JUDGMENT OF THE COURT (Second Chamber)
29 April 1999 *

In Case C-224/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgerichtshof, Austria, for a preliminary ruling in the proceedings pending before that court between

Erich Ciola

and

Land Vorarlberg

on the interpretation of Articles 59 to 66 in conjunction with Article 5 of the EC Treaty and Article 2 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: G. Hirsch (Rapporteur), President of the Chamber, R. Schintgen and K. M. Ioannou, Judges,

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Austrian Government, by Christine Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Antonio Caeiro, Principal Legal Adviser, and Viktor Kreuschitz, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Ciola, represented by Harald Bösch, Rechtsanwalt, Bregenz; Land Vorarlberg, represented by Peter Bußjäger, lawyer in the Legislative Department, Office of the Government of the *Land* of Vorarlberg, and Martina Büchel, acting head of the Department of European and External Affairs, Office of the Government of the *Land* of Vorarlberg, acting as Agents; the Austrian Government, represented by Christine Stix-Hackl; and the Commission, represented by Viktor Kreuschitz, at the hearing on 12 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1998,

gives the following

Judgment

1 By order of 26 May 1997, received at the Court Registry on 16 June 1997, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 59 to 66 in conjunction with Article 5 of the EC Treaty and Article 2 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter 'the Act of Accession').

2 Those questions were raised in proceedings brought by Mr Ciola against fines imposed on him for exceeding the maximum quota of moorings on the shore of Lake Constance reserved for boats whose owners are resident abroad.

3 Mr Ciola is the manager *inter alia* of ABC-Boots-Charter GmbH. In 1990 that company leased certain land on the shore of Lake Constance. It obtained permission to establish 200 moorings for pleasure boats there.

4 At the company's request, the Bezirkshauptmannschaft Bregenz (the administrative authority of first instance of the *Land* of Vorarlberg) addressed to it on 9 August 1990 an individual administrative decision (*Bescheid*), point 2 of which stated:

'With effect from 1 January 1996 a maximum of 60 boats whose owners are resident abroad may be accommodated in the harbour. Until that time the proportion of boats owned by persons resident abroad is to be progressively reduced. No new allocation of moorings to boat-owners resident abroad or extension of expired rental contracts with such owners is permitted until the maximum foreigner quota has been reached...'.

5 Under the first sentence of Paragraph 4(1) of the Landschaftsschutzgesetz (Countryside Protection Law) of the *Land* of Vorarlberg, any alteration to the landscape in lake areas and in a 500-metre-wide strip of shore adjacent thereto, calculated at mean water level, is prohibited.

6 However, Paragraph 4(2) allows the administrative authority to authorise exceptions to that prohibition if there is a guarantee that such alterations will not harm the interests of landscape protection, in particular that they will not obstruct views of the lake, or if the alterations are necessary for reasons of public safety.

7 By decision of 10 July 1996 the Unabhängiger Verwaltungssenat (Independent Administrative Senate) of the *Land* of Vorarlberg found Mr Ciola, in his capacity as manager of the aforesaid company, guilty of renting two moorings to boat-owners who were resident abroad, namely in the Principality of Liechtenstein and

the Federal Republic of Germany, even though the maximum quota of 60 moorings reserved for foreigners had already been exceeded.

8 Consequently, as Mr Ciola had failed to comply with the conditions of point 2 of the administrative decision of 9 August 1990 and had therefore committed an administrative offence within the meaning of Paragraph 34(1)(f) of the Landschaftsschutzgesetz, he was fined ATS 75 000 for each of the two offences.

9 Since it considered that Mr Ciola's appeal against the fines raised questions concerning the interpretation of Community law, the Verwaltungsgerichtshof stayed proceedings and referred the following two questions to the Court:

'1. Are the provisions concerning the freedom to provide services to be interpreted as precluding a Member State from prohibiting the operator of a boat harbour, on pain of criminal prosecution, from renting more than a specific quota of moorings to boat-owners who are resident in another Member State?

2. Does Community law, in particular the provisions concerning the freedom to provide services in conjunction with Article 5 of the EC Treaty and Article 2 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 (OJ 1994 C 241, p. 21; OJ 1995 L 1, p. 1), give the provider of the services referred to in Question 1 above, who is resident in Austria, the right to assert that the prohibition issued in the terms set out in Question 1 by a specific individual administrative decision (*Bescheid*) adopted in 1990 should not be applied in decisions of the Austrian courts and administrative authorities adopted after 1 January 1995?'

Question 1

10 By its first question, the national court essentially asks whether the Treaty provisions on freedom to provide services are to be interpreted as precluding a Member State from establishing a maximum quota of moorings which may be rented to boat-owners resident in another Member State.

11 It should be observed at the outset that, as the national court has pointed out, first, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraph 37) and, second, in accordance with Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 16, and Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195, paragraph 15, that right includes the freedom for recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions.

12 Consequently, Articles 59 to 66 of the Treaty apply to a service such as that which the company of which Mr Ciola is manager provides, by means of a contract for the rental of a mooring, to a boat-owner resident in another Member State who receives and enjoys the service in a Member State other than that in which he resides.

13 In those circumstances, a restriction on moorings of the kind at issue in the main proceedings infringes the prohibition under the first paragraph of Article 59 of the Treaty of all discrimination, even indirect, with regard to providers of services.

14 While the restriction of the number of moorings which may be allocated to non-resident boat-owners is not based on their nationality, and so may not be regarded as direct discrimination, it does, however, use as the distinguishing criterion their place of residence. It is settled case-law that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners (see Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521, paragraph 29).

15 To justify imposing a quota on moorings reserved for nationals of other Member States on mandatory grounds in the general interest, the *Land* of Vorarlberg relied at the hearing on the need to reserve access to the moorings for local boat-owners, as there is a risk of such moorings being monopolised by persons resident in other Member States and willing to pay higher rental charges. Because of the limitation of the total number of moorings available, for reasons concerning protection of the environment, lifting the quota would increase the pressure on the authorities of the *Land* of Vorarlberg.

16 National rules which are not applicable to services without distinction whatever the place of residence of the recipient, and which are therefore discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 56 of the EC Treaty (see Case 352/85 *Bond van Adverteerders and Others* v *Netherlands State* [1988] ECR 2085, paragraph 32); however, economic aims cannot constitute grounds of public policy within the meaning of that provision (Case C-288/89 *Collectieve Antennevoorziening Gouda* v *Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

17 Since the *Land* of Vorarlberg has justified the imposition of a quota on moorings for non-resident owners not on grounds of public policy, public security or public health, but for economic reasons for the benefit of local owners, Article 56 of the Treaty cannot be applied; in those circumstances, it must be ascertained whether

the existence of an exception in the Act of Accession authorised the *Land* of Vorarlberg to take measures such as the quota at issue in the main proceedings in order to limit the influx of boat-owners from other Member States.

18 On this point, it suffices to note that Article 70 of the Act of Accession lays down an express derogation, for a limited time, only for existing legislation regarding secondary residences.

19 Consequently, the establishment by a Member State of a maximum quota for moorings which may be rented to boat-owners resident in another Member State is contrary to the principle of freedom to provide services.

20 The answer to Question 1 must therefore be that Article 59 of the Treaty is to be interpreted as precluding a Member State from prohibiting the manager of a boat harbour, on pain of prosecution, from renting moorings in excess of a specified quota to boat-owners who are resident in other Member States.

Question 2

21 By its second question, the Verwaltungsgerichtshof essentially asks whether a prohibition which is contrary to the freedom to provide services, laid down before a Member State's accession to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.

22 It appears from the grounds of the order for reference that in a case of failure to comply with general abstract rules which were not compatible with a fundamental principle of the Treaty, the Verwaltungsgerichtshof would have set aside such rules in favour of Community law on the basis of the Court's judgment in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629.

23 However, as the case-law to date, according to the Verwaltungsgerichtshof, lays down only the principle of the primacy of Community law over general rules of national law, that court asks whether that principle also applies to a specific individual administrative decision that is not in conformity with Community law such as, in the main proceedings, the *Bescheid* of 9 August 1990.

24 The Austrian Government submits that there is no reason why the case-law on the primacy of Community law should be applied, automatically and without restriction, to specific individual administrative acts. In support of its argument, it relies on the enforceability of administrative acts and refers in that connection to the case-law on what is known as the 'procedural autonomy of the Member States'. In its view, to hold that Community law takes precedence over an enforceable administrative act would be liable to call into question the principles of legal certainty, protection of legitimate expectations or protection of lawfully acquired rights.

25 It must be observed at the outset, as the Advocate General does in points 40 to 43 of his Opinion, that the dispute concerns not the fate of the administrative act itself, in this case the decision of 9 August 1990, but the question whether such an act must be disregarded when assessing the validity of a penalty imposed for failure to comply with an obligation thereunder, because of its incompatibility with the principle of freedom to provide services.

26 Next, since the provisions of the EC Treaty are directly applicable in the legal systems of all Member States and Community law takes precedence over national law,

those provisions create rights for the persons concerned which the national authorities must observe and safeguard, and any conflicting provision of national law therefore ceases to be applicable (see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 35).

27 Since the essential requirements of Article 59 of the Treaty became directly and unconditionally applicable at the end of the transitional period (see Case 279/80 *Webb* [1981] ECR 3305, paragraph 13), that provision consequently precludes the application of any conflicting measure of national law.

28 As regards the Republic of Austria, it is apparent from Article 2 of the Act of Accession that the provisions of the EC Treaty apply as from accession, that is, 1 January 1995, the date from which Article 59 of the Treaty thus became a direct source of law.

29 While the Court initially held that it is for the national court to refuse if necessary to apply any conflicting provision of national law (see *Simmenthal*, cited above, paragraph 21), it subsequently refined its case-law in two respects.

30 Thus it appears from the case-law, first, that all administrative bodies, including decentralised authorities, are subject to that obligation as to primacy, and individuals may therefore rely on such a provision of Community law against them (Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839, paragraph 32).

31 Second, provisions of national law which conflict with such a provision of Community law may be legislative or administrative (see, to that effect, Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 43).

32 It is consistent with that case-law that those administrative provisions of national law should include not only general abstract rules but also specific individual administrative decisions.

33 There is no reason why the legal protection which individuals derive from the direct effect of provisions of Community law and which the national courts must ensure (see Case C-213/89 *R* v *Secretary of State for Transport ex parte Factortame and Others* [1990] ECR I-2433, paragraph 19) should be refused to those individuals in cases where the dispute concerns the validity of an administrative measure. The existence of such protection cannot depend on the nature of the conflicting provision of national law.

34 It follows from the foregoing that a prohibition which is contrary to the freedom to provide services, laid down before the accession of a Member State to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.

Costs

35 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 26 May 1997, hereby rules:

1. **Article 59 of the EC Treaty must be interpreted as precluding a Member State from prohibiting the manager of a boat harbour, on pain of prosecution, from renting moorings in excess of a specified quota to boat-owners who are resident in other Member States.**

2. **A prohibition which is contrary to the freedom to provide services, laid down before the accession of a Member State to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession.**

Hirsch Schintgen Ioannou

Delivered in open court in Luxembourg on 29 April 1999.

R. Grass G. Hirsch

Registrar President of the Second Chamber