

JUDGMENT OF THE COURT (Fifth Chamber)
7 September 1999 *

In Case C-355/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberster Gerichtshof, Austria, for a preliminary ruling in the proceedings pending before that court between

Landesgrundverkehrsreferent der Tiroler Landesregierung

and

Beck Liegenschaftsverwaltungsgesellschaft mbH,

Bergdorf Wohnbau GmbH, in liquidation,

Intervener:

Karl Hacker,

on the interpretation of 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Landesgrundverkehrsreferent der Tiroler Landesregierung, by Herwig Grosch, Rechtsanwalt, Kitzbühel,
- Beck Liegenschaftsverwaltungsgesellschaft mbH, by Klaus Reisch, Rechtsanwalt, Kitzbühel,
- Dr Hacker, by Michael Graff, Rechtsanwalt, Vienna,
- the Republic of Austria, by Christine Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Viktor Kreuzschatz, Legal Adviser, and Maria Patakia, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 March 1999,

gives the following

Judgment

- 1 By order of 28 August 1997, received at the Court on 15 October 1997, the Austrian Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1; hereinafter 'the Act of Accession').
- 2 That question was raised in proceedings between the Landesgrundverkehrsreferent der Tiroler Landesregierung (an official of the *Land* of Tyrol responsible for monitoring the legality of transactions for the purchase or sale of immovable property; hereinafter 'the Landesgrundverkehrsreferent'), on the one hand, and Beck Liegenschaftsverwaltungsgesellschaft mbH (hereinafter 'Beck') and Bergdorf Wohnbau GmbH (hereinafter 'Bergdorf'), on the other, concerning the sale by Bergdorf to Beck of a flat at Fieberbrunn, in the Tyrol, by contract dated 14 October 1983 and notarised by Dr Hacker (hereinafter 'the transaction in dispute').

The relevant national legislation

- 3 Under the Tiroler Grundverkehrsgesetz of 18 October 1983 (Tiroler LGBl. 69/1983; Tyrol Law on the acquisition and sale of land; hereinafter 'the TGVG

1983'), as amended by the Law of 3 July 1991 (Tiroler LGBL. 74/1991; hereinafter 'the 1991 Law') which entered into force on 1 October 1991, where there are grounds for assuming that a transaction for the purchase or sale of immovable property in the Tyrol — including one concluded before the 1991 Law entered into force — is either fictitious or fraudulent, the Landesgrundverkehrsreferent may bring proceedings for a declaration that it is void.

- 4 The TGVG 1983, as amended, was replaced with effect from 1 January 1994 by the Tiroler Grundverkehrsgesetz of 7 July 1993 (Tiroler LGBL. 82/1993; hereinafter 'the TGVG 1993'). This Law, which also provides that, in the case of a fictitious or fraudulent transaction involving immovable property, the Landesgrundverkehrsreferent may bring an action for a declaration that it is void, even where it has been concluded before the entry into force of the new Law, states that the provisions of the TGVG 1983, in the version most recently in force, are to continue to govern actions brought in respect of transactions concluded before 1 January 1994.

- 5 The TGVG 1993 was itself repealed, with effect from 1 October 1996, by the Tiroler Grundverkehrsgesetz of 3 July 1996 (Tiroler LGBL. 61/1996; hereinafter 'the TGVG 1996'), Section 35(1) of which confirms the right of the Landesgrundverkehrsreferent to have a fictitious or fraudulent land transaction declared void and also provides that the TGVG 1983, in the version most recently in force, is to continue to govern proceedings concerning transactions concluded before 1 January 1994.

- 6 Section 40(2) of the TGVG 1996 accordingly provides:

'In administrative disputes concerning transactions involving immovable property which were pending as at 1 January 1994 the merits of the case shall continue to be decided on the basis of the TGVG 1983. So far as concerns the competent authorities and the procedure, the provisions contained in the present Law shall apply.'

7 Section 40(5) of the TGVG 1996 provides:

‘The right conferred on the Landesgrundverkehrsreferent to bring proceedings under Section 35(1) also covers fictitious or fraudulent transactions concluded before the entry into force of the present Law. The TGVG 1983 is to be applied to proceedings brought under Section 35(1) in so far as they concern fictitious or fraudulent transactions concluded before 1 January 1994.’

The relevant Community legislation

8 Article 70 of the Act of Accession provides:

‘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.’

The main proceedings

9 On 28 March 1994 the Landesgrundverkehrsreferent brought an action on the basis of the TGVG 1983, as amended by the 1991 Law, before the Landesgericht (Regional Court), Innsbruck, for a declaration that the transaction in dispute was void.

- 10 By judgment of 25 January 1995 the Landesgericht Innsbruck found in favour of the Landesgrundverkehrsreferent; by judgment of 28 June 1995, that decision was upheld on appeal by the Oberlandesgericht (Higher Regional Court), Innsbruck.
- 11 Beck and Dr Hacker, the intervener, thereupon appealed on a point of law to the Oberster Gerichtshof (Supreme Court), challenging in particular the right of the Landesgrundverkehrsreferent to bring an action where there was no legal basis for it.
- 12 The Oberster Gerichtshof declared that the 1991 Law, amending the TGVG 1983, on which the action brought by the Landesgrundverkehrsreferent was based, had been declared unconstitutional by the Verfassungsgerichtshof (Constitutional Court) by judgment of 28 September 1996 and could not therefore be relied upon in the dispute.
- 13 In order to ascertain whether the TGVG 1993 could constitute a basis for the action brought by the Landesgrundverkehrsreferent in the main proceedings, the Oberster Gerichtshof raised the question whether that Law was constitutional and submitted the matter to the Verfassungsgerichtshof which, by judgment of 10 December 1996, declared that the TGVG 1993 was unconstitutional and inapplicable to the dispute, save for those of its provisions which remained in force by virtue of Section 40 of the TGVG 1996.
- 14 The Oberster Gerichtshof concludes, therefore, that the question whether the Landesgrundverkehrsreferent is entitled to bring proceedings must be decided on the basis of Section 40 of the TGVG 1996, since the previous legislation no longer applies.
- 15 However, since the TGVG 1996 was adopted after Austria's accession to the European Union on 1 January 1995, the Oberster Gerichtshof is uncertain whether Section 40(2) and (5) of the TGVG 1996 are among the provisions

which, pursuant to Article 70 of the Act of Accession, Austria was authorised to maintain for a period of five years from the date of accession.

- 16 Taking the view that the interpretation of Article 70 of the Act of Accession was necessary to enable it to give judgment in the case, the Oberster Gerichtshof ordered proceedings to be stayed and referred the following question to the Court for a preliminary ruling:

‘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 Section 40(2) and (5) of the *Tiroler Grundverkehrsgesetz 1996* (*Landesgesetzblatt für Tirol* No 61/1996) 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?’

- 17 By its question, the Oberster Gerichtshof essentially asks whether the concept of existing legislation, within the meaning of Article 70 of the Act of Accession, covers provisions such as Section 40(2) and (5) of the *TGVG 1996*, which were adopted after the date of accession and which provide that legislation already in force on that date — but since declared unconstitutional and inapplicable in the proceedings in progress — which confers on administrative authorities the right to bring an action to have sales of immovable property declared void is to continue to apply to transactions concluded before accession.

Admissibility

- 18 According to the Landesgrundverkehrsreferent, the Austrian Government and the Commission, a preliminary ruling from the Court on the question referred in this case can be of no use whatsoever in resolving the dispute in the main proceedings.
- 19 First, Community law cannot be relied upon in that dispute, whether *ratione temporis* — because both the transaction at issue, concluded on 14 October 1983, and the proceedings for annulment, brought by the Landesgrundverkehrsreferent on 28 March 1994, predated Austria's accession — or *ratione materiae* — because the transaction, concluded between two Austrian companies and having no legal effects outside Austrian territory, did not fall within the scope of Community law.
- 20 Second, whereas the interpretation sought concerns the phrase 'existing legislation regarding secondary residences' within the meaning of Article 70 of the Act of Accession, there is nothing in the order for reference to indicate that the dispute in the main proceedings concerns a secondary residence, with the result that the question is irrelevant.
- 21 Lastly, insufficient grounds have been given in the order for reference, relating as it does to the legal consequences of successive legislative amendments and declarations of unconstitutionality, to enable the Court to establish whether the interpretation sought is likely to have a bearing on the appraisal of the legal basis of the judicial proceedings brought by the Landesgrundverkehrsreferent.
- 22 There is not enough force in any of those arguments to rebut the presumption of relevance attaching to questions referred by the national courts for a preliminary ruling. That is possible only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the

Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-105/94 *Celestini* [1997] ECR I-2971, paragraph 22). Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of Community law (see *Bosman*, cited above, paragraph 59).

- 23 In the present case, the order for reference sets out the grounds of domestic law which led the national court to consider that the question concerning the right of the Landesgrundverkehrsreferent to bring an action for a declaration that a land transaction is void — the point on which the case before the national court turns — must be decided on the basis of Section 40(2) and (5) of the TGVG 1996. That Law contains provisions, Sections 11 and 14 in particular, designed to prevent the establishment of secondary residences.
- 24 Against that factual and legislative background, so defined by the national court and the accuracy of which is not a matter for this Court to ascertain (see, to that effect, Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraphs 9 to 14); it does not appear that the interpretation of the concept of ‘existing legislation’ within the meaning of Article 70 of the Act of Accession is wholly unrelated to the main action, or that the problem is hypothetical, or that the Court lacks the factual or legal material necessary to give a useful answer.
- 25 The Landesgrundverkehrsreferent and the Commission also maintain that, from the way the question is framed, the Court is being asked to classify certain provisions of national law — the TGVG 1996 — in terms of the Community concept of ‘existing legislation’, that is to say, it is being asked to interpret national law. However, it is for the national court alone to determine which provisions of national law formed part of the existing legislation of the Member State at the date of its accession.

- 26 While, in principle, it is for the national court to determine the content of existing legislation regarding secondary residences on 1 January 1995, it is for the Court of Justice to provide that court with guidance on interpreting the Community concept of 'existing legislation' in order to enable it to do so (see Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 27).
- 27 It is appropriate, therefore, to answer the question referred.

The question referred for a preliminary ruling

- 28 The first point to note is that, since the rule in Article 70 of the Act of Accession is laid down by way of derogation, it should in principle be applied solely in the case of national legislation which, in the absence of that rule, would as such be incompatible with Community law. Thus, before addressing the question whether or not Section 40(2) and (5) of the TGVG 1996 constitutes existing legislation regarding secondary residences at the time of Austria's accession to the European Union, the national court must first ascertain that, subject to the application of Article 70 of the Act of Accession, those provisions are contrary to a rule of Community law. That appraisal, which is a matter for the national court, in any event goes beyond the scope of the question referred to the Court for a preliminary ruling.
- 29 The Landesgrundverkehrsreferent, the Austrian Government and the Commission contend that provisions such as Section 40(2) and (5) of the TGVG 1996 merely maintain in force, with respect to transactions concluded before that Law took effect, rules which were part of the legislation applicable at the time when Austria acceded to the European Union. Thus the legal situation existing as at 1 January 1995 could not in any event have deteriorated and the measure does not go beyond the scope of the transitional provisions of the Act of Accession

which allow Austria a period of five years to bring its legislation into line with Community law.

30 Beck submits, on the other hand, that since the legislation prior to the TGVG 1996 has been eliminated with retroactive effect from the Austrian legal system after being declared unconstitutional by the Verfassungsgerichtshof, Section 40 of the TGVG 1996 constitutes new legislation. That legislation adversely affects the position of the parties concerned by comparison with previous arrangements under the TGVG 1983 as it stood before it was amended by the 1991 Law. Under those arrangements, according to Beck, in order to contest a transaction, the administration had to bring an action within three years of its completion, whereas the TGVG 1996 places no temporal restrictions on the initiation of such proceedings.

31 The concept of existing legislation within the meaning of Article 70 of the Act of Accession, which it is for the national court to apply, is based on a factual criterion, so that its application does not require an assessment of the validity in domestic law of the national provisions at issue. Thus, any rule regarding secondary residences which was in force in Austria at the date of accession is, in principle, covered by the derogation laid down in Article 70 of the Act of Accession (see *Konle*, cited above, paragraph 28).

32 It would be otherwise if that rule were withdrawn from the domestic legal system by a decision subsequent to the date of accession but with retroactive effect from before that date, thereby eliminating the provision in question as regards the past (see *Konle*, cited above, paragraph 29).

33 In proceedings for a preliminary ruling, it is for the courts of the Member State concerned to assess the temporal effects of declarations of unconstitutionality

made by the constitutional court of that Member State (see *Konle*, cited above, paragraph 30).

- 34 Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. Thus, if it is in substance identical to the previous legislation or is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation (see *Konle*, cited above, paragraph 52).
- 35 On the other hand, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of accession (see *Konle*, cited above, paragraph 53).
- 36 It follows that, if the provisions of Section 40 of the TGVG 1996 were deemed to have as their sole purpose the maintenance of rules which were in force on 1 January 1995, they would have to be covered by the derogation introduced by Article 70 of the Act of Accession.
- 37 The answer to the question referred for a preliminary ruling must therefore be that the concept of existing legislation, within the meaning of Article 70 of the Act of Accession, covers provisions adopted after the date of accession which are in substance identical to the legislation previously in force or limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation.

Costs

- 38 The costs incurred by the Austrian Government and 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Oberster Gerichtshof by order of 28 August 1997, hereby rules:

The concept of existing legislation, within the meaning of 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, covers provisions adopted after the date of accession which are in substance identical to the legislation previously in force or

limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation.

Puissochet Moitinho de Almeida Gulmann
Edward Wathelet

Delivered in open court in Luxembourg on 7 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber