OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 23 February 1999 *

Introduction

1. The questions raised by the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) seek to ascertain whether the provisions adopted by the Austrian *Land* Tirol with regard to the acquisition of immovable property are compatible with Community law and whether the conditions are met for the plaintiff in the main proceedings to bring a claim against Austria before the national court for non-contractual liability, should the provisions adopted by the Tirol legislature be in breach of obligations arising from the Treaty. An initial difficulty in the problem referred to the Court is that the Act of Accession of Austria to the Union expressly allows that State to maintain the provisions cited in the order for reference in force for the transitional period prescribed in the Act.

The national provisions on acquisition of immovable property

2. The Austrian Federal Constitution confers on the *Länder* competence to regulate the transfer of agricultural and forestry land and the acquisition of immovable property by foreigners. Under the Bundes-Verfassungsgesetznovelle (Law amending the Constitution), BGBl. 276/1992, Art. 1.1, the *Länder* are authorised to introduce administrative controls on property transactions and they have in fact done so. To be precise, the national rules that constitute the alleged breach of obligations under Community law (with the consequent obligation to compensate the person concerned) are the rules laid down in the 1993 Tiroler Grundverkehrsgesetz (Tirol Law on the Sale of Land of 1993, hereinafter the 'TGVG 1993'), in force from 1 January 1994 to 1 October 1996, and the 1996 Tiroler Grundverkehrsgesetz (Tirol Law on the Sale of Land of 1996, hereinafter the 'TGVG 1996'), which entered into force on 1 October 1996. [1]

The TGVG 1993

3. Under Paragraphs 9(1)(a) and 12(1)(a) of the TGVG 1993, the person acquiring the property at issue in the main proceedings is required to obtain prior authorisation from the competent authority. Author-

* Original language: Italian.

1 — See Tiroler LGBl. 82/1993 and Tiroler LGBl. 61/1996, respectively.

isation may be refused if the person seeking to acquire the property does not provide convincing proof that it is not to be used for a secondary residence (Paragraph 14(1) of the TGVG 1993). However, Austrian nationals who have declared that they do not want to establish a secondary residence on the property they acquire are exempt from the requirement to obtain authorisation (Paragraph 10(2) of the TGVG 1993).

Under Paragraph 13(1) of the TGVG 1993, authorisation may be granted to foreigners, including nationals of other Member States, only if the acquisition does not conflict with the economic interests of the Austrian State and if there is an economic, cultural or social interest in the acquisition.

Under Paragraph 3, which entered into force on 1 January 1994, as prescribed in Paragraph 41, the provisions relating to foreigners are not applicable to persons who can show that they are acting within the framework of the freedoms guaranteed by the Agreement on the European Economic Area (hereinafter the 'EEA Agreement'). [2]

2 — OJ 1994 L 1, p. 420.

The TGVG 1996

4. Under the new law too, authorisation cannot be granted if the person seeking to acquire the property does not provide convincing proof that it is not to be used to establish a secondary residence (Paragraph 11(1)(a)).

The new law abolishes the exemption from the requirement to obtain authorisation previously granted to Austrian nationals. Authorisation must now be obtained by all persons seeking to acquire immovable property, irrespective of their nationality. It may also be granted under an accelerated procedure. Under Paragraph 25(2), if the conditions for authorising the acquisition of building land are clearly met, the competent authority must take the relevant decision within two weeks of the date on which the application for authorisation is filed.

Under Paragraph 3, the new law applies to Austrian nationals and foreigners alike, in cases where the property is acquired within the framework of freedom of movement for workers, freedom of establishment, freedom to provide services and the free movement of capital, provided that other rules do not apply under Article 70 of the Act of Accession of Austria or Article 40 of the EEA Agreement. On the other hand, foreigners who are not entitled to the same treatment as Austrian nationals must comply not only with the provisions applicable to those nationals but also with the other

specific condition laid down in the earlier law, which still applies, namely that the acquisition must not conflict with the economic interests of the Austrian State and there must be an economic, cultural or social interest in the acquisition (see Paragraph 13(1)(b)). Those provisions do not however apply if they conflict with international agreements.

The relevant Community provisions

5. The provision that is the subject of the request for interpretation in the present case is Article 70 of the Act concerning the conditions of accession of the Kingdom of Norway, 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 (hereinafter the 'Act of Accession'). [3] The provision reads as follows:

'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.'

3 — OJ 1995 L 1, p. 1.

The Treaty obligations that are the subject of the alleged breach in this case concern freedom of establishment and the free movement of goods. [4]

Facts

6. Mr Klaus Konle, a German national, was the successful bidder in an enforcement sale by auction of a parcel of land in Osttirol, organised by the Bezirksgericht Lienz (Lienz District Court) on 11 August 1994. As the TGVG 1993 was in force at the time, Mr Konle submitted his own application for authorisation, declaring that he intended to use the land he had acquired to establish his principal residence and the head office of his own undertaking, EUVAT GmbH. Thus, Mr Konle made a declaration that was essentially similar to the declaration Austrian nationals are allowed to submit under Tirol law instead of an application for authorisation. The Bezirkshauptmannschaft Lienz (Lienz District Administration), as land transfer

4 — Article 52 of the Treaty reads as follows:
'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'
Under Article 73b(1) of the Treaty:
'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.'

authority of first instance, nevertheless rejected the application by decision of 18 November 1994, on the ground that the conditions applying to foreigners contained in Paragraph 13 of the TGVG 1993 were not met. It also considered that Mr Konle's application had not provided the necessary proof — without which authorisation could not be granted — that the acquisition in question was not to be used to establish a secondary residence, contrary to the objectives of the law on the transfer of land.

Mr Konle first lodged an appeal with the Landesgrundverkehrskommission (Land Transfer Commission attached to of the Tirol *Land* Government, hereinafter the 'LgvK'). The LGvK, by decision of 12 June 1995, upheld the decision of 18 November 1994 on the ground that Mr Konle had not provided proof that he did not intend to establish a secondary residence or that he intended to exercise his right to freedom of establishment. Mr Konle then brought an appeal before the Verwaltungsgerichtshof (Administrative Court). That court too, by judgment of 10 May 1996, dismissed the appeal as unfounded. Having exhausted the administrative remedies, Mr Konle applied to the Verfassungsgerichtshof (Constitutional Court, hereinafter the 'VfGH') on the basis of Paragraph 144(1) of the Constitution. The VfGH, by judgment of 25 February 1997, decided to extend to Mr Konle the effects of its own judgment of 10 December 1996 in which it had ruled that the whole TGVG 1993 was unconstitutional. It therefore set aside the LGvK's decision.

The appeal against the decision was consequently referred back for review by the LGvK, this time in the light of the TGVG 1996, which had entered into force on 1 January 1996. The provisions of that law which are relevant for the purposes of the main proceedings have been mentioned above. It should also be noted that the accelerated procedure provided for in Paragraph 25 was not followed in Mr Konle's case. As we learned in the course of the present proceedings, the authorisation was granted in February 1998. Only then was the completion of the acquisition authorised.

7. Considering that the application of the TGVG 1993 and the TGVG 1996 in his case was injurious to the fundamental freedoms guaranteed to him under the EC Treaty, Mr Klaus Konle also brought an action for damages against the Republic of Austria before the Landesgericht für Zivilrechtssachen Wien. To quote the order for reference: 'The plaintiff considers, with respect to the application of the TGVG 1993, that he has been discriminated against and his freedom of establishment and free movement of capital affected, in that he was required to prove that he would not establish a secondary residence, whereas for Austrians the mere declaration under Paragraph 10(2) of the TGVG 1993 would have sufficed. ... With respect to the TGVG 1996, the plaintiff considers that his fundamental freedoms under European law have been infringed, in that he has to submit to an authorisation procedure before acquisition of the land (that is, before his property right is entered in the land register).' The authorisation procedures had delayed the completion of Mr

Konle's acquisition, preventing him from entering into possession of the property.

In the proceedings before the national court, Austria for its part contended that the legislation at issue was covered by the derogation granted under Article 70 of the Act of Accession.

The questions

8. The Landesgericht für Zivilrechtssachen Wien felt obliged, in the context of the action brought by Mr Konle, to refer the following questions to the Court for a preliminary ruling:

'1. Does it follow from the interpretation of Article 6, Article 52 et seq. (Part Three, Title III, Chapter 2) and Article 73b et seq. (Part Three, Title III, Chapter 4) of the EC Treaty and Article 70 of the Act of Accession (Act concerning the conditions of accession of ... the Republic of Austria ... and the adjustments to the Treaties on which the European Union is founded) that

(a) in that, while the TGVG 1993 was in force, the plaintiff was required to prove that he would not establish a holiday residence, whereas in the case of an acquisition by an Austrian a mere declaration under Paragraph 10(2) would have sufficed to obtain the consent of the land transfers authority, and he was refused consent, and

(b) in that, under the TGVG 1996, the plaintiff, even before his property right is entered in the land register, must — as Austrians now also must — undergo a consent procedure, the possibility of making an effective declaration that no holiday residence is being created no longer existing for Austrians either, Community law was infringed and the plaintiff injured in respect of a fundamental freedom guaranteed by provisions of Community law?

2. If so, is it for the Court of Justice in proceedings under Article 177 of the EC Treaty also to decide whether a breach of Community law is "sufficiently serious" (as the phrase is used, for example, in the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*)?

3. If questions 1 and 2 are answered in the affirmative, is the breach "sufficiently serious"?

4. Is the principle of the liability of Member States for the damage caused to an individual by breaches of Community law complied with, on a proper interpretation of Article 5 of the EC Treaty, if the national law on liability of a Member State with a federal structure lays down that in the case of infringements imputable to a part of the State, the injured party may claim only against the part State, not the State as a whole?'

Substance

Applicability of Article 70 of the Act of Accession

9. Mr Konle claimed in the case before the national court that the fact that he had had to go through the prescribed authorisation procedures, first under the TGVG 1993 and then under the TGVG 1996, had caused the alleged damage he had suffered, as a result of the breach of the EC Treaty rules on the right of establishment, free movement of capital and the prohibition of discrimination. I have already pointed out, however, that according to the Austrian Government neither the provisions of the TGVG 1993 nor those of the TGVG 1996 could determine the alleged breach of the Treaty. It contends that, in both cases, the provisions are covered by Article 70 of the Act of Accession, under which the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession *notwithstanding* the obligations under the Treaties on which the European Union is founded. The point raised by Austria is a preliminary point and I shall deal with it at once. Clearly, the question whether the Tirol legislation is compatible with the Treaty (and whether Austria may be liable in the event of a breach) can in fact be considered only with respect to provisions that do not fall within the ambit of Article 70 of the Act of Accession.

10. The provisions at issue in this case have, as I explained, undergone various modifications. For the purposes of applying the derogation granted to Austria under the Act of Accession, it is therefore important to establish what is meant by the 'existing legislation' that can be maintained in force under Article 70. In my view, the criterion for a correct reading of the provision in question is clearly discernible from the case-law of the Court. Article 70 constitutes a derogation and, as such, it can be interpreted only in the light of the aim it is intended to achieve and must in any event be interpreted restrictively in accordance with the relevant judgments of the Court. [5] In the first place, the Contracting Parties granted Austria the option of maintaining

5 — The requirement to interpret provisions that constitute a derogation restrictively was recently reiterated by the Court in its judgment of 3 December 1998 in Case C-233/97 *KappAhl Oy* [1998] ECR I-8069, in particular paragraphs 15 and 21.

its own laws for five years in order to allow, or even facilitate, the adjustment of the national legal order to the Community rules. The derogation was however granted, with the prospect of a gradual approximation to the Community rules, *expressly* and *exclusively* with reference to the provisions in force at the time of accession. Austria may not therefore rely on the derogation with respect to legislation existing at the time of accession that is subsequently amended, unless such amendments — and particularly any that introduce further restrictions on the freedom of movement guaranteed to individuals under the Treaty — are expressly agreed by the Contracting Parties under the Act of Accession. [6]

11. That being said, let us now consider the present case more closely in the light of the legislation in force, starting with the TGVG 1993. The Bezirkshauptmannschaft Lienz applied that law in the present case to refuse Mr Konle the authorisation he had requested. The decision to refuse authorisation, when challenged, was initially upheld by the Landesgrundverkehrskommission and the Verwaltungsgerichtshof. However, the Austrian Constitutional Court had ruled, in a judgment dated 10 December 1996, that the whole TGVG 1993 was unconstitutional. Mr Konle applied to that court, which held that the TGVG 1993 was not applicable in his case and consequently set aside the Lienz authorities' decision to refuse authorisation. [7] The point of interest here is whether the decisions of the Austrian Constitutional Court are relevant for the purpose of determining whether or not the TGVG 1993 is to be regarded as 'existing legislation'. As I have already pointed out, the term refers to domestic legislation actually in force in Austria at the time of its accession to the Union. The decisions that the provision was unconstitutional were handed down later. But what effects do those decisions produce, in respect of time? Under Austrian law, judgments annulling laws that are incompatible with the Constitution apply, in principle, *ex nunc* and *pro futuro*. Under Article 140(5) of the Constitution, such judgments produce their effects from the date on which they are published in the Official Gazette, unless the Court sets a different date. [8] In the present case, the judgment of 10 December 1996

6 — In view of the express reference to existing 'legislation', I cannot agree with the interpretation of Article 70 proposed by Austria — as defendant State — according to which the maintenance of the existing restrictions on the acquisition of secondary residences is in any case necessarily authorised from 1 January 1995 to the end of 1999. Nor, for the same reasons, can I agree with the Commission's argument that — since the derogation is provided in Chapter 2, which refers expressly in the list of contents only to 'free movement of workers, services and capital' — it does not extend to the guarantees relating to freedom of establishment and the principle of non-discrimination. Such a view is inconsistent with the actual content of the provision and overlooks the fact that the list of contents of Chapter 2 is exactly the same as that of Title III of the EC Treaty, which also includes the right of establishment. As to the principle of non-discrimination, it is an essential part of the rules on fundamental freedoms: any derogation affecting the exercise of those freedoms inevitably has repercussions on the rights arising from the Treaty.

7 — Mr Konle's application was based on Article 144(1) of the Constitution, which provides that: 'The Constitutional Court shall rule on appeals against decisions of the administrative authorities... where the appellant considers that he has suffered injury in respect of his rights... through the application of an unconstitutional law.... An appeal may be lodged only after all administrative remedies have been exhausted'.

8 — See Öhlinger, *Verfassungsrecht*, third edition, 1997, p. 398 et seq., Peyrou-Pistouley, *La Cour constitutionnelle et le contrôle de la constitutionnalité des lois en Autriche*, 1993, p. 325 et seq., and Palermo, *Codice di diritto costituzionale austriaco*, Padua, 1998, p. 27. As regards the procedures for challenging provisions adopted by the public authorities, the Constitutional Court had initially ruled out the possibility of giving retroactive effect to annulment decisions but that possibility was admitted following judgment VfSlg 10.203, see Öhlinger, op. cit., p. 410 et seq.

ruling that the TGVG 1993 was unconstitutional took effect after accession to the Treaty. It remains to be seen what conclusions are to be drawn from that fact. Had the legislation existing at the time of accession, the TGVG 1993, which the national court is required to take into account under the express terms of the aforementioned Article 70, the power to produce effects in respect of time conferred in this case by the judgment handed down by the Constitutional Court? In my view, the answer is that it had not. The judgment in question must be regarded, in the present case, as a *normative act*. I refer specifically to the power of annulment *erga omnes* of a declaration of unconstitutionality, the first example in Europe being found, as we know, in the Austrian legal order. For the purposes of the Act of Accession, the ruling of unconstitutionality is, in my view, only relevant when it has the *objective result of removing* measures that have been declared illegal from the legal order. Its possible effect on the 'existing legislation' that may be maintained in force should, I think, be assessed in the light of the position the Court has taken in other judgments where it has held (or at least implied), with regard to the internal legal order of the Member States, that the constitutional procedure of repealing laws is equivalent to the procedure culminating in their removal by means of a declaration of constitutional illegality. [9] If that is the case, the Austrian court's ruling can affect existing legislation, within the meaning of the Act of Accession, *in so far as* and only *from the time when* it enters into effect as an act of legislation, even — in Hans Kelsen's words — 'negative' legislation. [10] That being established, we may disregard the fact that the Austrian court held in its judgment of 25 February 1997, pursuant to Paragraph 140(7) of the Bundesverfassungsgesetz, that with respect to Mr Konle it should proceed 'as if the provision that had been ruled unconstitutional [in its previous judgment of 10 December 1996 with reference to the whole of the Tirol law of 1993] was not part of the legal order at the time when the events at issue in this case occurred'. [11] It must not be forgotten that the derogation under consideration is only intended to relieve the Austrian State of any liability it might incur in maintaining existing provisions in force during the time allowed, even if they were incompatible with its Community obligations. In adopting that provision, the parties to the Act of Accession certainly did not intend that maintaining those national measures in force should be contingent on observance of the rules of the Austrian Constitution. The derogation relates only to the compatibility of provisions maintained in force with Community law. It could not be otherwise. In the present case, therefore, there is no occasion to take account of the judgment by which the Constitutional Court confirmed Mr Konle's right under Austrian law not to be subject to provisions that had been declared illegal. For the purposes of the present examination, as I have already said, the only relevant judgment is the other judgment ruling that the whole TGVG 1993 was unconstitutional and that judgment is relevant because of its power of annul-

9 — See the judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24.

10 — H. Kelsen, *Giustizia costituzionale*, Milan, 1981, p. 300.

11 — See point III.1 in the grounds for the judgment.

ment — equivalent in my view to the effect of a repeal of the legislation in question — which affected the maintenance in force of the provisions in question only from the date on which it became operative.

The TGVG 1993 can therefore be regarded as existing legislation for the purposes of the derogation. [12]

12. In the second place, it must be borne in mind that the Landesgrundverkehrskommission, to which the Konle case had been referred back after the Constitutional Court's decision of 25 February 1997, was obliged to apply the TGVG 1996, which had superseded the TGVG 1993. That law, the most recent Tirol legislation, entered into force on 1 October 1996, that is after Austria's accession to the Union. The Austrian Government contends that that law too is covered by the derogation. According to it, the TGVG 1996 made purely formal amendments to the system of the TGVG 1993, leaving the provisions of that law substantially unaltered. That view cannot however be accepted. The TGVG 1996 in fact introduced different procedures from those laid down in the TGVG 1993 at the time of accession. In place of the declaration procedure (reserved for Austrians and — from 1 January 1996 — persons enjoying freedom of movement under the EEA Agreement), the TGVG 1996 introduced a general obligation to obtain authorisation and also allowed the competent administrative authorities to grant authorisation to those acquiring the property in question under an abridged procedure. Thus the two laws prescribe objectively different control procedures. Also, the abolition of the declaration procedure and the introduction of an authorisation procedure for all applicants placed even greater restrictions on the transfer of immovable property, to the disadvantage of Austrian nationals and also of other nationals eligible for equal treatment under Paragraph 3 of the 1993 law.

The question of a possible breach of the Treaty

13. Since the TGVG 1996 is not covered by the derogation, it is necessary to answer question 1(b) in the order for reference, which seeks to ascertain whether, the fact that 'under the TGVG 1996, the plaintiff, even before his property right is entered in the land register, must — as Austrian citizens now also must — undergo a consent procedure, the possibility of making an effective declaration that no holiday residence is being created no longer existing for Austrians either', constitutes an infringe-

12 — Since Austria's liability does not depend on the application of the TGVG 1993, there is no occasion to consider whether, as Mr Konle claims, the system of declaration and authorisation laid down in the TGVG 1993 constitutes a breach of the principle of non-discrimination and fundamental freedoms. Nor is there any need to consider the objection raised by Austria — as defendant Government — that Mr Konle has not succeeded in establishing the alleged breach of the Treaty. Austria had in fact contended that if Mr Konle thought he was entitled, on the basis of Community provisions that had direct effect, to apply for authorisation in the same way as Austrian nationals, he ought to have submitted a declaration in the form laid down in Paragraph 10.

ment of Community law, with the result that 'the plaintiff [was] injured in respect of a fundamental freedom guaranteed by provisions of Community law'. The national court refers, in particular, to Articles 6, 52 et seq. and 73b et seq. of the Treaty, on the principle of non-discrimination, freedom of establishment and free movement of capital. [13]

14. The plaintiff claims that it is an infringement of freedom of establishment and the free movement of capital to make the acquisition of immovable property subject to administrative authorisation. Austria contends — in the statement it submitted as a party in the main proceedings — that the prescribed authorisation procedures are not discriminatory and do not unduly restrict the exercise of the freedom guaranteed by the Treaty. In its view, Article 222 of the Treaty leaves the rules in Member States governing the system of property ownership intact.

I cannot agree with the Austrian Government's contention that the Tirol legislation at issue is exempt from the requirement to comply with the Treaty and consequently from scrutiny by this Court, simply because the subject-matter of that legislation is referred to in Article 222. [14] If that were the case, there would have been no need to provide the derogation we find in Article 70 of the Act of Accession. Access to the ownership of immovable property is in fact implicit in the freedoms guaranteed by the Treaty and the right to stay and reside in another Member State within the limits prescribed in Article 8a of the Treaty. If the provisions of national law cited in the order for reference are not covered or justified by the derogation, there is no reason why the Court should not examine their compatibility with the requirements of Community law and, in particular, with the conditions governing any restriction on the exercise of the freedoms guaranteed by the Treaty.

15. That being established, let us begin by considering whether the provisions in question unduly restrict the freedom of establishment. As the Commission has observed, the Court has stated that 'as is apparent from Article 54(3)(e) of the Treaty and the general programme for the abolition of restrictions on freedom of establishment of 18 December 1961, the right to acquire, use or dispose of immovable property on the territory of a Member State is the

13 — With regard to Article 6, the Court has already stated that that provision 'applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. See judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461.

14 — In interpreting Article 222, the Court has held that 'although Article 222 of the Treaty does not call into question the right of Member States to institute a system of public expropriation, such a system does not however escape the fundamental principle of non-discrimination underlying the Chapter of the Treaty on the right of establishment'. See judgments in Case 44/79 *Hauer* [1979] ECR 3727, paragraph 17, and Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 72.

corollary of freedom of establishment'. [15] A system of prior authorisation for the acquisition, such as the system prescribed in the TGVG 1996, may therefore constitute an obstacle to the exercise of freedom of establishment. It is true that the rules in the present case make no reference to the nationality of those to whom they are addressed and may be regarded in that respect as applicable without distinction. However, they must also comply with the criteria established in the Community case-law, according to which measures of this kind, in addition to being applied in a non-discriminatory manner, must be justified by imperative requirements in the general interest, must be suitable for securing the attainment of the objective which they pursue, and must not go beyond what is necessary in order to attain it. [16]

16. The first point to consider, therefore, is whether the system of authorisation at issue in this case is based on imperative requirements that are subject to the assessment of the Tirol legislature. It cannot, in my view, be denied that there are reasons, indeed serious reasons, for the provisions in question. These are clear from the preparatory work on the Law on the construction of secondary residences, the Tirolerraumordnungsgesetz of 1994, with which the rules governing property transactions at issue in this case are closely connected. [17] The Austrian Constitutional Court recognised the importance of the requirements laid down by the Tirol legislature in its judgment on the Tirol Raumordnungsgesetz. [18] These are essentially to do with land management and they are determined by the particular characteristics of the region concerned, namely the limited amount of space suitable for human habitation and the need to make sparing use of it; the pressing need to guarantee adequate accommodation for the resident population, in a situation where any increase in the already high number of secondary residences may cause property prices to rise and make purchase more difficult; the advantage of avoiding further development and other costs that would have repercussions for local communities if the demand for secondary residences was not kept within reasonable limits. These requirements were taken into account at Community level when Austria acceded to the Union. The Member States in fact declared that 'the Community *acquis* shall not prevent individual Member States from adopting national, regional or local measures on the subject of secondary residences, provided that such measures are necessary for the purposes of land management and environmental protection and that, in accordance with the *acquis*, their application does not involve direct or indirect discrimination among nationals of the Member States'. [19]

15 — Judgment in Case C-305/87, *Commission* v *Greece*, cited above, paragraph 22. That view is based on the assumption that the guarantees with regard to establishment provided in the Treaty are concerned not solely with 'the specific rules on the pursuit of occupational activities but also with the rules relating to the various general facilities which are of assistance in the pursuit of those activities', citing in this connection the statement made in the judgment in Case 63/86 *Commission* v *Italy* [1988] ECR 29.

16 — These principles, originally developed in connection with the free movement of goods, have also been applied with reference to the other freedoms. See, *ex multis*, the judgments in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, on freedom of establishment, and Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 21, on freedom to provide services.

17 — See annex to the minutes of the Tirol Landtag, eleventh legislature, sixth session, fourth sitting, held on 6, 7 and 8 July 1993, p. 45 et seq.

18 — Judgment of the Verfassungsgerichtshof of 28 November 1996, paragraph 3.3.3.2.

19 — That statement cannot be regarded as having absolute authority. The Court has in fact recently repeated that a common declaration, like an individual statement of position, can be taken into account only if its content is reflected in the provision to be interpreted (see paragraph 23 of the judgment in Case C-233/97 *KappAhl Oy*, cited above). Such declarations must also meet the criteria of proportionality and non-discretionary application laid down by the Court.

17. Even if they are theoretically ascribable to imperative requirements in the general interest, the restrictive provisions at issue in the present case will nevertheless be justified according to the canons of Community case-law only if they are proportionate, that is to say they must be appropriate to the aim the national legislature has in view and must not exceed what is necessary to achieve it. [20] I should like, if I may, to make some observations in this connection.

An initial comment seems to be called for regarding the aspects of the national legal order that the national court must take into account in applying the current system of authorisation and consequently also in determining whether, in its present form, it is inconsistent with the standards laid down in the Community case-law.

The Austrian Constitutional Court held, in its judgment on the Tirol Raumordnungsgesetz, that the prohibition on secondary residences was contrary to the principle of proportionality, since it exceeded what was necessary for the purposes of environmental protection and land management on which, as we have seen, the Tirol legislation is based. [21] The Austrian court took the view that such reasons of general interest could justify adopting the restrictive measures in question only for certain clearly defined areas, whereas they had been adopted for the whole region. In what sense is that criterion relevant to the present case? Clearly, the parameters invoked before the Constitutional Court are separate and distinct from the parameters of Community law. Nevertheless, I feel bound to point out that the judgment of the Vienna court may affect the application of the provisions mentioned in the order for reference. It is for the national court that issued that order to determine whether the failure to observe the principle of proportionality recorded by the Constitutional Court constitutes a breach of the obligations imposed by the Treaty. For my own part, bearing in mind the criteria laid down in Community case-law, I am inclined to think that it does, and I will explain the reason. The system of authorisation applied in the present case relates to the acquisition of immovable property for a principal residence but it is clearly being used in the present case to prevent the person acquiring the property from evading the prohibition on establishing a secondary residence in the Tirol. It will be for the court in which the main proceedings are being heard to ascertain whether the property to be acquired is in an area in which the prohibition on secondary residences is not justified, in accordance with the ruling of the Constitutional Court. If that is in fact the case, then to make the acquisition subject to the rigours of the authorisation procedure would, in my view, be a clear breach of the principle of proportionality in relation to the aim to be achieved, in that the restriction on the freedom of establishment would be entirely extraneous to, or incompatible with, the aims that the Tirol legislature was constitutionally empowered to pursue.

18. As regards the criteria that may be relevant to the aspect of the case we are

20 — See *inter alia* the judgment in Case C-145/88 *Torfaen* [1989] ECR 3851, paragraph 15.

21 — Judgment of the Verfassungsgerichtshof of 28 November 1996, cited above, paragraph 3.3.3.2.

considering, the Court has moreover given clear and useful guidance as to principle in its judgment in *Bordessa*. That judgment is of particular interest for the purposes of the present case, in that it concerns prior administrative control procedures that have the effect of restricting free movement guaranteed by the Treaty. [22] The decision in that case concerns the free movement of capital and it distinguishes between the system of authorisation, which the Court criticised because it entails suspension of the legal transaction that is the subject of the authorisation and because the procedure is subject to the discretion of the administrative authorities, and the system of prior declaration, which allows the authorities to exercise control over the achievement of the aim in view that is equally effective but less restrictive of the freedom traders should enjoy. [23] The Court has also pointed out, in its judgments in *Sanz de Lera* regarding the free movement of goods and *Parodi* with respect to the freedom to provide services, that the means used to achieve the aim the legislature has in view must not exceed what is necessary for that purpose. [24] Similar considerations may therefore apply to freedom of establishment, as I shall now explain.

19. It is, of course, for the national court to determine whether the restriction on freedom of establishment that may result from the application of the administrative control prescribed in the present case is excessive — and consequently unjustified within the meaning of Community law. Nevertheless, the Court may and indeed must indicate to the national court the criteria it considers useful for determining how the requirement relating to excessive restrictions is to be met in accordance with the Treaty.

In the first place, the national court must consider the question of the burden of proof in this case where, in order to obtain authorisation, the person acquiring the property must show that he does not intend to use it for a secondary residence.

In the second place, a lack of proportionality may be observed in the present case in a different and important respect. Looking at the history of the provisions at issue, it is clear that the system of prior declaration, originally prescribed as an alternative to the system of authorisation and now completely abolished, is an obvious point of reference for determining the proportionality of the measures adopted. The Commission has observed in the course of the proceedings before the Court that in 1993 *the very same legislature* had considered prior declaration to be an effective means of control to prevent immovable property that was acquired from being used for a secondary residence. The fact is that the declaration procedure was reserved for

22 — Judgment in Joined Cases C-358/93 and C-416/93 *Bordessa* [1995] ECR I-361, paragraph 23, referring to Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

23 — Paragraphs 24 and 27.

24 — Judgments in Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-4821, paragraph 23, and Case C-222/95 *Parodi* [1997] I-3899, paragraph 21.

Austrian nationals. Acquisitions by foreigners, including Community nationals, were still subject to compulsory authorisation. The 1996 law abolished that disparity, requiring authorisation to be obtained in all cases, irrespective of the nationality of the person acquiring the property. Although a simplified procedure was allowed in certain cases, the new system nevertheless made the conditions for the acquisition of immovable property and the exercise of the right of establishment by nationals of other Member States more onerous, as compared with the system of prior declaration which the very same legislature had considered to be *entirely appropriate for the purpose of exercising the necessary control* and which it could therefore have maintained in force, with the necessary adjustments to extend it to Community nationals. That option would have achieved the aim in view just as well as the one that was actually chosen and would have impinged less on the freedom of establishment guaranteed by the Treaty.

In my opinion, this last consideration also supports the view that restrictive measures such as those adopted by the Tirol legislature in 1996 may reasonably be held to be open to criticism if — as Community case-law requires — they are examined in the light of the principle of proportionality. I am therefore driven to the conclusion that, in that respect too, there appears to be a breach of freedom of establishment.

20. It remains, lastly, to consider whether the measures in question are being applied in a discriminatory manner. As I have explained, the TGVG 1996 abolished the declaration procedure previously reserved for Austrian nationals and made all types of acquisition subject to the authorisation procedure. Paragraph 25(2) of the law provides however that authorisation must be granted by the Landesgrundverkehrsreferent within two weeks of the application in cases where 'the conditions for granting authorisation are clearly met'. The Landesgrundverkehrsreferent is not required to give reasons for his decision, which is final. According to the plaintiff, the provision of a simplified authorisation procedure in addition to the normal one effectively perpetuates, to the detriment of nationals of Member States of the Community, the discriminatory policy that the TGVG 1993 had allowed to operate up to 1 January 1996. That was the very date on which Paragraph 3 entered into effect, extending — pursuant to the EEA Agreement and the relevant Act of Accession — the system applicable to Austrian nationals to include individuals availing themselves of the freedom of movement established by the EEA Agreement. That this was indeed the legislature's intention is confirmed, according to Mr Konle's lawyer, by the report on the TGVG 1996. In the commentary on the provision covering the accelerated procedure (Paragraph 25), the introduction of that procedure is linked with the abolition of the declaration originally reserved for

Austrian nationals.[25] Thus, in his opinion, direct discrimination was replaced by indirect discrimination, permitted by the wording of the law.

21. This is not the proper place to decide whether, as Mr Konle's defence lawyer stated in the course of the proceedings, 'the simplified procedure applies only to Austrian nationals'.[26] That suggestion appears to be at odds with the account of the relevant legislation given by the national court, according to which the system for authorising acquisition now applies without distinction to anyone seeking to acquire a property in Tirol irrespective of their nationality. There is, on the contrary, nothing to suggest that the Austrian authorities in fact discriminate in their application of the law in question, in the sense of allowing or refusing applicants an opportunity to avail themselves of the abridged procedure, according to whether they are Austrian nationals or nationals of another Member State of the Community. Naturally, if they did, it would be a clear breach of Community obligations. But this, I repeat, is a purely hypothetical proposition advanced by Mr Konle's defence lawyer, which is not confirmed in the account of the facts and the relevant legislation given by the national court. On the basis of the documents in the case, therefore, the Court is not in a position to determine whether or not there is any indirect discrimination in the provisions of the so-called abbreviated procedure or the manner in which they are administered.

22. The national court also asks the Court whether the national provisions at issue conflict with the Community rules on free movement of capital, but I consider that there is no need to address that aspect of the problem. The issue of Austria's liability for damages has been raised in the main proceedings. To determine whether the conditions for the alleged liability are met — a point which I shall consider at more length later — it is necessary and sufficient to establish a breach of the rules on establishment. Consequently, in view of the answer I feel should be given to that aspect of the question, there is no need also to consider the possible impact on this case of the rules on free movement of capital.

25 — See minutes of the Tirol Landtag, twelfth legislature, sixth session, fourth sitting, held on 3 and 4 July 1996, Annex I (Report on the draft law tabled by the Government. Commentary on Paragraphs 11 and 25 of the TGVG 1996, p. 13). In clarifying certain points in response to a request from the Court, Austria explains that reports on draft laws are not sources of law. Moreover, they can be used to interpret a law only if the wording of the law causes uncertainty, which is not the case with the legislation at issue in this case.

26 — To show that the prohibition on establishing secondary residences is effectively enforced, irrespective of the type of authorisation procedure employed, Austria, in reply to a question from the Court, gave examples of the penalties imposed in cases where, authorisation for acquisition having been granted, immovable property is used for a secondary residence. In particular, a fine of ATS 500 000 may be imposed (Paragraph 6(6)(c) of the TGVG 1996). Restrictions are also imposed on the transfer and use of the property.

Austria's liability for damages

23. The questions relating to liability must now be considered. In the second and third questions, the Court is asked whether it has jurisdiction, in proceedings under Article 177, to determine whether or not a breach of Community law is sufficiently serious and, if so, whether in the present case the possible breach committed by Austria falls into that category.

24. The answer to the first part of the question should, in my view, be in the affirmative. The Court is essentially being asked if the assessment as to whether there is a sufficiently serious breach of Community law — which is one of the conditions for claiming reparation from a Member State for failure to fulfil its obligations [27] — should be made by the Court or by the national court. The answer, it seems to me, follows from the case-law of the Court. The Court has repeatedly ruled that it is for the national court to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled. [28] This is quite understandable since, in the Community legal order, the national courts are responsible for protecting the rights of individuals in judicial proceedings. This does not mean, however, that the Court itself is not required to define the scope of the principles and rules of Community law that the national courts must then apply in specific cases. This task of centralised supervision, so to speak, is reserved for the Court and is connected with the need to ensure correct and uniform interpretation of Community law, a need that is fulfilled through the permanent dialogue between Community and national courts within the framework of the well-known instrument of judicial cooperation represented by the procedure for preliminary rulings under Article 177 of the Treaty. Only the Court therefore may, in general interpretative terms, clarify the concept at issue in this case, that is to say only the Court may define the scope of a 'sufficiently serious' breach, by establishing the conditions in which an individual may claim protection of his right to reparation from a Member State, and only the Court may explain how those conditions are to be understood. It is

27 — See judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paragraph 51.

28 — See judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, cited above, paragraph 58, which states that 'the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterise the breaches of Community law at issue'. The principle that it is for the national courts to verify whether the conditions for State liability are met has also been upheld in situations where the Court considered that it had all the information necessary to judge whether there was a serious breach of Community law. See judgments in Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 41, and Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* [1996] ECR I-5063, paragraph 49.

then for the national court to determine whether or not the facts in the case before it meet the conditions defined by the Court. If in doubt, the national court is, of course, still free to apply to the Court for further interpretative clarification under the preliminary-ruling procedure, to help it to solve the problem.

25. Let us now consider the nature of the breach on which the national court seeks clarification. In this connection, the Court has already suggested some factors that national courts may take into consideration in deciding whether a breach is 'sufficiently serious'. They include 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement'. [29] In such cases, as Advocate General Tesauro has observed, the limits set to the action of the States are not clearly defined. [30]

26. In the present case, it must be borne in mind that the Community obligations to be considered in the case of the Tirol legislation on second homes are difficult to define precisely because of the problem, now referred to the Court, of defining the scope of the derogation provided in Article 70 of the Act of Accession. In the present case, the Community rule at issue is not applicable with the clarity and precision required under Community law to establish an obligation by the State to make reparation for any damage suffered by the individual. Although the national rules must be applied in accordance with the requirements of the Treaty, in the circumstances the error of law committed by Austria may, for the reasons I have given, be regarded as excusable. This effectively precludes the hypothesis that the breach of its obligations under the Treaty is sufficiently serious.

The fourth question

27. The answer I have proposed to the second and third questions relieves me of the obligation to answer the fourth.

29 — Judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, cited above, paragraphs 56 and 57.

30 — See point 78 of his Opinion.

Conclusions

28. In the light of the foregoing considerations, I therefore propose that the Court give the following answers to the questions referred by the Landesgericht für Zivilrechtssachen Wien:

(1) National legislation such as the TGVG 1996 cannot be regarded as being covered by the derogation provided in Article 70 of the Act of Accession. By imposing a procedure of prior authorisation before property rights are entered in the land register, legislation of this kind may obstruct the exercise of freedom of establishment.

The aims of securing land management and environmental protection are imperative requirements in the general interest. However, national legislation based on those aims must meet the conditions defined in the case-law of the Court, that is to say they must be applied in a non-discriminatory manner, must be suitable for securing the attainment of the objective which they pursue, and must not go beyond what is necessary in order to attain it.

Any restrictions on the freedoms guaranteed by the Treaty imposed by national legislation with the aims of securing land management and environmental protection may be regarded as proportionate only in so far as they are confined to areas in which those requirements are in fact imperative and in so far as the aims cannot be pursued by measures that are less restrictive.

(2) & (3) Although in principle it is for the national courts to determine whether the conditions for establishing a Member State's liability for damages are fulfilled, it is for the Court, within the framework of the procedure provided for in Article 177 of the Treaty, to clarify the principles on which those conditions are defined.

A breach cannot be regarded as sufficiently serious when the Community rules in question are not sufficiently clear and precise.