

OPINION OF ADVOCATE GENERAL  
LA PERGOLA

delivered on 2 March 1999 \*

1. In the present reference for a preliminary ruling, the Oberster Gerichtshof (Supreme Court), Vienna seeks clarification from the Court on the interpretation of Article 70 of the Act concerning the conditions of accession of the Kingdom of Norway, 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 (hereinafter 'the Act of Accession').<sup>1</sup> In particular it asks the Court whether the derogation clause laid down in Article 70 also covers legislation such as the Austrian legislation on secondary residences which was adopted after accession.<sup>2</sup>

**Legislative and factual background to the main proceedings**

*The relevant national legislation*

2. The legislation of the *Land* of Tyrol regarding the acquisition of land, in so far

as it is relevant to the present case, is described by the referring court as follows:

The case at issue relates to the provisions which confer on the administration the right to bring proceedings to contest land transactions. The order for reference notes in this regard three legislative measures. The first, the 'TGVG 1983',<sup>3</sup> provided that the acquisition of land by natural persons who were not Austrian citizens, or by legal persons established abroad or controlled by foreign nationals, was subject to authorisation granted by the competent administration. If property was acquired without the prescribed authorisation, the penalty imposed was the annulment of the sale. The 'TGVG 1991',<sup>4</sup> introduced a legislative provision which accorded the *Landesgrundverkehrsreferent* (Land Director responsible for land transfers, hereinafter 'the Land Director') the right 'to bring proceedings for a declaration that the transaction is void where there is reason

\* Original language: Italian.

1 — OJ 1994 C 241, p. 21.

2 — Article 70 provides that: 'Notwithstanding the obligations under the Treaties on which the EU is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession'.

3 — Tiroler Grundverkehrsgesetz [Tyrol Law on the Transfer of Land] of 18 October 1983.

4 — Tiroler Grundverkehrsgesetz of 3 July 1991.

to believe that it is a sham or evading transaction'.<sup>5</sup>

The second measure introduced by the legislature, the 'TGVG 1993',<sup>6</sup> replaced the previous rules. Paragraph 35(2) confirmed the right of the *Land* Director to bring proceedings for the annulment of sham or evading transactions.<sup>7</sup> Under Paragraph 40, the *Land* Director's right to bring an action was extended to all transactions existing upon the entry into force of the Law. The same provision also laid down that operations concluded before that date were governed by the TGVG 1983.

In 1996 the Tyrol legislature introduced a further amendment, the TGVG 1996,<sup>8</sup> which entered into force on 1 October 1996. The order for reference mentions Paragraph 35(1) of that Law, which reproduces the corresponding provision of the TGVG 1993, and Paragraph 40, which lays down the transitional provisions. Paragraph 40(5), which is of particular interest, provides as follows: 'The right of the *Landesgrundverkehrsreferent* to bring proceedings for a declaration under Paragraph 35(1) shall extend also to sham and evading

transactions concluded before the entry into force of this Law. For procedures under Paragraph 35(1) whose subject is a sham or evading transaction concluded before 1 January 1994, the Grundverkehrsgesetz 1983 shall be applicable.'<sup>9</sup>

3. Two successive rulings on that legislation were delivered by the Verfassungsgerichtshof (Austrian Constitutional Court). The first, on 28 September 1996, declared as unconstitutional the Law of 3 July 1991 in so far as it amended the TGVG 1983, whose provisions thus became inoperative. By the second ruling, of 10 December 1996, the Verfassungsgerichtshof declared the TGVG 1993 to be unconstitutional; the relevant provisions could therefore no longer be applied to pending proceedings, with the exception of those whose application — as stated by the national court — resulted from the reference made by Paragraph 40(4) of the TGVG 1996.

5 — Paragraph 16(a)(1). The final provisions of the law stipulated that the law also applied to 'sham or evading transactions existing upon the entry into force of the present Law'.

6 — Tiroler Grundverkehrsgesetz of 7 July 1993.

7 — That provision states that 'the *Landesgrundverkehrsreferent* may bring (...) proceedings for a declaration that a legal transaction is void, in particular because it is a sham or evading transaction'.

8 — Tiroler Grundverkehrsgesetz of 3 July 1996.

9 — The rest of Paragraph 40 provides: '(2) In administrative matters concerning land transfers which were pending on 1 January 1994, the Grundverkehrsgesetz 1983 shall continue to apply as regards substantive law. With respect to official bodies and procedure, however, the provisions of this Law shall apply. (3) For legal transactions and operations which were concluded before 1 January 1994, the Grundverkehrsgesetz 1983 shall continue to be applicable as regards substantive law. With respect to official bodies and procedure, the provisions of this Law shall apply. (4) Infringements of the Grundverkehrsgesetz 1983 committed before 1 January 1994 shall be prosecuted under that Law. Infringements under the Tiroler Grundverkehrsgesetz, LGBl. No 82/1993, committed before the entry into force of this Law shall be prosecuted under the Tiroler Grundverkehrsgesetz, LGBl. No 82/1993. (...) (6) Paragraphs 34 and 35 shall also apply to legal transactions and operations already recorded in the land register, in respect of which consent would have been required under the Grundverkehrsgesetz 1983'.

*Facts and main proceedings*

4. The facts which gave rise to the main proceedings fall within the context described above. On 14 October 1983 Beck Liegenschaftsverwaltungsgesellschaft mbH (hereinafter 'Beck'), established in Fieberbrunn, Austria, and Bergdorf Wohnbau mbH, in liquidation, (hereinafter 'Bergdorf'), established in Zell am See, likewise in Austria, concluded a contract for the sale of shares in land located in the district of Kitzbühel.

5. By application to the Landesgericht (Regional Court), Innsbruck of 28 March 1994, the *Land* Director sought a declaration, on the basis of the TGVG 1983, that the contract of purchase between Beck and Bergdorf was void on the ground that the transaction was a sham or evading transaction. However, the order for reference does not make clear in what way the transaction was a sham or constituted evasion. Clarification is provided by the *Land* Director in his observations to the Court: he explains that, following the conclusion of the transaction for the sale of land at issue, the shares of the company buying the land had been acquired by German citizens. There was therefore a sham because the transaction involving the purchase of the land by an Austrian company, followed by the acquisition of the shares of that same company by German citizens, purportedly served to evade the Tyrol legislation on the purchase of land by foreign nationals. However, this fact is not developed fur-

ther — and is not even mentioned — by the referring court or by the other parties who have submitted observations.

The application was granted at first instance. The unsuccessful parties lodged an appeal contesting the allegation that the transaction was a sham and the right of the *Land* Director to bring proceedings. However, by a judgment of 28 June 1995, the Oberlandesgericht (Higher Regional Court) Innsbruck upheld the decision of the lower court.

6. An appeal on a point of law was lodged against that judgment before the referring court, which first examined the right of the *Land* Director to bring proceedings contesting the sale transaction at issue.

The issue is presented as follows. Following the abovementioned rulings of the Constitutional Court, the TGVG 1983 and 1993 were no longer applicable to the present case. It followed, according to the referring court, that the administration's right to bring proceedings could be justified solely on the basis of the TGVG 1996, and in particular the transitional provisions laid down in Paragraph 40 which, in turn, refer to the earlier 1983 and 1993 legislation with regard to certain aspects. In essence the earlier legislation, which had also been held to be contrary to the national constitution, continued to apply in the case at issue on account of the reference made in

Paragraph 40 of the TGVG 1996. Only by virtue of the application of the TGVG 1996 could the right of the *Land* Director to bring proceedings in the case be recognised. However, the national court notes a possible conflict between the application of the legislative provisions of the TGVG 1996 and Article 70 of the Act of Accession. Article 70 permits Austria, by way of derogation, to maintain in force for a transitional period existing legislation regarding secondary residences. However, the derogation is expressly restricted to rules existing at the time of accession, whereas the TGVG 1996 — which contains the provisions on the basis of which the administrative authority would be entitled to bring proceedings in the case — was introduced subsequently. The national court therefore asks the Court whether the TGVG 1996 may, in the light of the facts of the case, be brought within the scope of the derogation provided for in Article 70 of the Act of Accession. The question referred for a preliminary ruling is worded as follows:

‘Is Article 70 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, which provides 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 (1 January 1995), to be interpreted as meaning that the transitional provisions in Paragraph 40(2) and (5) of the Tiroler Grundverkehrsgesetz 1996

(*Landesgesetzblatt für Tyrol* No 61/1996), which entered into force on 1 October 1996, fall within the definition of existing legislation, or are those provisions to be regarded as new legislation if, as a result of decisions of the Austrian Verfassungsgerichtshof, the provisions of previous Tyrol laws on the sale of land were not applicable in the present case?’

### The jurisdiction of the Court

7. The Commission and the Austrian Government both take the view that the Court of Justice should not answer the question submitted by the national court. In their view, the description of the factual and legislative context set out in the order for reference is incomplete and does not enable the Court to understand either the significance of the question or its relevance to the decision to be given in the main proceedings. In fact it would appear from the information provided by the national court that the question raised is merely hypothetical. First of all, the case does not fall within the scope of Community law, since the contested transaction dates back to 1983, that is to say before Austria's accession to the Community. Community law is therefore inapplicable *ratione temporis*. In addition, every aspect of the case falls within the same Member State, with the

result that the case lies entirely outside the scope of the Community rules.

8. That view should be endorsed, in my opinion. The Court has unequivocally held that 'in order to reach an interpretation of Community law which will be of use to the national court, it is essential that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'.<sup>10</sup> The national court is required to give a full description of the factual and legislative background to the main proceedings. This serves the dual purpose of giving 'the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court of Justice'<sup>11</sup> and enabling the Court to examine the basis of its own jurisdiction to answer the questions referred by the national court.<sup>12</sup> Indeed, it is for the national court to assess whether the questions which it submits to the Court for a preliminary ruling are necessary and relevant; however, the Court reserves the right to review that assessment in order to ascertain whether the interpretation of Community law sought 'bears a relation

to the actual facts of the main action or its purpose' or whether 'the problem is hypothetical [and it] does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'.<sup>13</sup> In other words, the Court wishes to maintain some control over the correct application of the preliminary ruling mechanism, specifically to ensure that that procedure is used effectively as an instrument of judicial cooperation. The system established by Article 177 enables the Court to fulfil its interpretative role in the determination of disputes which involve the application of Community law. It therefore follows that questions which do not serve to determine the case correctly, since they are of merely theoretical or hypothetical relevance, are inadmissible.

9. That said, I do not believe that the strict requirements laid down by the Court's case-law are satisfied in the present case. The question under examination concerns Article 70 of the Act of Accession, and in particular the scope of the temporary derogation granted to Austria as regards secondary residences. However, the applicability of the derogation in question stems from the implicit but unequivocal assumption that there is an infringement of the Treaty which must be brought within the scope of the derogation. If there were no complaint of any violation of the freedoms guaranteed by the Treaty, there would obviously not be any reason to invoke the derogation provided for in Article 70 in the light of the alleged infringement of the obligations arising under Community law. In this case, however, the national court does not take that approach. In the order

10 — See Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, Case C-66/97 *Banco de Formento e Exterior* [1997] ECR I-3757, paragraph 7, Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 5, Case C-9/98 *Ermanno Agostini* [1998] ECR I-4261, paragraph 4.

11 — See, *inter alia*, the order in *Testa and Modesti*, cited above, paragraph 6.

12 — See Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25.

13 — See Case C-134/95 *USSL No 47 di Biella* [1997] ECR I-195, paragraph 12.

for reference there is a question which seeks to ascertain whether the derogation laid down in the Act of Accession also covers legislation of the kind applied in the main proceedings, but there is no description at all of any violation of rights guaranteed by the Community legal order. It is only the alleged violation of such rights which logically justifies the need to apply the derogation in question. However, the national court does not clarify the grounds which prompted it to consider that the application of the derogation provided for in Article 70 was necessary and thus to submit the question under examination for a preliminary ruling.

10. But there are further considerations. As can be seen from the order for reference, the present case would not appear to have any connection with Community law. The land which is the subject of the dispute pending before the national court is located in Austria and both purchaser and vendor are Austrians. The situation therefore produces its effects entirely and solely within one Member State and consequently falls outside the scope of Community law.<sup>14</sup> In those circumstances, any answer which the Court gives to the question referred would be merely hypothetical, since it would concern the interpretation of a provision

which is already known to be inapplicable in the main proceedings.

It might be possible to arrive at a different assessment on the basis of the remark that the action for annulment brought in the main proceedings is founded on the alleged sham or, at least, the evasive nature of the transaction. The view could then be taken — as the *Land* Director does in his written observations<sup>15</sup> — that the alleged sham actually conceals the use of an intermediary in the contested transaction with a Community national rather than an Austrian as the real purchaser. However, as I have already stated, that remark is made — and not fully developed — solely in the observations submitted by the *Land* Director, and to which there is no reference in the account given by the national court. The Court's case-law, on the other hand, requires the matters of fact and of law in the main proceedings to be described clearly and fully by the national court in the order for reference. This is because it is only the order that is notified to the interested parties, including the Governments of the Member States.<sup>16</sup> I do not consider, therefore, that it is justified in the

14 — The inapplicability of Community law to purely domestic situations follows from the consistent case-law of the Court. See *inter alia* Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37, Case C-332/90 *Steen* [1992] ECR I-341, paragraph 9, Joined Cases C-29/94 to C-35/94 *Aubertin and Others* [1995] ECR I-301, paragraph 9, and *USSL No 47 di Biella*, cited above, paragraph 19.

15 — The *Land* Director does not, however, draw the appropriate conclusions from this observation since he himself supports the view that the Court lacks jurisdiction to answer the question, rightly claiming that the land transaction at issue involves two Austrian entities and is therefore a purely domestic situation arising in one Member State.

16 — In accordance with the case-law, 'it is the Court's duty to ensure that the opportunity to submit observations is maintained, bearing in mind that... only the decisions making references are notified to the interested parties': see Joined Cases 141/81, 142/81 and 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; orders in Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 13, Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 10, Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraphs 8 and 20, and Case C-2/96 *Sunino and Data* [1996] ECR I-1543, paragraph 5.

present case for the Court to venture into hypothetical reconstructions which have not been described in the order for reference and on which the Governments concerned have not had the opportunity to put forward their point of view, especially since the Court has properly adopted a cautious approach where there is the risk of answering hypothetical questions, with a view to safeguarding the effectiveness of the preliminary ruling procedure whose function would otherwise be distorted.

appear, 'objectively needed for the decision to be taken by the national court',<sup>18</sup> as required by the case-law of the Court. Where there is no such need, the Court clearly tends to decline jurisdiction to answer the questions submitted to it by the national court for a preliminary ruling.<sup>19</sup>

## Substance

11. I therefore believe that the Court should not answer the question referred by the national court for a preliminary ruling: any ruling on interpretation by the Court would — according to the terms of the order for reference — concern a merely domestic situation, since the main proceedings do not appear in any way to involve interests which merit protection under the Community legal order.<sup>17</sup> Bearing this in mind, the question of interpretation raised by the national court is not, it would

12. In the event of the Court nevertheless taking the view that it has to answer the question referred for a preliminary ruling, I will examine the merits of the question.

17 — This ground appears to me to override that put forward by the Commission and by the Austrian Government relating to the inapplicability *ratione temporis* of Community law to the present case. In that regard I do not believe that there are any doubts over the fact that the events at issue in the main proceedings arose prior to Austria's accession to the Community. However, when faced with a similar set of issues to that under examination here, the Court, in its judgment in *Saldanha* (Case C-122/96 [1997] ECR I-5325, paragraph 14), stated that Community law was applicable even to events arising prior to Austria's accession, provided that the effects of such previously existing situations persist (and continue) after accession. In the present case, this makes it problematical to accept the view that Community law is inapplicable *ratione temporis*. However, this ground is — in my view — irrelevant for the purposes of this case, since I believe the considerations put forward in the text concerning the inapplicability of Community law *ratione materiae* to be sufficient in themselves to justify the inadmissibility of the reference for a preliminary ruling.

The essential issue raised by the national court has already been brought to the attention of the Court of Justice in the *Konle* case. On that point, therefore, I will

18 — See the order in *Testa and Modesti*, cited above, paragraph 17.

19 — See Case C-291/96 *Grado and Bashir* [1997] ECR I-5531, paragraphs 16 and 17, and the order in Case C-428/93 *Monin Automobiles* [1994] ECR I-1707, paragraphs 15 and 16.

merely refer to the assessments which I made in that case.<sup>20</sup> The issue which arises essentially consists in ascertaining whether legislation introduced after Austria's accession to the Community, in so far as it makes a reference to legislative provisions introduced prior to accession, may be brought within the scope of the derogating provision laid down in Article 70 of the Act of Accession. That article provides that '[n]otwithstanding the obligations under the Treaties on which the EU is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession'. It is therefore necessary to assess whether legislation such as the TGVG 1996 — which was clearly introduced after accession — may nevertheless be regarded as legislation which may, under Article 70, be maintained in force.

In my view, the answer must be in the negative. As I stated in my Opinion in the *Konle* case, we are dealing with a derogation which, in accordance with the Court's case-law, must be given a strict interpretation.<sup>21</sup> That derogation is intended to grant the Austrian State exemption from liability if, during the prescribed period, it maintains its own legislation on secondary

residences. The derogation is thus applicable to the *provisions existing at the time of accession*. This means that, from that date, any further law-making by the Tyrol legislature remains outside the scope of Article 70 and must therefore necessarily comply with all the Community obligations from the observance of which Austria would be exempted if the derogation could apply. Chronologically speaking, the TGVG 1996 was clearly introduced after Austria's accession to the Community. In addition, it cannot be claimed, in my view, that that Law provides for merely procedural amendments to the previous system and leaves its provisions essentially unchanged. The TGVG 1996 introduces the general obligation to obtain authorisation for the acquisition of land and also permits the competent administrative authority to grant authorisation to the purchasers of the land in question by a fast-track procedure; no provision was made for either at the time of accession.<sup>22</sup> Furthermore, the abolition of the declaration procedure — previously envisaged by the TGVG 1993 — and the introduction of the authorisation procedure for everyone, further restricted the transferability of land. Therefore, the TGVG 1996 cannot either chronologically or substantively be regarded as forming part of the national legislation in force at the time of accession which is covered by the derogation provided for in Article 70.

20 — See the Opinion delivered on 23 February 1999 in Case C-302/97 *Konle*, pending.

21 — See Case C-233/97 *Kappahl Oy* [1998] ECR I-8069, paragraphs 15 and 21.

22 — The TGVG 1993 essentially prescribed that authorisation was necessary for land acquisitions, from which Austrian citizens who declared that they did not intend to establish a secondary residence on the land in question were exempted. As far as foreign nationals were concerned, it provided that authorisation would be granted only if acquisition did not impair the economic interests of the Austrian State and satisfied economic, social or cultural interests.



## Conclusion

13. In the light of the foregoing, I propose that the Court:

- declare inadmissible the reference for a preliminary ruling submitted by the Oberster Gerichtshof, Vienna, by order of 28 August 1997.