JUDGMENT OF THE COURT
16 March 1999 *

In Case C-222/97,

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

Manfred Trummer,

Peter Mayer,

on the interpretation of Article 73b of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and K. M. Ioannou, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Finnish Government, by Holger Rotkirch, Ambassador, Head of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Antonio Caeiro, Principal Legal Adviser, and Barbara Brandtner, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Portuguese Government, represented by Angelo Cortesão de Seiça Neves, Lawyer in the European Communities General Directorate of the Ministry of Foreign Affairs, acting as Agent; the Finnish Government, represented by Tuula Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Swedish Government, represented by Lotty Nordling, Rättschef in the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by Antonio Caeiro and Barbara Brandtner, at the hearing on 9 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 6 October 1998,

gives the following

Judgment

1 By order of 27 May 1997, received at the Court on 13 June 1997, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question concerning the interpretation of Article 73b of that Treaty.

2 That question has been raised in an appeal on a point of law ('Revision') brought by Mr Trummer and Mr Mayer against a refusal to enter in the land register a mortgage denominated in German marks.

3 By an agreement dated 14 November 1995, Mr Mayer, residing in Germany, sold to Mr Trummer, residing in Austria, a share in the ownership of a property situated at Sankt Stefan im Rosenthal, Austria, for a sum denominated in German marks. Under the same agreement, Mr Mayer allowed Mr Trummer to settle the purchase price by 31 December 2000 at the latest and waived the provision of a value guarantee and the payment of interest. The parties agreed, however, that a mortgage should be created to secure payment of the purchase price.

4 On 1 July 1996 an application was made to the Bezirksgericht (District Court), Feldbach, for registration of the transaction in the Sankt Stefan im Rosenthal land register. On 17 July 1996 that application was allowed as regards registration of the joint property right but refused with regard to the mortgage. That decision was upheld on 19 February 1997 on appeal to the Landesgericht für Zivilrechtssachen (Regional Civil Court), Graz.

5 Those two courts took the view that registration of a mortgage securing a debt payable in a foreign currency was contrary to Section 3(1) of the Verordnung über wertbeständige Rechte (Decree on fixed-value rights) of 16 November 1940, as amended by Section 4 of the Schillinggesetz (Law on the Austrian schilling). Under that provision, mortgages may be created only in Austrian schillings, failing which in such a way that the sum to be paid for the property is determined by reference to the price of fine gold.

6 The Landesgericht für Zivilrechtssachen further considered that the national legislation was not incompatible with Community law, since freedom of movement of capital was not affected.

7 It observed in that regard that, since the Treaty does not contain any definition of the term 'movement of capital', its meaning should be determined by reference to the nomenclature in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

8 The Landesgericht für Zivilrechtssachen found that, as that nomenclature did not mention rights of security in respect of real property such as the mortgage in the present case, the transaction in question was not covered by Article 73b of the Treaty.

9 Mr Mayer and Mr Trummer lodged an appeal on a point of law before the Oberster Gerichtshof.

10 That court observes, with reference to the relevant national case-law and legal literature, that in Austria registration of a security right in respect of a foreign-currency debt has been held to be valid only where it is denominated in Austrian schillings in a sum corresponding to the amount of the foreign-currency debt as at

the date of application for registration. The national court therefore considers that the applicants' claim can be allowed only on the basis of the fundamental prohibition, laid down in Article 73b of the Treaty, of all restrictions on the free movement of capital and payments.

11 Article 73b provides 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.'

12 In addition, the following transactions are included amongst the movements of capital listed in Annex I to Directive 88/361:

'II — INVESTMENTS IN REAL ESTATE

A — Investments in real estate on national territory by non-residents

B — Investments in real estate abroad by residents

...

IX — SURETIES, OTHER GUARANTEES AND RIGHTS OF PLEDGE

A — Granted by non-residents to residents

B — Granted by residents to non-residents'.

13 The introduction to Annex I states *inter alia* as follows:

'The capital movements listed in this Nomenclature are taken to cover:

— all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers ...,

...

— operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof or immediate use of such proceeds within the limits of Community obligations,

...

This Nomenclature is not an exhaustive list for the notion of capital movements — whence a heading XIII — F. "Other capital movements — Miscellaneous". It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the Directive.'

14 In the explanatory notes to the nomenclature, the proceeds of liquidation (of investments, securities, etc.) are defined as 'the proceeds of sale including any capital appreciation, amount of repayments, proceeds of execution of judgments, etc.'.

15 In those circumstances, the Oberster Gerichtshof decided to stay proceedings and to refer to the Court the following question:

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

16 It should be stressed at the outset, first, that the national legislation at issue in the main proceedings precludes neither the denomination of a debt in a foreign currency nor the possibility of securing such a debt by means of a guarantee, even in the form of a mortgage. It prohibits only the registration in a foreign currency of the mortgage securing such a debt.

17 Second, the Court's reasoning is founded on the premiss, set out by the national court, that the national legislation at issue does not authorise a person who is owed a debt denominated in a foreign currency to register a mortgage in Austrian schillings for an amount greater than the corresponding value of that debt in Austrian schillings as at the date of the application for registration.

18 By its question, the national court is essentially asking whether Article 73b of the Treaty precludes the application by a Member State of domestic rules which require a mortgage securing a debt payable in the currency of another Member State to be registered in its own national currency.

19 In order to answer that question, it is necessary first of all to consider whether the creation of a mortgage to secure a debt payable in the currency of another Member State is covered by Article 73b of the Treaty.

20 It should be noted in that connection that the EC Treaty does not define the terms 'movements of capital' and 'payments'.

21 However, inasmuch as Article 73b of the EC Treaty substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 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., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.

22 It is apparent from point II of Annex I to Directive 88/361, from the introduction to the nomenclature and from the explanatory notes appearing at the end of Annex I, that the liquidation of an investment in real property constitutes a movement of capital.

23 Moreover, mortgages represent the classic method of securing a loan linked to a sale of real property, which is a transaction covered by the nomenclature. In those circumstances, a mortgage must be regarded as constituting an 'other guarantee' within the meaning of point IX of the nomenclature, headed 'Sureties, other guarantees and rights of pledge'.

24 A mortgage of the kind at issue in the main proceedings is inextricably linked to a capital movement — in the present case, the liquidation of an investment in real property. In addition, it is included within point IX of the nomenclature of capital movements annexed to Directive 88/361. Consequently, it is covered by Article 73b of the Treaty.

25 Second, it is necessary to consider whether the rule prohibiting registration of a mortgage in the currency of another Member State constitutes a restriction on the movement of capital.

26 The effect of national rules such as those at issue in the main proceedings is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments (see, in relation to Article 106(1) of the EEC Treaty, Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 28, and Case 308/86 *Lambert* [1988] ECR 4369, paragraph 16).

27 Furthermore, the rules at issue may well cause the contracting parties to incur additional costs, by requiring them, purely for the purposes of registering the mortgage, to value the debt in the national currency and, as the case may be, formally to record that currency conversion.

28 In those circumstances, an obligation to have recourse to the national currency for the purposes of creating a mortgage must be regarded, in principle, as a restriction on the movement of capital within the meaning of Article 73b of the Treaty.

29 The Finnish Government submits, however, that the free movement of capital is not an absolute principle and that the national rules at issue in the main proceedings are designed to ensure the foreseeability and transparency of the mortgage system, which constitutes an overriding factor serving the public interest, and is such as to justify the rules in question.

30 It should be noted that a Member State is entitled to take the necessary measures to ensure that the mortgage system clearly and transparently prescribes the respective rights of mortgagees *inter se*, as well as the rights of mortgagees as a whole *vis-à-vis* other creditors. Since the mortgage system is governed by the law of the State in which the mortgaged property is located, it is the law of that State which determines the means by which the attainment of that objective is to be ensured.

31 Neither the Austrian Government nor the parties to the main proceedings have submitted observations to the Court. But even assuming that rules such as those in issue are in fact designed to attain that objective, it appears that those rules enable lower-ranking creditors to establish the precise amount of prior-ranking debts, and thus to assess the value of the security offered to them, only at the price of a lack of security for creditors whose debts are denominated in foreign currencies.

32 In addition, national rules such as those at issue in the main proceedings contain an element of uncertainty which may compromise the attainment of the objective described above. As stated in paragraph 5 of this judgment, the Austrian rules allow the value of the mortgage to be expressed by reference to the price of fine gold. Yet, as the Advocate General observes in point 14 of his Opinion, the price of gold is currently subject to fluctuations in the same way as the value of a foreign currency.

33 Although the Commission stated at the hearing that, according to the information at its disposal, that provision of the legislation had fallen into disuse, the fact remains that it has not been formally repealed.

34 In the light of the foregoing considerations, the answer to be given to the national court must be that Article 73b of the Treaty precludes 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.

Costs

35 The costs incurred by the Finnish, Portuguese and Swedish 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,

in answer to the question referred to it by the Oberster Gerichtshof, by order of 27 May 1997, hereby rules:

Article 73b of the EC Treaty precludes 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.

Rodríguez Iglesias Kapteyn Puissochet

Hirsch Jann Mancini

Moitinho de Almeida Gulmann Murray

Edward Ragnemalm Sevón

Wathelet Schintgen Ioannou

Delivered in open court in Luxembourg on 16 March 1999.

R. Grass G. C. Rodríguez Iglesias

Registrar President