JUDGMENT OF THE COURT (Fifth Chamber)
11 January 2001 *

In Case C-464/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesgericht für Zivilrechtssachen Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Westdeutsche Landesbank Girozentrale

and

Friedrich Stefan,

intervener:

Republik Österreich,

on the interpretation of Article 73b of the EC Treaty (now Article 56 EC),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Westdeutsche Landesbank Girozentrale, by T. Fabian, Rechtsanwalt,

— Mr Stefan, by M. Witt, Rechtsanwalt,

— Republik Österreich, by C. Gewolf, acting as Agent,

— the Commission of the European Communities, by V.C. Kreuschitz and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Westdeutsche Landesbank Girozentrale, represented by T. Fabian, of Mr Stefan, represented by E. Lindinger, Rechtsan-

walt, of the Republik Österreich, represented by C. Gewolf, and of the Commission, represented by V.C. Kreuschitz, acting as Agent, at the hearing on 11 May 2000,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2000,

gives the following

Judgment

1 By order of 28 October 1998, received at the Court on 18 December 1998, the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 73b of the EC Treaty (now Article 56 EC).

2 Those questions have been raised in proceedings brought by Westdeutsche Landesbank Girozentrale, a German bank, against Mr Stefan, a notary, in which it complains that he registered a mortgage denominated in German marks at a time when Austrian law required mortgages to be registered in the national currency.

The legal framework

A — *Community law*

3 Articles 67 to 73 of the EEC Treaty, which provided for the progressive liberalisation of movements of capital, were replaced as from 1 January 1994, pursuant to Article 73a of the EC Treaty (repealed by the Treaty of Amsterdam), by Articles 73b to 73g of the EC Treaty (Articles 73c and 73d of the EC Treaty became Articles 57 EC and 58 EC, Article 73e of the EC Treaty was repealed by the Treaty of Amsterdam and Articles 73f and 73g of the EC Treaty became Articles 59 EC and 60 EC). Article 73b of the Treaty is worded as follows:

'1. 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.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

4 Article 73d of the Treaty provides:

'1. The provisions of Article 73b shall be without prejudice to the right of Member States:

(a) ...

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements, for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. ...

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.'

5 The notion of capital movements is not defined by the EC Treaty. However, inasmuch as Article 73b of the Treaty substantially reproduces the contents of Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), the nomenclature in respect of movements of capital used in Annex I to that directive still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq. of the Treaty, subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21).

6 In view of the circumstances of the main proceedings, it is appropriate to recite the terms of points VII and IX of that annex:

'VII — Credits related to commercial transactions or to the provision of services in which a resident is participating

1. Short-term (less than one year)

2. Medium-term (from one to five years)

3. Long-term (five years or more)

A — Credits granted by non-residents to residents

B — Credits granted by residents to non-residents

...

IX — Sureties, other guarantees and rights of pledge

A — Granted by non-residents to residents

B — Granted by residents to non-residents'.

B — *The national legislation*

7 Paragraph 3(1) of the Verordnung über wertbeständige Rechte (Decree on fixed-value rights, dRGBl I, p. 1521) of 16 November 1940, as amended by Paragraph 4 of the Schillinggesetz (Law concerning the schilling, StGBl 1945, No 231), provides:

'Within the scope of the Grundbuchgesetz (Land Register Law, hereinafter "the GBG"), charges on real property may, following the entry into force of this Decree, be created in currencies other than schillings only if the amount of money to be paid in respect of the property is determined by reference to the price of fine gold.'

8 The first sentence of Paragraph 130(1) of the GBG is in the following terms:

'Where it is apparent from an entry that the terms of the Law are such as to preclude the registration thereof in the land register, that entry shall automatically be struck out as invalid.'

The proceedings before the national court

9 On 16 December 1991 the plaintiff granted a loan in the sum of DEM 20 million to the Grundstücks- und Bauprojektentwicklungs GmbH. By way of security for

the loan, a mortgage was registered in DEM pursuant to an enforceable notarial act drawn up by the defendant. That mortgage related to two parcels of real property situated in Vienna which were owned by the debtor.

10 On 7 June 1995 insolvency proceedings were commenced in relation to the debtor. The plaintiff sought to enforce its charge and, to that end, brought proceedings for the realisation of its security. The administrator of the insolvent estate, representing the debtor, contested the validity of the charge before the Oberster Gerichtshof (Supreme Court), Austria, pleading the illegality of the entry in the land register of a foreign-currency mortgage. The Oberster Gerichtshof decided to stay proceedings and to refer to the Court of Justice for a preliminary ruling a question concerning the scope of Article 73b of the Treaty (Case C-167/98 *Westdeutsche Landesbank Girozentrale*). However, it withdrew its question by decision of 21 October 1998.

11 The plaintiff ultimately concurred with the view taken by the administrator and consented to the charge being struck out in order, *inter alia*, to minimise its loss.

12 It then brought proceedings before the Landesgericht für Zivilrechtssachen Wien, seeking an order requiring the defendant to pay compensation on the ground that the latter had failed, in breach of the obligations incumbent upon him in drawing up a contract, to inform it of the invalidity of the charge.

13 The defendant denies that the mortgage denominated in DEM is unlawful and relies in that regard on, *inter alia*, Article 73b of the Treaty.

14 The Landesgericht für Zivilrechtssachen Wien states that the Oberster Gerichtshof has ruled on several occasions prior to the accession of the Republic of

Austria to the European Union that Paragraph 3 of the Verordnung über wertbeständige Rechte precludes the registration of foreign-currency mortgages. Registrations effected in breach of that rule are incurably invalid and have no effect in law. Under Paragraph 130 of the GBG, they are automatically to be struck out.

15 According to the national court, the Austrian legal order does not allow, in the absence of an express legislative provision, for the retroactive remedying of void legal acts. Consequently, the Verordnung über wertbeständige Rechte could be rendered inapplicable in this particular case only on the basis of the prohibition, laid down in Article 73b of the Treaty, of all restrictions on the movement of capital and payments. The national court considers in that regard that, if Article 73b of the Treaty prohibits obstacles to the registration of foreign-currency mortgages, and if that provision applies to mortgages which, upon the accession of the Republic of Austria to the European Union, were void under national law despite being registered in the land register, an effective charge will have been acquired by the plaintiff prior to the commencement of the insolvency proceedings.

16 The questions referred for a preliminary ruling by the Landesgericht für Zivilrechtssachen Wien are as follows:

'(1) Does a refusal to allow a mortgage to be created to cover a debt denominated in a foreign currency (in this case, German marks) constitute a restriction on the movement of capital and payments compatible with Article 73b of the EC Treaty?

(2) (a) Does Article 73b of the EC Treaty apply retroactively to mortgages which were registered in German marks prior to the accession of Austria to the European Community, and thus incurably void at the time of registration, in such a way as to remedy them *ex post facto*?

Alternatively,

(b) Have the Community rules concerning the free movement of capital, in particular Article 73b of the EC Treaty, had the effect, by virtue of the accession application made by Austria on 17 July 1989 and the Opinion of 31 July 1991, of rendering the registration of a foreign-currency mortgage in Austria on 16 December 1991 permissible?'

The first question

17 By its first question, the national court is essentially asking whether Article 73b of the Treaty precludes the application of rules of a Member State requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

18 In paragraph 34 of the judgment in *Trummer and Mayer*, cited above, the Court held that Article 73b of the Treaty precludes the application of national rules requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

19 Since the plaintiff has not put forward any argument warranting reconsideration of that decision, the answer to the first question must be that Article 73b of the Treaty is to be construed as precluding the application of national rules such as

those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

The second question

20 By its second question, the national court is essentially asking whether Article 73b of the Treaty was applicable in Austria even before that State acceded to the European Union. If the answer to that question is in the negative, the national court wishes to know whether Article 73b of the Treaty is capable of remedying the incurable nullity, under the national law applicable at the time, of a mortgage registered prior to the accession of the Republic of Austria to the European Union.

The applicability of Article 73b of the Treaty prior to the accession of the Republic of Austria to the European Union

21 In accordance with Article 73a of the Treaty, Article 73b entered into force on 1 January 1994 in the States which then formed the Union. Since the Republic of Austria did not accede to the Union until 1 January 1995, and in the absence of any contrary provision in 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), it was only from that date that Article 73b started to take effect in that Member State.

22 In the light of the foregoing considerations, the answer to this part of the second question must be that Article 73b of the Treaty is to be construed as meaning that it did not apply in Austria prior to the date of accession of the Republic of Austria to the European Union.

The applicability of Article 73b of the Treaty to a mortgage registration such as that at issue in the main proceedings

23 It is apparent from the account of the national legal system provided by the referring court that the nullity of a mortgage registration such as that at issue in the main proceedings is absolute and incurable from the outset and operates to render such registration non-existent.

24 The entry into force of Community law in a Member State can have the effect of remedying such a mortgage registration only in so far as, under the applicable national law, it is recognised as having some legal value until such time as it is found by a court to be null and void.

25 In the light of the foregoing considerations, the answer to this part of the second question must be that Article 73b of the Treaty is to be construed as incapable of remedying, with effect from the entry into force of the EC Treaty in Austria, a mortgage registration which, under the relevant national law, is vitiated from the outset by absolute and incurable nullity such as to render that registration non-existent.

Costs

26 The costs incurred by the Commission, which has 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 (Fifth Chamber),

in answer to the questions referred to it by the Landesgericht für Zivilrechtssachen Wien by order of 28 October 1998, hereby rules:

1. **Article 73b of the EC Treaty (now Article 56 EC) is to be construed as precluding the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.**

2. **Article 73b of the Treaty is to be construed as meaning that it did not apply in Austria prior to the date of accession of the Republic of Austria to the European Union.**

3. **Article 73b of the Treaty is to be construed as incapable of remedying, with effect from the entry into force of the EC Treaty in Austria, a mortgage registration which, under the relevant national law, is vitiated from the outset by absolute and incurable nullity such as to render that registration non-existent.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 11 January 2001.

R. Grass — A. La Pergola

Registrar — President of the Fifth Chamber