

JUDGMENT OF THE COURT (Sixth Chamber)

5 March 2002 *

In Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99,

REFERENCES to the Court under Article 234 EC by the Unabhängiger Verwaltungssenat Salzburg (Austria) for a preliminary ruling in the proceedings pending before that court between

Hans Reisch (C-515/99),

Walter Riedl (C-527/99),

Alexander Hacker (C-528/99),

Gerhard Eckert (C-529/99),

Franz Gstöttenbauer (C-530/99),

Helmut Hechwarter (C-531/99),

Alois Bixner (C-532/99),

Geza Aumüller (C-533/99),

* Language of the case: German.

Berthold Garstenauer (C-534/99 and C-536/99),

Robert Eder (C-535/99),

Hartmut Ramsauer (C-537/99 and C-538/99),

Harald Kronberger (C-539/99),

Erich Morianz (C-540/99)

and

Bürgermeister der Landeshauptstadt Salzburg,

Grundverkehrsbeauftragter des Landes Salzburg,

and between

Anton Lassacher,

Heinz Schäfer (C-519/99),

Dertnig GmbH & Co. KG,

Heinrich Reutter (C-520/99),

Francesco Branka (C-521/99),

Neubau GmbH,

Baumeister Bogensberger GmbH & Co. KG (C-522/99 and C-526/99),

Peter Fidelsberger (C-523/99),

**GWP Gewerbeparkentwicklung GmbH,
Johann Lindner and Emma Lindner (C-524/99)**

and

**Grundverkehrsbeauftragter des Landes Salzburg,
Grundverkehrslandeskommision des Landes Salzburg,**

on the interpretation of Articles 56 EC to 60 EC,

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissechet (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— H. Schäfer, represented by A. Pirkner, Rechtsanwalt,

— GWP Gewerbearparkentwicklung GmbH, by J. W. Aichlreiter, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by H. Sevenster, acting as Agent, and of the Commission of the European Communities, represented by U. Wölker and M. Patakia, acting as Agents, at the hearing on 12 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2001,

gives the following

Judgment

- 1 By 22 orders dated 22 December 1999, received at the Court on 30 December 1999, the Unabhängiger Verwaltungssenat Salzburg (Independent Administrative Chamber, Salzburg) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 56 EC to 60 EC.

- 2 In Cases C-515/99 and C-527/99 to C-540/99, a first question was raised in the course of actions brought against decisions of the Bürgermeister der Landeshauptstadt Salzburg (Mayor of Salzburg) imposing fines for late notification, as provided for in the Salzburger Grundverkehrsgesetz 1997 (Salzburg Land Transfer Law, Salzburg LGBl. No 11/97, hereinafter ‘the SGVG’), to the Grundverkehrsbeauftragter des Landes Salzburg (land transfer agent of the *Land* of Salzburg, responsible for receiving the notification from acquirers of title in immovable property, hereinafter ‘the Grundverkehrsbeauftragter’).

- 3 In Cases C-519/99 to C-524/99 and C-526/99, a second question arose in the course of appeals against decisions of the Grundverkehrslandeskommission des Landes Salzburg (Land Transfer Commission of the *Land* of Salzburg, hereinafter ‘the Grundverkehrslandeskommission’) adopted pursuant to the SGVG, opposing the acquisition of building plots or authorising such acquisition only subject to provision of security.

The legal background

Community law

- 4 Article 56(1) EC provides:

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

National legislation

- 5 Under Austrian law, ownership of immovable property is acquired by means of an entry in the land register confirmed by the Grundbuchsgericht (Land Registry Court), which is required to determine whether authorisation is necessary for the transfer and, if so, whether that authorisation has been granted.

- 6 In the *Land* of Salzburg, Paragraph 12 of the SGVG provides that certain legal transactions relating to building plots, such as the transfer of ownership or the grant of a right to build, are permissible only where the acquirer of title submits a declaration stating, first, that he is an Austrian national, or a national of another Member State exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area. The acquirer of title must, secondly, declare that the land will be used as his principal residence or to meet a commercial need. Use of the land as a secondary residence is possible only if the land was already used for that purpose before 1 March 1993 or if it is located in an area in which secondary residences are permitted.

- 7 On the basis of the declaration referred to in the preceding paragraph, the Grundverkehrsbeauftragter issues confirmation. He may only refuse to do so if there are grounds for suspecting that the property will not be used for the purpose stated in the declaration or if the acquisition is inconsistent with the aims of the SGVG. In that case the Grundverkehrsbeauftragter refers the acquirer of title to the Grundverkehrslandeskommission, which may authorise the transfer after ascertaining that the same substantive criteria relating to prohibition of use as a secondary residence have been met.

- 8 In the absence of confirmation from the Grundverkehrsbeauftragter or authorisation from the Grundverkehrslandeskommission no land may be acquired in the *Land* of Salzburg.

- 9 Paragraph 19 of the SGVG requires the acquirer of title to use the land in accordance with the declaration referred to in Paragraph 12 of the SGVG. Paragraph 19 also enables the Grundverkehrslandeskommission to attach conditions and requirements to its authorisation in order to ensure that the acquirer of title uses the land for the stated purpose, in particular by requiring security in an amount not exceeding the purchase price or the value of the land.

- 10 Paragraph 36 of the SGVG lays down the time-limits within which the acquirer of title must lodge the declaration of acquisition.

- 11 Under Paragraph 42 of the SGVG the Grundverkehrsbeauftragter may bring before the national court an action for annulment of the property transaction where this is intended to circumvent the application of the SGVG.

- 12 Paragraph 43 of the SGVG provides for fines of up to ATS 500 000 and sentences of imprisonment of up to six weeks, *inter alia* where the acquirer of title has failed to submit the necessary declaration or to apply for the necessary authorisation, or if he uses the land for an unauthorised purpose.

The main proceedings and the questions referred for a preliminary ruling

- 13 In Cases C-515/99 and C-527/99 to C-540/99 the Mayor of Salzburg imposed a fine on each of the applicants for failure to notify to the Grundverkehrsbeauftragter within the period laid down by Paragraph 36 of the SGVG a legal transaction relating to the acquisition of building plots. They appealed against those decisions to the Unabhängiger Verwaltungssenat Salzburg.
- 14 In Cases C-519/99 to C-522/99 and C-526/99, the Grundverkehrslandeskommission did not grant at first instance the authorisation necessary for the sale of building plots, and the acquirers of title appealed against the corresponding decisions to the Unabhängiger Verwaltungssenat Salzburg.
- 15 In Cases C-523/99 and C-524/99, the Grundverkehrslandeskommission granted authorisation to acquire building plots but required that security be provided pursuant to Paragraph 19(3) of the SGVG. The acquirers of title appealed against the corresponding decisions to the Unabhängiger Verwaltungssenat Salzburg.
- 16 In the light of the judgment in Case C-302/97 *Konle* [1999] ECR I-3099, which concerned the legislation of the *Land* of Tyrol on land transactions, the referring court was concerned with the issue whether the requirement of prior notification/authorisation in respect of the acquisition of building plots and the criminal sanctions attaching to failure to fulfil that requirement were compatible with the fundamental freedoms of the Treaty.

- 17 Accordingly, the Unabhängiger Verwaltungssenat Salzburg referred to the Court for a preliminary ruling the following questions:

In Cases C-515/99 and C-527/99 to C-540/99:

‘Are the provisions of Article 56 EC et seq. to be interpreted as precluding the application of Paragraphs 12, 36 and 43 of the SGVG 1997 in the version published in LGBL. No 11/99, whereby any person who wishes to acquire a building plot in the federal *Land* of Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedoms of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?’

In Cases C-519/99 to C-524/99 and C-526/99:

‘Are the provisions of Article 56 EC et seq. to be interpreted as precluding the application of Paragraphs 12 to 14 of the SGVG 1997 in the version published in LGBL. No 11/99, whereby any person who wishes to acquire a building plot in the federal *Land* of Salzburg must comply with a notification or authorisation procedure in respect of the acquisition of that plot, with the consequence that one of the fundamental freedoms of the acquirer of title as guaranteed by the laws of the European Union has been infringed in this case?’

- 18 Cases C-515/99 and C-527/99 to C-540/99 were joined for the purposes of the written and oral procedure and of the judgment by order of the President of the Court of Justice of 24 February 2000. Cases C-519/99 to C-524/99 and C-526/99 were also joined for the purposes of the written and oral procedure and of the judgment by order of the President of the Court of Justice of 24 February 2000.
- 19 For the purposes of the present judgment, it is appropriate to order the joinder of all those cases.

The questions referred for a preliminary ruling

Admissibility

- 20 GWP Gewerbeparkentwicklung GmbH submits, first, that the question referred for a preliminary ruling in Cases C-519/99 to C-524/99 and C-526/99 is inadmissible since it does not concern the interpretation of the Treaty, but the interpretation or assessment of the validity of the provisions of the SGVG, which are matters for the national court alone.
- 21 Secondly, it considers that the main proceedings to which it is a party, which concern only the conditions for the acquisition by an Austrian company of land in Austria pursuant to the SGVG, have no connection with Community law and relate to a purely internal situation, thereby making the reference for a preliminary ruling inadmissible.

- 22 It will be recalled in respect of the first submission that, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5).
- 23 In the main proceedings, the referring court asks the Court to interpret Treaty provisions solely for the purposes of determining whether those provisions are capable of affecting the effects of national rules which the referring court is required to apply. It cannot therefore be maintained that the purpose of the question referred for a preliminary ruling in each of the cases is anything other than the interpretation of provisions of the Treaty.
- 24 As for the second submission, it is apparent from the documents in the case file, and it is not, moreover, in dispute, that all the facts in the main proceedings are confined to a single Member State. National legislation such as the SGVG, which applies without distinction to Austrian nationals and to nationals of Member States of the European Communities, may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 9, and Case 98/86 *Mathot* [1987] ECR 809, paragraphs 8 and 9).
- 25 However, that finding does not mean that there is no need to reply to the questions referred to the Court for a preliminary ruling in this case. In principle, it is for the national courts alone to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable

them to give their judgment and the relevance of the questions which they refer to the Court (see Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 22). A reference for a preliminary ruling from a national court may be rejected by the Court only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18).

- 26 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the referring court. Such a reply might be useful to it if its national law were to require that an Austrian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (*Guimont*, cited above, paragraph 23).
- 27 Accordingly, it is necessary to consider whether the provisions of the Treaty, interpretation of which is sought, preclude the application of national legislation such as that in issue in the main proceedings to the extent that it is applied to persons resident in other Member States.

Substance

- 28 It should be stated, as a preliminary point, that national legislation which regulates the acquisition of land for the purposes of prohibiting, in the interests of regional planning, the establishment of secondary residences in certain areas must

comply with the provisions of the Treaty on the free movement of capital (*Konle*, cited above, paragraph 22).

- 29 First, as is apparent from Article 44(2)(e) EC, the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment (Case 305/87 *Commission v Greece* [1989] ECR 1461, paragraph 22), generates capital movements when it is exercised.
- 30 Secondly, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for the purposes of defining the notion of capital movements (see Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21, and Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5).
- 31 It is therefore necessary, as the referring court requests the Court to do, to determine the scope of the national measures in issue in the main proceedings in the light of Articles 56 EC to 60 EC.
- 32 It is not in dispute that those measures, by laying down a procedure of prior notification/authorisation for the acquisition of immovable property, restrict, by their very purpose, the free movement of capital (see, to that effect, *Konle*, cited above, paragraph 39).

- 33 Such restrictions may nevertheless be permitted if the national rules pursue, in a non-discriminatory way, an objective in the public interest and if they observe the principle of proportionality, that is if the same result could not be achieved by other less restrictive measures.
- 34 As regards the first requirement, it is apparent from paragraph 40 of the *Konle* judgment, cited above, that restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposes in order to maintain, for regional planning purposes, a permanent population and an economic activity independent of the tourist sector, may be regarded as contributing to an objective in the public interest. That finding can only be strengthened by the other concerns which may underly those same measures, such as protection of the environment. Moreover, it is apparent from the provisions of the SGVG that they do not discriminate between Austrian acquirers of title and persons resident in other Member States who exercise the freedoms guaranteed by the Treaty.
- 35 As regards the second requirement, the Court held, in paragraphs 44 to 48 of the *Konle* judgment, cited above, that a requirement of declaration prior to the purchase of building plots, coupled with the possibility of penalties for breach of the agreed declaration, for regional planning purposes, did comply with Community law. The procedure laid down by the SGVG is essentially declaratory in principle.
- 36 As the Austrian Government points out, it is only where the Grundverkehrsbeauftragter considers that there are grounds for believing that the property is not being used lawfully that he must refer the acquirer of title to the Grundverkehrslandeskommision for the transaction to be submitted to the authorisation procedure. That minimum requirement of prior notification has the advantage,

unlike supervision procedures which are applied only *a posteriori*, of providing the acquirer of title with an element of legal certainty. Furthermore, it may be thought that prior examination is better suited to preventing certain damage, which is repairable only with difficulty, caused by hastily completed building projects. Thus, the formality of prior notification may be regarded as a step which is additional to the criminal sanctions and the action for annulment of the sale which the administrative authorities may bring before the national court. In those circumstances, this first aspect of the procedure instituted by the SGVG may be regarded as compatible with Community law.

- 37 As regards the procedure of prior authorisation before the Grundverkehrslandeskommision, by contrast, the Court has already held that restrictions on the free movement of capital resulting from the requirement of prior authorisation were able to be eliminated by means of an appropriate notification system without thereby detracting from the effective pursuit of the aims of those rules (see Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 27, and Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 26 and 27).
- 38 In the main proceedings, given the opportunity for supervision which the prior notification scheme affords to the public authority, the existence of criminal sanctions and a specific action for annulment which may be brought before the national court should the project carried out fail to comply with the initial declaration, the prior authorisation procedure, which the Grundverkehrsbeauftragter alone may initiate on the basis of mere presumptions, cannot be regarded as a measure which is strictly indispensable to prevent infringements of the legislation in issue in the main proceedings in respect of secondary residences. This is all the more so given that the competent authorities may make the grant of prior authorisation subject to requirements on which the SGVG does not impose any substantive restriction, and require the acquirer of title to provide security up to the value of the property.

39 The provisions of the SGVG relating to the prior authorisation procedure before the Grundverkehrslandeskommission therefore go beyond both that which is necessary to achieve the chosen regional planning objective and the measures which Member States are entitled to take, as set out in Article 58(1)(b) EC, to prevent infringements of their laws and regulations.

40 Accordingly, the reply to the referring court should be that Articles 56 EC to 60 EC:

- do not preclude a prior notification procedure such as that laid down by the scheme for the acquisition of land established by the SGVG;

- preclude a prior authorisation procedure such as that laid down by that scheme.

Costs

41 The costs incurred by the Austrian and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Unabhängiger Verwaltungssenat Salzburg, by orders of 22 December 1999, hereby rules:

Articles 56 EC to 60 EC:

- do not preclude a prior notification procedure such as that laid down by the scheme for the acquisition of land established by the Salzburger Grundverkehrsgesetz 1997;
- preclude a prior authorisation procedure such as that laid down by that scheme.

Colneric

Gulmann

Puissochet

Schintgen

Skouris

Delivered in open court in Luxembourg on 5 March 2002.

R. Grass

F. Macken

Registrar

President of the Sixth Chamber

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