in particular in its judgments in the *Schumacker* [3] and *Clean Car Autoservice* [4] cases, that 'national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners'.

21. The placing of a maximum limit on the moorings which may be allocated to non-residents therefore constitutes indirect discrimination prohibited by Article 59 of the Treaty.

3 — Case C-279/93 [1995] ECR I-225.

4 — Case C-350/96 [1998] ECR I-2521, paragraph 29.

22. At the hearing before the Court, the Land Vorarlberg argued, however, that the restriction in question was objectively justified by overriding reasons relating to of the public interest. In the absence of the restriction, boat owners residing in the other Member States, prepared to pay higher rents, would be able to rent the majority of the moorings. There would no longer be sufficient places for persons living in the area and there would be strong pressure on the authorities of the Land to increase the overall ceiling of 200 moorings. This, it says, would have adverse consequences on the countryside and on the quality of water of Lake Constance, which is used as a water reservoir for more than 4 million people.

23. The fact that a measure such as that in question in the main proceedings is not applicable without distinction to all provisions of services, whatever the origin or destination, rules out any question as to the possible existence of overriding reasons relating to the public interest capable of justifying such a measure. [5]

24. Such a measure may therefore be justified only on the basis of an express derogation in the Treaty itself (in this case, Article 36) or in an act of accession.

25. It may be noted here that the concern to limit the influx of 'foreigners' has, in the past, been taken into consideration by Community law, namely in relation to second homes. However, this has always been the subject of an express derogating provision.

26. Thus the Protocol (No 1) on the acquisition of property in Denmark provides 'Notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes'.

27. The Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adaptations of the Treaties on which the Union is founded provides, in Article 70, that 'Notwithstanding the obligations under the Treaties on which the European Union is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession'. [6]

28. In the absence of an express derogating provision like Article 70, cited above, or the possibility of relying on grounds of public policy, public security or public health (Article 56 of the Treaty), it is not possible to escape application of the general rule laid down by

5 — See, in particular, the judgment in Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraphs 10 to 13.

6 — OJ 1994 C 241, p. 35.

the Court, according to which Article 59 of the Treaty entails not only elimination of all discrimination against persons providing services or persons receiving services by reason of their nationality, but also by reason of the circumstance that the person concerned is established in a Member State other than that in which the service is to be performed.

29. The question whether the Land Vorarlberg could possibly find another criterion, which would be compatible with Community law, for resisting the pressure to increase the overall ceiling of 200 moorings is not the subject-matter of the order for reference and does not therefore fall to be examined in this Opinion.

30. In response to the first question, it must therefore be concluded that Article 59 of the Treaty is to be interpreted as precluding a Member State from prohibiting the operator of a marina, upon penalty of criminal proceedings, from hiring out moorings above a specific quota to boat owners who reside in another Member State.

The second question

31. By its second question, the Austrian court essentially seeks to ascertain the consequences which would flow from an affirmative reply to the first question in the particular case where 'the criminal nature of the conduct complained of is based, not on the infringement of a general norm, but on the contravention of a restriction imposed on a company, of which the appellant is managing director, by means of an administrative decision (Bescheid) adopted specifically against that company' and where 'there is no general abstract provision restricting the number of services which may be offered by the company to recipients resident in another Member State'.

32. The Verwaltungsgerichtshof points out in this regard that 'since its judgment in Case 6/64 *Costa* v *ENEL*, [7] the Court of Justice has held the view that the law stemming from the Treaty could not be overridden by domestic legal provisions' and that in its judgment in *Simmenthal* [8] the Court held *inter alia* that 'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation'.

33. The Austrian court then goes on to state that 'as far as can be seen, that view has been applied without exception to facts concerning the application of general-abstract provisions of domestic law. However, in the present case,

7 — Case 6/64 [1964] ECR 585.
8 — Case 106/77 [1978] ECR 629.

this Court decision turns on whether, when appraising the criminal nature of the appellant's conduct in 1995, the Austrian courts and authorities must refuse to apply a final administrative order (Bescheid) adopted in 1990 in relation to a specific person'.

34. The Verwaltungsgerichtshof adds that 'if the decision adopted in 1990 were not to be applied when assessing the lawfulness of the appellant's conduct in connection with the hire in 1995 to persons who (among other things) were resident in a Member State, the factual preconditions of the administrative offence would not be fulfilled'.

35. As far as the Austrian Government is concerned, the question is 'whether the primacy of Community law must also be upheld in relation to individual specific decisions of administrative authorities' and it is therefore necessary to determine 'whether Community law may have an effect on the rules relating to the enforceability of administrative decisions'.

36. It argues that 'there is no ground for transposing, without examination and without limit, the case-law on the primacy of Community law, developed in the context of general rules (laws, regulations) to specific individual administrative decisions (Bescheide)'. Here, Austria relies, in particular, on the case-law concerning what may be called 'the procedural autonomy of the Member States' [9] and more particularly on the judgment in *Rewe*, [10] from which it appears that, in the absence of measures harmonising procedural rules, the rights conferred by Community law must be exercised before the national courts according to the procedural rules of domestic law and this would be otherwise only if those rules and time periods resulted in making it practically impossible to exercise the rights which the national courts have the obligation to safeguard. As the Austrian Government emphasises, the Court concluded that the laying down of reasonable periods for bringing proceedings does not render it impossible to exercise those rights.

37. The Austrian Government also explains that the binding effect of the decision which prevents the Verwaltungsgerichtshof from annulling it for unlawfulness serves legal certainty and protection of legitimate expectations of the various parties in question and therefore 'the principles of legal certainty, protection of legitimate expectations and protection of rights duly acquired must be weighed in this specific case against the interest in observing the principle of non-discrimination laid down by Community law'.

9 — The Republic of Austria cites the following judgments: Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7; Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, paragraph 17; Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12 and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 43.

10 — Cited in the footnote above.

38. For the Austrian Government, the problem, therefore, seems to be one of the legitimacy of a period for bringing proceedings which the appellant in the main proceedings allowed to elapse, so that he would therefore no longer be entitled to challenge the 1990 decision, because it is now final.

39. I cannot share the Austrian Republic's view of the nature of the legal problems raised in this case.

40. The matter before the national court is not, in my view, one concerning an application for annulment, on grounds of illegality, directed against the 1990 decision which could be barred by a time limit the compatibility of which with Community law would be the subject of the preliminary question. The question, rather, is whether the national court must refrain from applying that decision in the specific case before it.

41. Nor do I discern, in the main proceedings, any issue related to legal certainty, the protection of legitimate expectations or of properly acquired rights, as raised by the Austrian Government. If the appeal court were to annul the sentence imposed on Mr Ciola and if the company in question were to be able, pursuant to Article 59 of the Treaty, to hire out moorings as freely to boat owners residing in another Member State as to boat owners residing in Austria, that would not *ipso facto* entail termination of the contracts in force with boat owners residing in Austria. Furthermore, I do not see how that could infringe the rights of third partners or disturb their legitimate expectations.

42. In any case, the binding effect of administrative decisions does not seem to be absolute since the Austrian Government tells us that 'the appellant in the main proceedings had and still has the possibility of asking the competent authority, according to domestic procedural rules, to amend its decision or its operative part'. Such a procedure is apparently provided for by Paragraph 68 of the Allgemeines Verwaltungsverfahrensgesetz (General Law on Administrative Procedure). We are told that the appellant has the possibility of invoking Community law in this new procedure and, if he were not to obtain satisfaction, to lodge appeals.

43. However, it is not necessary to enter into those considerations. The sole legal issue posed by the second preliminary question is, in my view, whether the Verwaltungsgerichtshof must, in assessing the lawfulness of the appellant's action, disapply a decision incompatible with Community law, notwithstanding the fact that the decision concerned is a specific individual administrative measure and not a general, abstract rule.

44. In regard to that question, the case-law of the Court contains sufficient guidance to support the conclusion that this second question also calls for a positive reply.

45. As the national court itself points out, in its judgment in *Costa* the Court held that 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, *however framed*, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.

46. Likewise, it follows from the judgment in *Lück* [11] that the direct effect of a provision of the Treaty excludes 'the application of *any national measure* incompatible with it' and from the judgment in Case 48/71 *Commission* v *Italy* [12] that the direct effect of Community law entails 'a prohibition having the full force of law on the competent national authorities against applying *a national rule* recognised as incompatible with the Treaty'.

47. Still more clearly, the Court held in the French maritime code case [13] that 'since the provisions of Article 48 and of Regulation No 1612/68 [14] are directly applicable in the legal system of every Member State and Community law has priority over national law, these provisions give rise on the part of those concerned, to rights which the national authorities must respect and safeguard and as a result of which *all contrary provisions of internal law* are rendered inapplicable to them'.

48. Finally, in one of the *Rewe* cases, [15] the Court held that 'a national authority may not apply to a person legislative *or administrative* measures which are not in accordance with an unconditional and sufficiently clear obligation imposed by the directive'. What applies in relation to an unconditional and sufficiently precise obligation laid down in a directive obviously also applies in relation to an unconditional and sufficiently precise obligation of primary Community law, such as that laid down in Article 59 of the Treaty.

49. It follows from these few citations from established case-law that Community law overrides *any* provision of domestic law. It also follows that the direct effect and primacy of Article 59 of the Treaty together oblige the national court to disapply prohibitions laid down in domestic provisions, including

11 — Case 34/67 [1968] ECR 245.

12 — Case 48/71 [1972] ECR 529, paragraph 7.

13 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 35.

14 — Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

15 — Case 158/80 *Rewe* [1981] ECR 1805, paragraph 43.

individual administrative decisions, that are incompatible with that article.

50. In the *Factortame* case [16] the Court also held that 'it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law'.

51. Moreover, it follows from the judgment in *Fratelli Costanzo* [17] that, like national courts, an administration, including decentralised authorities, has the obligation to apply unconditional and sufficiently precise provisions of Community law and to disapply those of national law which are not in conformity with it.

52. As far as the Republic of Austria is concerned, that conclusion must apply in relation to circumstances occurring after 1 January 1995, the date of its accession to the European Union. Article 2 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adaptations to the Treaties on which the Union is founded [18] provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

53. Therefore, it may be said that Article 59 of the Treaty, being directly applicable, is an immediate source of rights after 1 January 1995 for the company in question and that, since that date, any administrative prohibition incompatible with Article 59 is unenforceable against it.

54. It must therefore be concluded, in response to this second question, that Community law confers on persons providing services the right to assert that a prohibition such as that in question in the main proceedings, contained in a specific individual administrative decision, must remain unapplied where an administrative authority or a court of law must determine whether conduct postdating the accession of the Republic of Austria may be sanctioned.

16 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19.

17 — Case 103/88 [1989] ECR 1839, paragraphs 30 to 33.

18 — Cited above.

Conclusion

55. In view of this analysis, I propose that the two questions referred by the Verwaltungsgerichtshof be answered as follows:

(1) Article 59 of the EC Treaty is to be interpreted as precluding a Member State from prohibiting the operator of a marina, upon penalty of criminal proceedings, from hiring out moorings above a specific quota to boat owners who reside in another Member State.

(2) Community law confers on persons providing services the right to assert that a prohibition such as that in question in the main proceedings, contained in a specific individual administrative decision, must remain unapplied where an administrative authority or a court of law has to determine whether conduct post-dating the accession of the Republic of Austria may be sanctioned.