OPINION OF ADVOCATE GENERAL LÉGER

delivered on 30 January 2003 [1]

1. Under Austrian law, the *Länder* may make acquisitions of immovable property subject to a regime of administrative supervision. In its judgments in *Konle* [2] and in *Reisch and Others*, [3] the Court considered the land acquisition regimes adopted by the *Land* of Tyrol (Austria) and the *Land* of Salzburg (Austria) respectively.

2. In the present case, the Landesgericht (Regional Court) Feldkirch (Austria) has made a reference to the Court for a preliminary ruling on the compatibility with the free movement of capital of the land acquisition regime established by the *Land* of Vorarlberg (Austria). The Landesgericht also asks what effect the standstill clause in the Agreement on the European Economic Area of 2 May 1992 [4] could have on such a regime.

I — Legal framework

A — *Community law*

3. Article 73b of the EC Treaty (now, after amendment, Article 56 EC) 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. According to Article 73d(1) of the EC Treaty (now Article 58(1) EC), the provisions of Article 73b of the Treaty are without prejudice to the right of Member

1 — Original language: French.

2 — Case C-302/97 *Konle* [1999] ECR I-3099.

3 — Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157.

4 — OJ 1994 L 1, p. 3 (hereinafter referred to as the 'EEA Agreement').

States to, in particular, take all requisite measures to prevent infringements of national law and regulations or such measures as are justified on grounds of public policy or public security. It is, however, specified in Article 73d(3) that such measures shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

5. Point 1(e) of Annex XII to the Agreement on the European Economic Area states that:

'during transition periods, EFTA [European Free Trade Association] 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 [Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [5]]'.

5 — OJ 1988 L 178, p. 5.

6. Article 70 of 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 [6] provides:

'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.'

B — *National law*

7. The Vorarlberger Grundverkehrsgesetz (Vorarlberg Land Transfer Law) of 23 September 1993, as amended, [7] provides that, as a rule, authorisation by the competent land transfer authority is required for any purchase of land. [8] If authorisation is refused, the acquisition may not be entered in the land register, the act by which right of ownership is established. The transaction is thus void by force of law. [9]

6 — OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1 (hereinafter referred to as the 'Act of Accession').

7 — LGBl. 1993/61, amended in LGBl. 1995/11, 1996/9 and 1997/85 (hereinafter the 'VGVG').

8 — Order for reference, point 4.

9 — Ibid., point 5.

8. The VGVG distinguishes between building land and land which is built on.

9. As regards building land, Paragraph 8 of the VGVG provides:

'3. Acquisitions of rights in unbuilt plots of land other than for holiday purposes shall be authorised if...

...

(b) the acquirer shows adequately that the land will within a reasonable time be put to a use in conformity with the land use plan or is required for public interest, charitable or cultural purposes. A need of the acquirer is also to be taken into account in this connection.'

10. Paragraph 8(3)(b) of the VGVG results from an amendment which was enacted in 1997 and came into force on 1 January 1998. This amendment arose out of the setting aside in 1996, by the Verfassungsgerichtshof (Constitutional Court) (Austria), of the previous provision. [10]

11. As regards built-on land, Paragraph 7 of the VGVG provides that the requirement of authorisation by the competent land transfer authority may be waived if the acquirer of title furnishes a written declaration that the parcel of land is built on, that its acquisition is not for the purpose of establishing a secondary residence and that he is an Austrian national or satisfies one of the conditions in Paragraph 3 of the VGVG.

12. Under Paragraph 3, acquirers of title who do not have Austrian nationality but who are nationals of another Member State enjoy equality of treatment with Austrian acquirers where they invoke a fundamental freedom of the European Union. [11]

II — Facts and procedure

13. Doris Salzmann, an Austrian national residing in the commune of Fußach (Austria), purchased from Walter Schneider, also an Austrian national and likewise

10 — Ibid., point 7.
11 — Ibid., point 6.

residing in Fußach, a building plot in that commune. She did not apply for the authorisation provided for in Paragraph 8 of the VGVG.

14. On 9 November 1998, the applicant applied to the Bezirksgericht (District Court) Bregenz (Austria) for registration in the land register of her ownership of the building plot. She 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 to build a holiday residence thereon. She argued that the authorisation scheme contravened the Community obligations of the Republic of Austria and that a declaration should be sufficient for the purpose of registration.

15. By decision of 16 November 1998, the Bezirksgericht Bregenz refused to grant her application on the ground that the land transfer authorisation was lacking.

16. On 18 November 1998, the applicant brought an action before the Landesgericht Feldkirch seeking to have that decision set aside. [12]

17. By order of 29 December 1998, the Bezirksgericht Bregenz referred questions to the Court in Case C-178/99 *Salzmann* for a preliminary ruling. [13] In its judgment in that case, the Court declared that it had no jurisdiction to rule on the questions on the ground that the function being performed here by the Bezirksgericht Bregenz was of an administrative nature. Following that judgment, the Bezirksgericht Bregenz remitted the case to the Landesgericht Feldkirch.

III — The questions referred

18. The Landesgericht Feldkirch decided to stay proceedings and to refer to the Court for a preliminary ruling three questions which were virtually identical to those referred in Case C-178/99, cited above. The questions referred were:

'1. May nationals of a Member State of the European Union rely on free movement of capital for a domestic transaction if national law prohibits discrimination against that country's own nationals but has no legislation expressly guaranteeing free movement of capital for citizens of the Union?

2. Is it compatible with free movement of capital for authorisation by the land

12 — Order for reference, point 4.

13 — Case C-178/99 *Salzmann* [2001] ECR I-4421.

transfer authority with constitutive effect to be required for the acquisition of building land which has not been built on?

3. What effect does the "standstill" clause in point 1(e) of Annex XII to the [EEA] Agreement have on wholly new kinds of situations regarding authorisation under land transfer law, not created until after signature of the [EEA] Agreement on 2 May 1992?'

IV — Assessment

A — *Admissibility*

19. As a preliminary point, it does not seem open to dispute that the Court has jurisdiction to rule on the questions referred by the Landesgericht Feldkirch. That jurisdiction is not, moreover, challenged by the parties which have submitted observations. Unlike the Bezirksgericht Bregenz in Case C-178/99, cited above, the Landesgericht Feldkirch has had an action brought before it and is required, as the national court of final instance, to give judgment in the framework of a procedure designed to produce a decision having force of law. [14]

20. The question of the admissibility of the present reference for a preliminary ruling nevertheless arises on another count. In their written observations on the first question referred, the Commission of the European Communities [15] and the Austrian Government [16] maintain that the main proceedings do not fall within the scope of Community law and that there is therefore no call to interpret that law. They emphasise that all the facts in the proceedings are confined to a single Member State and argue that in such cases Article 73b of the Treaty does not apply. They rely in support of their analysis on the wording of that article and on the case-law of the Court according to which the Treaty provisions concerning fundamental freedoms do not apply to circumstances which are purely national in scope.

21. The EFTA Surveillance Authority, while considering that the present reference for a preliminary ruling is admissible in accordance with the position taken by the Court in *Angonese* [17] and *Guimont*, [18] shares the view taken by the Commission and the Austrian Government that the main dispute does not come within the terms of Article 73b of the Treaty. [19]

14 — Order for reference, point 2.
15 — Points 11 to 17.
16 — Pages 2 to 5.
17 — Case C-281/98 *Angonese* [2000] ECR I-4139.
18 — Case C-448/98 *Guimont* [2000] ECR I-10663.
19 — See its written observations (points 17 to 23).

22. I consider that the admissibility of the present reference for a preliminary ruling can be inferred from the judgment in *Reisch*, cited above, which was delivered prior to the hearing in the present proceedings and the legal and factual circumstances of which are very similar to those in the main proceedings.

23. As indicated in point 1 of the present Opinion, the judgment in *Reisch* concerns the compatibility of the land acquisition regime adopted by the *Land* of Salzburg with the free movement of capital. Under that regime, the transfer of ownership of a building plot is conditional upon the presentation of a certificate issued on the basis of a declaration and, in some cases, of a land transfer authorisation. One of the parties which submitted observations challenged the admissibility of the reference for a preliminary ruling on the ground that the main dispute was purely internal in nature in so far as it concerned the acquisition by an Austrian company of a parcel of land situated in Austria.

24. The Court found first that all the facts in the main proceedings were confined to a single Member State. [20] It indicated, moreover, that national legislation such as the Salzburg Land Transfer Law which applies to Austrian nationals and to nationals of other Member States of the Community alike, may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations related to intra-Community trade. [21]

25. The Court went on to explain that those findings did not relieve it of the obligation to answer the questions put by the referring court. It pointed to the Court's consistently held view that it is for the national courts alone, which are seised of a case and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court. A reference for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action. [22]

26. The Court concluded that the interpretation of Community law requested by the referring court might be useful to it in dealing with the main action if national law were to require that an Austrian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation. [23]

20 — *Reisch*, cited above, paragraph 24.

21 — Idem.

22 — Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6, and *Angonese*, cited above, paragraph 18.

23 — *Reisch*, cited above, paragraph 26.

27. In so doing, the Court adopted the same position as that taken by it in the *Guimont* judgment, cited above, in the framework of the free movement of goods and of a main action in which all the facts were again confined to a single Member State. [24]

28. The judgments cited above in *Reisch* and *Guimont* are consistent with the rule in *Dzodzi*, [25] by virtue of which the Court declares that it has jurisdiction to rule on references for a preliminary ruling concerning provisions of Community law in situations where the facts in the main proceedings fall outside the scope thereof but where the provisions of Community law concerned have been made applicable by force of national law. In both those situations, whether the Court has jurisdiction depends solely on national law.

29. As I indicated in my Opinion in *Berliner Kindl Brauerei*, [26] this case-law has prompted considerable debate. In its judgment in *BIAO*, [27] the Court, sitting in plenary session, confirmed the rule in *Dzodzi*, cited above, even though Advocate General Jacobs proposed a reversal of precedent or, failing that, a substantial modification thereof. [28]

30. In the light of these points, it does not seem to me appropriate to reopen discussion on that case-law.

31. I will merely observe therefore that in the present case the referring court has indicated, in the grounds for the reference for a preliminary ruling [29] and in the formulation of the first question, that national law prohibits discrimination against Austrian nationals. In such a situation, the interpretation sought by the referring court may, considering that Austrian nationals may rely on the same rights as those which a national of another Member State would enjoy under Article 73b of the Treaty, help resolve the main proceedings.

32. The questions submitted by the national court concerning the interpretation of that provision must therefore be declared admissible.

24 — The proceedings were criminal proceedings brought by the French authorities against the managing director of a company established in France for having produced and sold, on French territory, rindless cheese under the name 'Emmenthal', in breach of French law.

25 — Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763. This line of decisions originated with the judgment in Case 166/84 *Thomasdünger* [1985] ECR 3001 and has been followed by the Court in many subsequent judgments, including those in Case C-28/95 *Leur-Bloem* [1997] ECR I-4161 and Case C-130/95 *Giloy* [1997] ECR I-4291.

26 — Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, paragraph 24.

27 — Case C-306/99 *BIAO* [2003] ECR I-1, paragraphs 86 to 92.

28 — Paragraphs 47 to 70.

29 — Point 10.

B — *The first and second questions submitted by the national court*

33. In submitting these two questions, which it is appropriate to consider together, the referring court asks in essence whether Article 73b of the Treaty should be understood as meaning that a prior authorisation scheme such as that provided for in the land acquisition regime established by the VGVG is unlawful.

34. It should first be noted that although the system of property ownership is, under Article 222 of the EC Treaty (now Article 295 EC), a matter for each Member State, that provision does not have the effect of exempting such a system from the rules of the Treaty concerning fundamental freedoms. [30]

35. Measures which, as here, regulate the acquisition of immovable property must comply with the rules governing the free movement of workers, the freedom of establishment and the freedom to provide services. [31]

36. Such measures must also comply with the provisions of the Treaty on the free movement of capital. [32]

37. It cannot be disputed that provisions which, like Paragraph 8 of the VGVG, lay down a procedure of prior authorisation for the acquisition of immovable property restrict, by their very purpose, the free movement of capital. [33] The objective pursued by these provisions is precisely that of enabling the competent authorities of the Member State concerned to oppose such acquisitions. They are therefore such as to prevent nationals of other Member States investing their capital in this way or to dissuade them from doing so.

38. The free movement of capital, as a fundamental principle of the Treaty, may be restricted by national rules only if they satisfy certain conditions. They must be justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest. Furthermore, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality. [34]

30 — Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7, and *Konle*, cited above, paragraph 38.

31 — See, to that effect, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 18 to 27.

32 — *Konle*, paragraph 22, and *Reisch*, paragraph 28.

33 — *Konle*, paragraph 39, and *Reisch*, paragraph 32.

34 — Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 49, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 45, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 45.

39. I will begin therefore by considering whether the regime at issue pursues an objective which is legitimate under Community law and is such as to justify a restriction of a fundamental freedom under the Treaty. If the answer is in the affirmative, and in so far as the ability of the contested regime to secure the objective which it pursues is not in dispute, I will then consider whether the restriction placed on the free movement of capital is proportionate to the objective pursued.

1. The objective pursued

40. This condition does not seem to me to present any real problems in the present case in view of the explanations provided by the Austrian Government and of the Court's decisions.

41. It is apparent from the Austrian Government's explanations that the primary objective pursued by Paragraph 8 of the VGVG has to do with land-use planning. It is to ensure that building plots are, within a reasonable time, used for building purposes that are in the public interest and are in accordance with the land-use plan. The purpose pursued by the regime at issue is therefore to prevent the purchase of unbuilt parcels of land by persons who do not intend to build or build within a reasonable time so as to promote the most judicious possible use of the available building land. [35] Another concern is to respond to the shortage of building plots in the *Land* of Vorarlberg owing to the mountainous terrain and population growth. [36]

42. The Court has held that those are grounds capable of justifying restrictions on the free movement of capital. Since the Court first accepted that restrictions on the exercise of the fundamental freedoms could be justified on grounds that were not provided for in the Treaty but pursued the 'objective... of protecting the public interest' [37] or could be classified as 'overriding reasons relating to the public interest', [38] [39] it has regularly extended the list of legitimate reasons that could be invoked by the Member States in support of such restrictions. [40] It has in particular ruled that maintaining, in a specific geographical area within a Member State a permanent population and an economic activity independent of the tourist sector may be regarded as an objective in the public interest capable of justifying restrictions on the free movement of capital. [41]

35 — See the Austrian Government's written observations, pages 16 and 17.

36 — See the Austrian Government's oral observations.

37 — See, in particular, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 29.

38 — See, in particular, Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 15.

39 — See, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 14.

40 — See, in this respect, the examples of overriding reasons relating to the public interest already accepted by the Court and cited in *Collectieve Antennevoorziening Gouda*, cited above, paragraph 14.

41 — *Konle*, paragraph 40, and *Reisch*, paragraph 34.

43. In the light of these considerations, I take the view that Paragraph 8 of the VGVG pursues an objective which is legitimate under Community law and which is such as to justify restrictions on the free movement of capital.

2. Proportionality

44. This condition constitutes the main difficulty in the present case.

(a) Arguments of the parties

45. The Austrian Government argues that Paragraph 8(3) of the VGVG is proportionate to the objective assigned to it and is as unrestrictive as possible. In its view, procedures such as prior notification, though deemed adequate in the case of built-on land, would manifestly be inadequate in the case of building plots. Such procedures would not, in its view, guarantee optimum utilisation of the available building land. The Government observes in this connection that no action can be taken against the author of a false declaration until the period granted the acquirer of title to build, namely 15 years, has elapsed. In contrast, the prior authorisation requirement, allowing as it does certain specific steps to be demanded of the acquirer of title, may prevent such a situation arising. This is all the more necessary in view of the fact that pressure from a rising population in the *Land* of Vorarlberg militates in favour of compliant utilisation of building plots. A prior authorisation scheme is, moreover, more advantageous to the acquirer of title, who gains quiet enjoyment of the property acquired, than a scheme based on subsequent sanctions.

46. The Austrian Government also stresses that Paragraph 8 of the VGVG applies to all equally and must be interpreted in the light of the principle of legality laid down in the Austrian Federal Constitution. Consequently, the competent administration does not have discretionary powers and is required to grant the authorisation requested provided that the conditions to which it is subject are met. This conclusion can also, in its view, be derived from the explanatory notes concerning Paragraph 8 of the VGVG.

47. Conversely, Mrs Salzmann, the Commission and the EFTA Surveillance Authority contend that the rules at issue are disproportionate to the objective pursued and that the latter could have been achieved by a less restrictive scheme involving prior notification or declaration. Mrs Salzmann and the Commission consider further that, in requiring the acquirer of title to provide proof of the future use to which the property is to be put, Paragraph 8(3) of the VGVG gives the competent administration a degree of latitude that could potentially be used in a discriminatory fashion.

(b) Assessment

48. Like Mrs Salzmann, the Commission and the EFTA Surveillance Authority, I take the view that the rules at issue must be deemed contrary to the provisions of Article 73b of the Treaty.

49. I base this assessment on two considerations. Firstly, it has not, in my view, been established that the prior authorisation scheme provided for in Paragraph 8 of the VGVG is strictly necessary to the achievement of the objectives pursued by that article. Secondly, the provision seems to me to confer on the competent administration a measure of discretion which the achievement of the objectives pursued does not warrant.

(i) The need for a prior authorisation scheme

50. It is useful to begin by recalling briefly the existing case-law concerning restrictions on the free movement of capital resulting from prior authorisation schemes applying to land acquisition.

51. In its judgments in *Bordessa*[42] and *Sanz de Lera*,[43] the Court held that the restrictions on the free movement of capital resulting from provisions making currency exports conditional upon prior authorisation by the administrative authorities could be eliminated by an adequate system of declaration, without compromising the aims of those rules.

52. The Court extended that approach to the question of land acquisition in the judgments, cited above, in *Konle* and *Reisch*.

53. In *Konle*, cited above, the Court considered provisions making the acquisition of land conditional upon prior authorisation by the administrative authorities in order to prevent such land being used to establish secondary residences. It indicated that the reasoning in *Bordessa* and *Sanz de Lera* could not be transposed directly in the circumstances and that, where the acquisition of property ownership is concerned, the requirement of prior authorisation does not reflect merely a need for information, as in the case of currency transfers, but can result in a refusal to grant authorisation, without necessarily being contrary to Community law.[44]

42 — Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 24 to 27.

43 — Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 26 and 27.

44 — *Konle*, cited above, paragraph 45.

54. The Court concluded from this analysis that a procedure simply involving a declaration cannot in itself ensure that the land is used in accordance with the national legislation, but that that did not mean that a prior authorisation procedure is nevertheless always necessary. It took the view that the State may take other measures to ensure compliance with its policies concerning land-use within its territory, such as fines, a decision requiring the acquirer of title to terminate the unlawful use of the land forthwith under penalty of its compulsory sale or a declaration that the sale is void. [45]

55. The Court adopted the same analysis in *Reisch*, cited above. It observed that the legislation in question provides that certain transactions relating to building plots, such as the transfer of ownership or the grant of a right to build, are permissible only where the acquirer of title makes a declaration stating, inter alia, that the land will be used as his principal residence or to meet a commercial need. If that declaration is not found to be satisfactory, the acquirer of title is required to obtain a transfer authorisation from another authority, which ascertains whether the substantive criteria relating to prohibition of use as a secondary residence are met. [46]

56. The Court ruled that the prior notification scheme could be regarded as compatible with Community law. On the other hand, it held that the prior authorisation scheme could not be viewed as a strictly indispensable measure, given the opportunity for supervision which the prior notification scheme affords to the public authority, the existence of criminal sanctions and a specific action for annulment which may be brought before the national court should the project carried out fail to comply with the initial declaration. [47]

57. I consider that the position taken by the Court in *Konle* and *Reisch* is capable of being applied to the circumstances of the present case.

58. Admittedly, Paragraph 8 of the VGVG does not, unlike the rules at issue in these two judgments, confine itself to requiring the acquirer of title to use the building plot to establish a principal residence. The article also seeks to ensure that the land purchased is built on within a reasonable time and that the building concerned complies with a land-use plan. The objectives pursued by the regime at issue and hence the obligations placed on the acquirer of title are therefore more extensive, since they include construction of a building within a reasonable time and the compliance of that building with certain requirements.

45 — Ibid., paragraph 47.
46 — Paragraphs 6 and 7.
47 — Ibid., paragraphs 36 to 38.

59. All the same, it has not in my view been demonstrated that the achievement of these objectives can be ensured only by a prior authorisation scheme such as that established by the *Land* of Vorarlberg, which is to say a scheme under which all transfers of unbuilt plots of land are conditional upon approval by the administrative authorities, which must be sought by special application and has suspensory effect in respect of the validity of the transaction.

60. I maintain in this connection that the arguments put forward by the Austrian Government to demonstrate that a prior notification scheme backed up by penalties would have been inadequate fail to convince. Those arguments are considered in turn below.

— A prior notification scheme would clearly be inadequate as a means of ensuring optimum utilisation of building plots

61. To this argument it can be replied that the schemes at issue in *Konle* [48] and *Reisch* [49] were also concerned with the acquisition of building plots. The Court held in these judgments that a prior notification scheme enables the administrative authorities to ascertain whether the purchase fulfils certain requirements and, in particular, whether the acquirer of title undertakes to use land acquired to establish his principal residence.

62. Such a scheme would also, in my view, provide a means of verifying that the acquirer of title undertakes to construct on the land purchased a building complying with the land-use plan. All that would be needed would be for the acquirer of title to be invited to state, in his written declaration, the type of building he intended to construct. The administrative authorities would thus be in a position to ascertain whether this type of building was consistent with one of the types provided for by the legislation and, if not, to oppose the building project, subject to doing so within a short, predetermined period after receipt of the declaration.

63. Nor does any particular risk or danger attach to providing that such administrative supervision be exercised through a declaratory procedure, under which the transaction concluded by the parties would, as a rule, be valid, unless the administrative authorities objected. [50] The situation in the present instance differs from that in cases where the question at issue is access to a profession regulated on grounds of professional ethics, competence or liability, [51]

48 — Paragraph 4.

49 — Paragraph 6.

50 — See, to this effect, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 40.

51 — See, with regard to the exercise of the profession of 'avvocato', Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 35.

or the exercise of an activity subject to public service obligations, [52] or again recognition of a diploma obtained in another Member State. [53] In these situations, the public interest demands that authorisation by the administrative authorities have suspensory effect in respect of the exercise of the freedom being asserted. The exercise of that freedom, even during the period in which a prior declaration is being examined, would represent a risk to the collective interest. This is not the case in the present instance.

64. It should be noted, in this connection, that in *Reisch* the Court indicated that the prior examination carried out in the light of the declaration by the acquirer of title could serve to prevent certain damage, reparable only with difficulty, caused by hastily completed building projects. [54]

65. Lastly, the undertaking to build given by the acquirer of title could be enforced, in the same way as his undertaking to use the land acquired to establish his principal residence, by a system of criminal and civil penalties, which could range from a warning to an action for annulment of the transaction.

52 — See, with regard to the provision of regular maritime cabotage services, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 36.

53 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 35.

54 — Paragraph 36.

— Such a system of penalties would not ensure optimum utilisation of building land in so far as 15 years would have to elapse before the system could be applied

66. It should be borne in mind that determination of the period granted the acquirer of title to proceed with the building project provided for in the land-use plan falls within the sovereign competence of the Austrian authorities or those of the *Land* of Vorarlberg. The length of that period cannot therefore constitute a valid argument for rejecting a notification scheme in favour of a prior authorisation scheme. Moreover, even a prior authorisation scheme would not suffice to ensure that all purchasers of building plots fulfil their undertakings.

— An application for prior authorisation would be more advantageous to the acquirer of title

67. This assertion calls, in my view, for qualification. An acquirer of title whose building project as set out in his declaration has not been rejected by the administrative authorities and whose ownership title has been entered in the land register will be in a position to ascertain his rights and obligations. Assuming he constructs the building provided for in his declaration and uses it as his principal residence, there is no reason therefore why he should be disturbed in the quiet enjoyment of his property.

68. This analysis was also set out by the Court in *Reisch*, where it indicated that a minimum requirement of prior notification has the advantage, unlike supervision procedures which are applied only *a posteriori*, of providing the acquirer of title with an element of legal certainty. [55]

69. Having regard to these considerations, a town and country planning policy such as that pursued in the present case is not, in my view, a valid ground for making acquisitions of building plots conditional upon a prior authorisation scheme having suspensory effect in respect of the validity of the transaction. This assessment is borne out by the degree of latitude which Paragraph 8 of the VGVG offers the competent administrative authorities.

(ii) The discretionary power vested in the administrative authorities

70. It should be remembered that Paragraph 8 of the VGVG attaches two conditions to authorisation of the acquisition of rights in unbuilt plots of land. The acquirer of title must demonstrate adequately that the land is not being purchased with a view to establishing a holiday residence thereon and that it will within a reasonable time be dedicated to a use in accordance with the land-use plan or is required for public interest, charitable or cultural purposes. [56]

71. As to the first condition, it is not, as the Court indicated very clearly in *Konle*, possible for the person seeking authorisation to provide incontrovertible proof of the future use of the land to be acquired. It follows that the administrative authorities have, in determining the probative value of the information received, considerable latitude which is closely related to a discretionary power. [57]

72. As to the second condition, it should be noted that several possible uses of the intended building are listed without any further guidance as to how the competent administrative authorities could give preference to one of those uses for a particular parcel of land. It is simply stated that the building project must be in accordance with the land-use plan or serve public interest, charitable or cultural purposes. The acquirer of title is, moreover, required to show 'adequately' that the land will within a reasonable time be assigned to a use in accordance with these uses but without any indication as to what particulars would constitute the necessary proof.

55 — Paragraph 36.

56 — See the Austrian Government's observations (pages 8 and 9).

57 — Paragraph 41.

73. In the absence of clarification by the Austrian authorities of the criteria applied by the administrative authorities in assessing whether the second condition is met, it must be stated that this lack of clarity is, here again, such as to leave those authorities with very considerable latitude which is closely related to a discretionary power.

74. It is settled case-law that a prior authorisation scheme such as that in the present case must be based on objective, non-discriminatory criteria which are known in advance to the persons concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. [58]

75. Where, as in the present case, the specific, objective circumstances in which prior authorisation will be granted or refused cannot be determined, the Court has taken the view that such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty, so that such a scheme must be regarded as contrary to the principle of legal certainty. [59]

58 — *Analir*, paragraph 38, *Commission* v *Portugal*, paragraph 50 and *Canal Satélite Digital*, paragraph 35, all cited above.

59 — Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraphs 21 and 22, and *Commission* v *France*, cited above, paragraph 50.

76. Having regard to all those points, I consider that the prior authorisation scheme provided for in Paragraph 8 of the VGVG is contrary to Article 73b of the Treaty.

77. As a subsidiary plea, the Austrian Government has submitted that, if the Court were to deem the scheme at issue to be contrary to Article 73b of the Treaty, the scheme would have to be regarded as covered by Article 70 of the Act of Accession, according to which the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession.

78. We have seen that Paragraph 8(3) of the VGVG, the provisions of which were relied on as against Mrs Salzmann, entered into force on 1 January 1998. In principle therefore, it cannot be regarded as legislation in existence at the date of accession of the Republic of Austria to the European Union. The Court has ruled however, in *Konle*, that any measure adopted after that date is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. The Court explained that the derogation provided for in that article may be applicable if the measure adopted after the date concerned is, in substance, identical to the previous legislation or if it is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation. [60]

60 — *Konle*, paragraph 52.

79. The Court also indicated that it is for the national court to determine the content of the existing legislation regarding secondary residences at the date of accession of the Republic of Austria. [61]

80. It is thus a matter for the referring court to determine whether Paragraph 8(3) of the VGVG satisfies the conditions which the Court identified in *Konle* as having to be met in order to benefit from the derogation provided for in Article 70 of the Act of Accession.

81. To help the national court in this assessment, the Court undertook in *Konle* a comparison of the legislation that was in force at the time of the accession of the Republic of Austria with the rules adopted subsequently and indicated why the latter could not be regarded as existing legislation within the meaning of Article 70 of the Act of Accession. [62]

82. It is not, to my mind, appropriate to proceed in this fashion in the present case in so far as the national court has been at pains to specify in the order for reference that the legislation that was in force at the time of the accession of the Republic of Austria was less restrictive than that which was adopted in 1997 and which was applied in the main proceedings. [63] I would add that the national court, which, it should be remembered, has not referred for a preliminary ruling a question concerning the interpretation of Article 70 of the Act of Accession, has not specifically cited the provision that was in force in 1995.

83. In the light of the foregoing considerations, I will therefore be proposing that the Court, in its response to the referring court, rule that Article 73b of the Treaty must be interpreted as meaning that it precludes a prior authorisation scheme such as that provided for by the land acquisition regime established by the VGVG.

C — *The third question submitted by the national court*

84. In submitting this question, the national court seeks to establish whether the 'standstill' clause in point 1(e) of Annex XII to the EEA Agreement precluded the adoption in 1993 of legislation making the acquisition of building land conditional upon prior authorisation.

85. The referring court is thus asking the Court to rule on the effects within the Austrian legal system of a provision of the EEA Agreement during a period prior to

61 — Ibid., paragraphs 27 and 51.

62 — Paragraphs 51 to 54.

63 — Order for reference, point 7.

the accession of the Republic of Austria to the European Union.

86. According to its case-law, the Court is not competent to answer such a question.

87. In *Andersson and Wåkerås-Andersson*, [64] the Court was similarly invited to rule on the effects within the legal system of a Member State of a provision of the EEA Agreement during a period prior to that State's accession. In essence, a Swedish court asked whether Article 6 of the EEA Agreement should be interpreted as meaning that the Kingdom of Sweden could be held responsible for damage caused to individuals as a result of the incorrect transposition of a directive prior to that State's accession to the European Union.

88. The Court ruled that while it has, in principle, jurisdiction to give a preliminary ruling on the interpretation of the EEA Agreement where such a question is raised before a court or tribunal of one of the Member States, that jurisdiction under Article 177 of the Treaty (now Article 234 EC) applies solely with regard to the Community. It does not therefore have jurisdiction to rule on the interpretation of that Agreement as regards its application in the EFTA States, nor has any such jurisdiction been conferred on it in the context of the EEA Agreement. [65]

89. The Court stated further that the fact that the EFTA State in question subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the Member States, cannot have the effect of attributing to the Court jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order. [66]

90. In its judgment in *Rechberger*, [67] delivered on the same date as *Andersson and Wåkerås-Andersson*, the Court reproduced this analysis, asserting that it did not have jurisdiction, either under Article 177 of the Treaty or under the EEA Agreement, to rule on the interpretation of that Agreement as regards its application by an EFTA State during the period prior to its accession to the European Union.

91. In the light of these considerations, I suggest that the Court declare that it does not have jurisdiction to answer the third question submitted by the national court.

64 — Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551.

65 — *Andersson and Wåkerås-Andersson*, paragraphs 27 to 31.

66 — Ibid., paragraph 30.

67 — Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraph 38.

V — Conclusion

92. In the light of the foregoing considerations, I therefore propose that the Court reply as follows to the questions referred by the Landesgericht Feldkirch:

(1) Article 73b of the EC Treaty (now Article 56 EC) must be interpreted as meaning that it precludes a prior authorisation scheme such as that provided for by the land acquisition regime established by the Vorarlberger Grundverkehrsgesetz (Vorarlberg Land Transfer Law) of 23 September 1993, as amended in 1997.

(2) The Court of Justice of the European Communities does not have jurisdiction to answer the third question submitted by the national court.