JUDGMENT OF THE COURT (Grand Chamber)

25 January 2011 *

In Case C-382/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Austria), made by decision of 19 August 2008, received at the Court on 25 August 2008, in the proceedings

Michael Neukirchinger

v

Bezirkshauptmannschaft Grieskirchen,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, D. Šváby, Presidents of Chambers, A. Rosas, U. Lõhmus, E. Levits, L. Bay Larsen (Rapporteur) and M. Berger, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 June 2010,

after considering the observations submitted on behalf of:

— Mr Neukirchinger, representing himself;

— the Austrian Government, by C. Pesendorfer and G. Eberhard, acting as Agents,

— the Polish Government, by M. Dowgielewicz and M. Szpunar, acting as Agents,

— the European Commission, by E. Traversa and B.-R. Killmann, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC et seq.

2 The reference has been made in proceedings between Mr Neukirchinger and the Bezirkshauptmannschaft Grieskirchen (Grieskirchen local authority) concerning a decision of that authority imposing an administrative fine on the appellant in the main proceedings for failure to comply with the rules governing the organisation of balloon flights.

Legal context

European Union legislation

3 The first three recitals in the preamble to Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1) state as follows:

'… it is important to establish an air transport policy for the internal market over a period expiring on 31 December 1992 as provided for in Article 8a of the Treaty;

… the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

… the application in the air transport sector of the principle of the freedom to provide services needs to take into account the specific characteristics of that sector.'

4 Under Article 1 of Regulation No 2407/92:

'1. This Regulation concerns requirements for the granting and maintenance of operating licences by Member States in relation to air carriers established in the Community.

2. The carriage by air of passengers, mail and/or cargo, performed by non-power driven aircraft and/or ultra-light power driven aircraft, as well as local flights not involving carriage between different airports, are not subject to this Regulation. In respect of these operations, national law concerning operating licences, if any, and Community and national law concerning the air operator's certificate (AOC) shall apply.'

5 Regulation No 2407/92 was repealed by Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ 2008 L 293, p. 3). Pursuant

to Article 28 (entitled 'Entry into force') of Regulation No 1008/2008, the regulation entered into force on the day following its publication in the *Official Journal of the European Union*, that date of publication being 31 October 2008.

National legislation

6 The Luftfahrtgesetz of 2 December 1957 (Austrian Law on air transport) (BGBl. 253/1957), as amended by the Law published on 26 June 2008 (BGBl. I, 83/2008) ('the LFG'), provides in Paragraph 11(1) that:

'Aircraft are vehicles which can transport persons or objects by air, without any mechanical connection to the earth, whether heavier than air (for example, aeroplanes, gliders, hang-gliders, paragliders or ornithopters, helicopters, gyroplanes and parachutes) or lighter than air (for example, dirigibles and free balloons).'

7 Paragraph 102(1) of the LFG states:

'Undertakings which, by means of non-power driven or ultra-light aircraft, wish, in commercial air traffic operations, to transport passengers, mail and/or cargo, or merely to organise round-trip flights not involving carriage between different airfields, are required to apply for a transport licence pursuant to Paragraph 104b et seq. and for an operating licence pursuant to Paragraph 108 from the Federal Minister for

Transport, Innovation and Technology or from the competent authority authorised to do so pursuant to Paragraph 140b.'

8 Paragraph 104 of the LFG provides:

'1. The application for issue of a transport licence must convincingly indicate that financial resources are available to establish and operate the undertaking.

2. The application must also mention:

(a) The surname and first name (company name), residence (company seat) and location of the undertaking's commercial premises;

(b) The names, place of residence and nationality of the persons entitled to represent the undertaking;

(c) The activities to be carried out, for example round-trip flights;

(d) …

(e) The airspace to be used, that is to say, the area to be covered by the planned operations;

(f) The number and design of aircraft to be used;

(g) How the undertaking is to be organised.

…'

9 Paragraph 106 of the LFG provides:

'1. The transport licence shall be issued:

(a) if the applicant is a national of a contracting party to the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 1)], is resident in Austria, and is reliable and technically competent;

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

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

2. If the operator is not a natural person, the undertaking must have its seat in Austria and the majority of the company's share capital must be held by nationals of a contracting party to the Agreement on the European Economic Area.'

10 Under Paragraph 108 of the LFG:

'1. The operation of an air transport undertaking may be authorised only pursuant to a licence issued, on application by the transport licence holder, by the Federal Minister for Transport, Innovation and Technology, or by the competent authority authorised to do so pursuant to Paragraph 140b (operating licence).

2. The operation must be authorised if the conditions laid down in the transport licence are fulfilled and traffic safety is guaranteed. In order for it to be valid, the licence must be issued in writing.'

11 Pursuant to Paragraph 169(1), fourth subparagraph, of the LFG, a fine of not less than EUR 3 630 is to be imposed in the case of the commercial carriage of passengers by air without the licences provided for under Paragraph 102 of that Law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 It is apparent from the order for reference that the Bezirkshauptmannschaft Grieskirchen, by an administrative penal order of 22 January 2008, imposed on Mr Neukirchinger a fine of EUR 3 630 and, in default of payment, a period of imprisonment of 181 days.

13 Mr Neukirchinger was charged with having, on 19 June 2007, transported passengers in a hot-air balloon for commercial purposes, from a meadow in the locality of Wies, in Kallham, in the *Land* of Oberösterreich (Federal State of Upper Austria), without a transport or operating licence as required by Paragraph 104 et seq. and Paragraph 108 of the LFG, respectively.

14 Mr Neukirchinger, who holds a licence, issued in Germany, for the operation of commercial balloon flights for passengers and cargo, appealed to the referring court against that administrative decision, claiming, inter alia, that the freedom of movement entitles a flight operator who holds a licence in Germany to carry out his activity in Austria.

15 Having regard to the fact that Mr Neukirchinger travelled temporarily to another Member State in the course of providing a service, the facts of the main proceedings come, according to the referring court, prima facie within the scope of freedom to provide services.

16 The referring court also states that Mr Neukirchinger was granted, by the Landeshauptmann (head of government) of the *Land* Oberösterreich, acting as the competent aviation authority at first instance for the area of activities concerned, a general launch licence pursuant to Paragraph 9 of the LFG, valid for the year 2008 for the whole of that *Land*. The issue of such a licence also implies recognition by that authority that the licence issued to Mr Neukirchinger in Germany was valid.

17 As it took the view that resolution of the dispute before it required an interpretation of Article 49 EC et seq., the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the *Land* of Upper Austria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 49 [EC] et seq. … to be interpreted as precluding a national provision which requires a person who is established in another Member State and who is licensed, pursuant to the legal order of that Member State, to operate commercial balloon flights (in Germany), to have a company seat or place of residence in Austria in order to be able to operate balloon flights in Austria (Paragraph 106 [of the LFG])?

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

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

establishing a separate place of business and/or residence, and without re-registering in Austria a hot-air balloon that is already registered in Germany?'

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

The questions referred for a preliminary ruling

Preliminary observations

19 As observed by the Advocate General in points 25 to 30 of his Opinion, a service such as that at issue in the main proceedings falls within the transport sector and, more particularly, within the air transport sector, referred to in Article 80(2) EC.

20 In the absence of any indication to the contrary in the EC Treaty, the concept of air transport within the meaning of that provision must be understood as also covering a form of transport which the referring court categorises as the carriage by air of passengers in a hot-air balloon for commercial purposes. Moreover, as the Advocate General states in point 26 of his Opinion, the Chicago Convention on International Civil Aviation of 7 December 1944 also applies to hot-air balloons.

21 While, under Article 80(2) EC, sea and air transport are, in so far as the Community legislature has not decided otherwise, not subject to the rules contained in Title V of Part Three of the EC Treaty relating to the common transport policy, they remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 32, and Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 45).

22 However, with regard to the freedom to provide services, in accordance with Article 51(1) EC, Article 49 EC does not apply as such to the air transport sector (see, to that effect, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 10 and the case-law cited, and Case C-467/98 *Commission* v *Denmark* ('Open Skies') [2002] ECR I-9519, paragraph 123).

23 With regard to the carriage by air of passengers in a hot-air balloon for commercial purposes, such as that at issue in the main proceedings, it should be noted that the Community legislature has adopted several measures on the basis of Article 80(2) EC which may, as observed by the European Commission, affect that form of air transport. That applies, for example, at the time of the facts of the main proceedings, in regard to Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ 2002 L 240, p. 1) and to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4), amended by Regulation (EC) No 1900/2006 of the European Parliament and of the Council of 20 December 2006 (OJ 2006 L 377, p. 176).

24 With regard, in particular, to the licensing of air carriers, Article 84(2) of the EEC Treaty (subsequently Article 84(2) of the EC Treaty, which itself, following amendment, became Article 80(2) EC) was implemented by the adoption of Regulation No 2407/92, which was applicable at the time of the facts at issue in the main proceedings.

25 It is, admittedly, true that, pursuant to Article 1(2) of Regulation No 2407/92, the Council excluded the licensing of air carriers from the scope of that regulation where, for example, the carriage by air of passengers was performed by non-power driven aircraft, thus including hot-air balloons. In respect of modes of transport of that nature, the Council explicitly specified, in that provision, that national law governing operating licences was alone to apply, and that European Union and national law was to apply in regard to the air operator's certificate.

26 Nevertheless, as is apparent from the first two recitals in the preamble to Regulation No 2407/92, the objective pursued by the Council, when adopting that regulation, was to establish, by 31 December 1992, an air transport policy for the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital would be ensured. The obligation on the Community to establish the internal market by that date, including in the transport sector, was provided for in Article 8a of the EEC Treaty (subsequently, following amendment, Article 7a EC, which itself, following amendment, became Article 14 EC).

27 Such a broad objective also prima facie covers carriage by air of passengers in a hot-air balloon for commercial purposes, such as that at issue in the main proceedings.

28 Thus, while the exclusion provided for under Article 1(2) of Regulation No 2407/92 can obviously be accounted for by the fact that the specific nature of the air transport sector did not justify carriage by air of passengers in a hot-air balloon for commercial purposes being made subject to the rules provided for under that regulation, it does not, however, follow that, by that exclusion, the Community legislature had intended to remove such a mode of transport completely from the scope of application of the Treaty.

29 It follows from all of the foregoing that carriage by air of passengers in a hot-air balloon for commercial purposes, such as that at issue in the main proceedings, falls within the scope of the EC Treaty and that it is therefore subject to a general rule of the Treaty, such as Article 12 EC.

30 Consequently, in order to provide the referring court with a useful answer, the questions referred must be examined from the perspective of Article 12 EC, which enshrines the general principle of non-discrimination on grounds of nationality (see, inter alia, Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 33, and Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 37).

First, second and third questions

31 By its first, second and third questions, which should be examined together, the referring court asks, in essence, whether Article 12 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which, for the operation of balloon flights in that Member State and subject to administrative sanctions in the case of non-compliance with that legislation,

— requires a person resident or established in another Member State, who is licensed in that second Member State to operate commercial balloon flights, to have a place of residence or company seat in the first Member State, and

— obliges that person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those applying to the licence already issued to him in the second Member State.

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

33 In the first place, to the extent to which legislation of a Member State, such as that at issue in the main proceedings, requires a person to have a place of residence or a company seat in that Member State in order to be permitted to operate commercial balloon flights there, it establishes a distinguishing criterion which is based, for natural persons, on their place of residence, and for companies, on their company seat.

34 With regard, first, to the distinguishing criterion based on residence, this in fact leads to the same result as discrimination based on nationality, since it is liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreign nationals (see, inter alia, to that effect, Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14; Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14; and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 53).

35 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (*Bidar*, paragraph 54 and case-law cited).

36 However, there is nothing in the documents submitted to the Court to indicate that any such justification exists in the case of legislation such as that at issue in the main proceedings.

37 With regard, second, to the distinguishing criterion based on the company seat, this amounts, in principle, to discrimination by reason of nationality, as is apparent from the case-law cited in paragraph 32 of the present judgment.

38 In the second place, legislation of a Member State such as that at issue in the main proceedings obliges a person resident or established in another Member State, who is licensed in that second Member State to operate commercial balloon flights, to obtain a new licence in the first Member State, without due account being taken of the fact that the conditions of issue are, essentially, the same as those applying to the licence already issued to him in the second Member State. That being the case, such legislation establishes a distinguishing criterion which in fact leads to the same result as a criterion based on nationality.

39 By refusing to take into account the licence issued in the second Member State, such legislation imposes on the person concerned, should he wish to organise commercial balloon flights on the territory of the first Member State, the obligation to repeat all the steps necessary in order to obtain a licence. The obligation imposed by that State concerns, in practice, primarily nationals of other Member States or companies which have their seat in other Member States.

40 The Austrian Government contends that the obligation to obtain a licence delivered by the Austrian authorities is justified by the interest in protecting the life and health

of the persons carried and by the interest in ensuring the safety of air transport. It also disputes the finding of the referring court that the conditions under which the licence was issued to Mr Neukirchinger in Germany are essentially the same as those required in Austria.

41 With regard to that argument, it must be borne in mind that it is the task of the Court of Justice to take account, under the division of jurisdiction between the European Union courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set (see Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 35). It is therefore not for the Court to rule on a finding such as that made by the referring court with regard to the similarity between the legislation of the two Member States concerned with regard to the conditions under which the licences at issue in the main proceedings are issued.

42 So far as concerns the protection of the interests to which the Austrian Government refers, these are undeniably legitimate objectives. However, for a Member State to require a person such as Mr Neukirchinger to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those applying to the licence already issued to him in another Member State, is not, as the Polish Government and the Commission correctly observe, proportionate to the legitimate objectives pursued. Since the conditions, in the two Member States, governing the issue of the transport licences at issue in the main proceedings are essentially the same, the view must be taken that the interests to which the Austrian Government refers were already taken into account when the first licence was issued in Germany.

43 It follows that legislation such as that at issue in the main proceedings constitutes, in reality, discrimination on grounds of nationality, aggravated by the administrative sanctions imposed in the event of failure to comply therewith.

44 Consequently, the answer to the questions referred is that Article 12 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which, for the organisation of balloon flights in that Member State and subject to administrative sanctions in the event of failure to comply with that legislation,

— requires a person resident or established in another Member State, who is licensed in that second Member State to operate commercial balloon flights, to have a place of residence or company seat in the first Member State, and

— obliges that person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those which apply to the licence already issued to that person in the second Member State.

Costs

45 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 12 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which, for the organisation of balloon flights in that Member State and subject to administrative sanctions in the event of failure to comply with that legislation,

— **requires a person resident or established in another Member State, who is licensed in that second Member State to operate commercial balloon flights, to have a place of residence or company seat in the first Member State, and**

— **obliges that person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those which apply to the licence already issued to that person in the second Member State.**

[Signatures]