JUDGMENT OF THE COURT (Sixth Chamber)
14 June 2001 *

In Case C-178/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bezirksgericht Bregenz (Austria) for a preliminary ruling in the land registration case brought before that court by

Doris Salzmann

on the interpretation of Article 73b of the EC Treaty (now Article 56 EC) and of point 1(e) of Annex XII to the Agreement on the European Economic Area,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and J.N. Cunha Rodrigues, Judges,

* Language of the case: German.

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

after considering the written observations submitted on behalf of:

— D. Salzmann, by W.L. Weh, Rechtsanwalt,

— the Austrian Government, by C. Stix-Hackl, acting as Agent,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Commission of the European Communities, by M. Patakia and M. Niejahr, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Doris Salzmann, represented by W.L. Weh, of the Austrian Government, represented by P. Kustor and M. Germann, acting as Agents, and of the Commission, represented by M. Niejahr, at the hearing on 14 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2001,

gives the following

Judgment

1 By order of 29 December 1998, received by the Court on 14 May 1999, the Bezirksgericht (District Court) Bregenz referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 73b of the EC Treaty (now Article 56 EC) and of point 1(e) of Annex XII to the Agreement on the European Economic Area.

2 These questions have been referred in the course of a claim by Mrs Salzmann for the registration in the land register of a contract of sale of an undeveloped plot of land in Fußach in the Land of Vorarlberg (Austria).

Community law

3 Article 73b of the Treaty provides:

'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 Point 1(e) of Annex XII to the Agreement on the European Economic Area, which refers to the application 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), states that 'during transition periods, EFTA States shall not treat new and existing investments by companies or nationals of EC Member States or other EFTA States less favourably than under the legislation existing at the date of signature of the Agreement, without prejudice to the right of EFTA States to introduce legislation which is in conformity with the Agreement and in particular provisions concerning the purchase of secondary residences which correspond in their effect to legislation that has been upheld within the Community in accordance with Article 6(4) of the Directive'.

5 Article 6(4) of Directive 88/361 provides:

'Existing national legislation regulating purchases of secondary residences may be upheld until the Council adopts further provisions in this area in accordance with Article 69 of the Treaty. This provision does not affect the applicability of other provisions of Community law.'

National law

6 Under Paragraph 8 of the Vorarlberger Grundverkehrsgesetz (Land Transfer Law of the Land of Vorarlberg, Vorarlberger LGBl. 85/1997) (hereinafter 'the GVG'),

no acquisition of building land can take effect unless consent has been granted by the competent authorities for matters relating to real property. Consent is granted when the acquirer demonstrates sufficiently that the land will, within a reasonable period, be developed in compliance with the land use plan. If consent is refused the transaction concerning the land is void under the legislation.

7 On the other hand, in relation to transactions concerning built-on land, the law of the Land of Vorarlberg provides only that the acquirer is required to produce a declaration, by which he undertakes not to use the acquired dwelling as a holiday residence.

The main proceedings and the questions referred for a preliminary ruling

8 Doris Salzmann, an Austrian national, residing at Fußach, within the jurisdiction of the Bezirksgericht Bregenz, purchased a building plot in the commune of Fußach from Walter Schneider, another Austrian. She did not seek consent but produced a declaration similar to what would have been required if the acquisition had concerned built-on land, by which she undertook not to use the acquired land by building a holiday residence upon it.

9 Before the Bezirksgericht Bregenz, which is competent to register real property transactions in the land register, Mrs Salzmann argued that the process of authorisation contravened the Community obligations of the Republic of Austria and that a declaration should be sufficient to enable the registration to be effected.

10 Not finding in the Court's case-law sufficient authority to enable it to determine the claim for registration, the Bezirksgericht Bregenz decided to refer the following questions to the Court for a preliminary ruling:

'1. May nationals of a Member State of the European Union rely on free movement of capital even if a capital transaction has no international element?

2. Is it compatible with the free movement of capital for an authorisation of the competent authority in real property matters to be necessary for a transaction concerning the purchase of a plot of building land to take effect?

3. What are the effects of the "standstill" clause in point 1(e) of Annex XII to the Agreement on the European Economic Area on the provisions requiring authorisation of registration in the land register, which are by their very nature novel, and which were adopted after the signature of the above Agreement on 2 May 1992?'

The jurisdiction of the Court

11 The Commission and the Spanish Government maintain that the Bezirksgericht, when it is acting as the tribunal responsible for keeping the land register, is not required to decide disputes, but to check that applications for registration of titles to property in the land register comply with the conditions laid down by law, which constitutes an activity of an administrative, not judicial, nature. Therefore the Bezirksgericht Bregenz does not fulfil, in the main proceedings, the conditions

to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty and the Court therefore lacks jurisdiction to reply to the national court's questions in this case. The Austrian Government, having been invited by the Court to give its opinion on the subject, adopted that view.

12 All three point out that the function which the Bezirksgericht performs, when acting as the tribunal responsible for keeping the land register, is of a similar nature to that which the Italian courts perform when they determine, in the course of a process of 'giurisdizione volontaria', an application for approval of a company's statutes for the purposes of its registration on the register, a function which the Court held lacked judicial character in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraphs 9 to 11.

13 In order to determine whether a referring body is a court or tribunal within the meaning of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and the case-law cited therein, and in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33).

14 Furthermore, whilst Article 177 of the Treaty does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers a question for a preliminary ruling (see Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12), it follows, none the less, from that article that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14).

15 Thus, when it makes an administrative decision without being required to decide a legal dispute, the referring body, even if it satisfies the other conditions mentioned in paragraph 13 of this judgment, cannot be regarded as exercising a judicial function. Such is the case, for example, when it determines an application for registration of a company according to a procedure, the object of which is not the annulment of a measure adversely affecting the applicant (*Job Centre*, paragraph 11).

16 It appears from the documents before the Court that when it considers an application for registration of a contract of sale of land in the land register in accordance with the provisions of the Grundbuchgesetz (Austrian Federal Law of 1955 on the Land Register), the Bezirksgericht is not seised of a dispute, but must merely determine whether the application complies with the conditions laid down by the law for the registration of property rights in the land register.

17 In the context of that activity, the Bezirksgericht exercises a non-judicial function.

18 That finding is not called into question by the fact that the Bezirksgericht may hear the parties in exceptional circumstances, since the nature of the function performed remains the same.

19 Mrs Salzmann, however, claims that her application to the Bezirksgericht Bregenz, which is described as a 'Rekurs' (appeal), follows the refusal of the Grundverkehrs-Landeskommission für Vorarlberg ('the Landeskommission') to confirm her declaration concerning the acquisition of the property, as well as the negative decision of the Rechtspfleger (Registrar) of the Bezirksgericht Bregenz on her application for registration of her title in the land register. Her application to the Bezirksgericht Bregenz therefore has the character of an appeal.

20 That argument is without substance.

21 It is apparent from the documents before the Court that, first, the Bezirksgericht Bregenz is not the competent court to decide appeals against the decisions of the Landeskommission, and, secondly, the Rechtspfleger is not a body deciding at first instance, whose decisions can be subject to a judicial appeal before the Bezirksgericht, but an official employed by that court and performing, by delegation and under its authority, the tasks which it allots to him. The 'Rekurs' before the Bezirksgericht against the decision of its Rechtspfleger has the character of an internal administrative complaint for the responsible body, and the previous involvement of that official is not sufficient to confer anything other than an administrative nature on the activity of the Bezirksgericht in respect of its keeping of the land register.

22 The Court therefore has no jurisdiction to rule on the questions raised by the Bezirksgericht Bregenz in the context of the procedure for registration of titles in the land register.

Costs

23 The costs incurred by the Austrian and Spanish Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for Mrs Salzmann, a step in the proceedings before the Bezirksgericht Bregenz, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber)

hereby rules:

The Court of Justice of the European Communities has no jurisdiction to answer the questions raised by the Bezirksgericht Bregenz in its order of 29 December 1998.

Gulmann Skouris Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 14 June 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber