OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 10 April 2003 [1]

1. In this case the Verwaltungsgerichtshof (Higher Administrative Court, Austria) has referred for a preliminary ruling two questions concerning the interpretation of Articles 12 EC and 56 EC et seq. In particular, the questions relate to a provision of national law which subjects the transfer of agricultural and forestry plots to restrictions imposed by the administrative authorities in the interest of preserving a small-scale agricultural structure.

2. The questions referred give the Court an opportunity to refine its case-law on the conditions on the acquisition of real property which are laid down in national legislation. In this case-law, and in particular in *Konle* [2] and *Reisch and Others*, [3] the Court set the bounds within which a Member State may lay down such conditions. In that respect the Court took as a basis the Treaty provisions relating to free movement of capital as laid down in Articles 56 EC to 60 EC. Both judgments concerned national measures adopted in the interests of regional planning. A different public interest in the field of agriculture is at issue in this case.

3. Another particular element is also relevant in this case. The appellants in the main proceedings are from the Principality of Liechtenstein. The question which now arises is whether nationals of a country which is party to the Agreement on the European Economic Area [4] (hereinafter 'the EEA Agreement') but is not a Member State of the European Union may derive rights from this agreement in a case in which the EC Treaty provides for an exception to the free movement of capital in respect of movement of capital to or from third countries.

II — Legal framework

A — *European law*

4. Article 56(1) EC provides as follows: 'Within the framework of the provisions set

1 — Original language: Dutch.

2 — Case C-302/97 [1999] ECR I-3099.

3 — Joined Cases C-515/94, C-519/99, to C-524/99 and C-526/99 to C-540/99 [2002] ECR I-2157.

4 — OJ 1994 L 1, p. 1.

out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

5. Article 57(1) EC provides: 'The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.'

6. Article 40 of the EEA Agreement provides as follows: 'Within the framework of the provisions of this agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this article.'

7. The abovementioned Annex XII declares applicable Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. [5] It is evident from the nomenclature of capital movements in Annex I to this directive that capital movements cover transactions by which persons not resident invest in real property in the territory of a Member State.

8. Finally, I cite Article 6 of the EEA Agreement: 'Without prejudice to future developments of case-law, the provisions of this agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this agreement.'

B — *National law*

9. Under Paragraph VII of the Austrian Bundes-Verfassungsgesetznovelle 1974, [6] the laws of the *Länder* are subject to rules whereby transactions in agricultural and

5 — OJ 1988 L 178, p. 5.
6 — BGBl. No 444.

forestry plots are subject to restrictions imposed by the administrative authorities in the public interest of preserving, strengthening or creating a viable agricultural community. The Grundverkehrsgesetz (Land Transfer Law) of the *Land* of Vorarlberg of 23 September 1993 [7] (hereinafter 'the VGVG') applies in respect of the present case.

10. Paragraph 1(1) of the VGVG provides: 'This law shall apply to transactions relating to:

(a) agricultural and forestry plots,

(b) building plots,

(c) plots to which foreigners acquire title.'

11. Under Paragraph 1(3), the purpose of the VGVG is to:

'(a) preserve agricultural and forestry plots of family farming establishments in the interest of improving their structural circumstances in accordance with the natural factors prevailing in the *Land*,

...

(c) preserve the broadest possible, socially sustainable distribution of land ownership in accordance with the size of the *Land*, and

(d) place restrictions on the acquisition of land by foreigners who do not have the same status as Austrians under Community law.'

12. Paragraph 3 of the VGVG provides, in so far as it is relevant: 'Subject to paragraph 2 and in so far as follows from the law of the European Union, the rules on the acquisition of land by foreigners shall not apply to ... (e) persons and companies for the purpose of direct investments, real property investments and other capital transactions.'

13. Paragraph 4(1) of the VGVG provides: 'The transfer of agricultural or forestry

7 — At the time the order for reference was made, the VGVG was in force in the version of the Novellen Vorarlberger LGBl. 1995/11, 1996/9 and 1997/85 and of the Kundmachung Vorarlberger LGBl. 1997/21.

plots shall be subject to authorisation by the authority responsible for land transactions where it relates to one of the following rights:

(a) ownership,

(b) ... the right to build on the land of third parties,

(c) the right of use or right of usufruct,

(d) leasehold rights over agricultural holdings,

...'

14. Paragraph 5 of the VGVG provides as follows:

'1. Acquisition of title shall be authorised only:

(a) in the case of agricultural plots, where it is consistent with the preservation of an effective agricultural community and the acquirer himself cultivates the plot as part of an agricultural establishment and also has his place of residence there or, where that is not the case, it is not contrary to the preservation and creation of an economically healthy, medium and small-scale agricultural estate,

(b) in the case of forestry plots, where it is not contrary to the interest of forestry in particular and to the general economic interest,

...

2. The conditions laid down in subparagraph (1) are not satisfied in particular where:

(a) the plot would be withdrawn from agricultural or forestry use without sufficient reason;

(b) the consideration exceeds considerably the price of the plot customary in the location concerned;

(c) it must be concluded that the plot is being acquired solely to form or extend a large estate or hunting areas;

(d) it must be concluded that cultivation by the acquirer himself is not certain in the long term or the acquirer does not have the specialist knowledge necessary to cultivate the plot himself;

(e) the favourable land ownership arrangement as a result of the restructuring of rural land holdings would be affected without compelling reason. ...'

15. Paragraph 11 of the VGVG contains exceptions to the authorisation requirement in respect of a number of types of land acquisition, in particular between family members and in the event of succession or testamentary gift.

16. Under Paragraph 25 of the VGVG, a deed of transfer is to become invalid with retrospective effect if authorisation is refused.

III — Facts

17. The first appellant in the main proceedings, Margarethe Ospelt (hereinafter 'the first appellant'), is the registered owner of immovable property with a surface area of 43 532m^2, situated in Austria. She possesses nationality of the Principality of Liechtenstein.

18. The immovable property covers a large number of plot numbers, the majority of which are designated open-space agricultural land in the land development plan of the Municipality of Zwischenwasser. The plots in question adjoin one another. The agricultural plots are at present leased to two agricultural establishments.

19. By deed of 9 April 1998, the Schlössle Weissenberg Familienstiftung seated in the Principality of Liechtenstein was established. This foundation is the second appellant in the main proceedings. Its sole trustee authorised to sign and first beneficiary is the first appellant. By a deed of transfer of 16 April 1998, authenticated before an official notary in Feldkirch (Austria) on 16 April 1998, the immovable property in question was transferred to the second appellant. The lease was continued on that occasion.

20. In order to assess properly the factual context of this case, I will also briefly examine below the structure of the *Land* of Vorarlberg and in particular certain characteristic features of the agriculture engaged in this state of the Republic of Austria. In doing so I will use the information which the Austrian Government has provided in these proceedings.

21. In general agriculture in Austria is organised on a small scale, particularly in the mountainous *Land* of Vorarlberg. Vorarlberg has a total surface area of 260 144 hectares. 47% of this surface area is used as agricultural land, of which 94.58% lies in mountain areas within the meaning of Article 18 of Regulation No 1257/1999 [8] and 3.55% is in areas affected by serious handicaps within the meaning of Article 20 of this regulation. Therefore, a total of 98.13% of the agricultural land is in less-favoured areas under Article 17 of the regulation.

22. The area lends itself to milk production on account of the regional conditions. Other forms of production, such as cattle breeding, are virtually impossible. In Vorarlberg milk production is organised on three levels (3 Stufen Wirtschaft). This means that in autumn, winter and spring the farmers work in the valley. In the summer they move their livestock to the pastures in the lower and upper mountain reaches. This method preserves the landscape and the countryside.

IV — Procedure

23. On 22 April 1998 the appellants sought authorisation for a land transfer within the meaning of Paragraph 4 of the VGVG. By decision of 19 October 1998, the competent authority, the Unabhängiger Verwaltungssenat of the *Land* of Vorarlberg, refused authorisation. The reason stated for the refusal was that the requirements laid down in Paragraph 5(1)(a) and Paragraph 5(2)(a) and (d) of the VGVG had not been satisfied.

24. In its statement of grounds the Unabhängiger Verwaltungssenat examines further the facts and the legislation at issue. It notes that the overwhelming majority of the plots at issue are designated agricultural land and thus approval from the land transfer authority is required pursuant to Paragraph 4(1)(a) of the VGVG. The intention of the VGVG is that such land should be cultivated and acquired by farmers as part of an agricultural establishment. According to the established case-

8 — Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations (OJ 1999 L 160, p. 80). See also point 107 below.

law of the Verfassungsgerichtshof (Federal Constitutional Court, Austria), it is in the public interest, which the VGVG seeks to protect, that plots of agricultural land acquired in connection with land transfers be cultivated by the acquirers themselves. The Schlössle Weissenberg Familienstiftung does not operate as a farmer, nor has it any intention of engaging in agriculture. The acquisition of plots used for agricultural purposes with the intention of leasing them on is contrary to the public interest, protected by the VGVG, in preserving an effective agricultural community and preserving and creating economically healthy, medium and small-scale agricultural holdings. The requirement that authorisation be refused if the land is not cultivated by the acquirer himself in connection with an agricultural establishment also applies where the plot was not already cultivated by the previous owner himself.

25. The appellants first lodged an appeal against this decision with the Austrian Verfassungsgerichtshof. It declined to consider the appeal by decision of 26 September 2000 and subsequently remitted it to the Verwaltungsgerichtshof pursuant to Paragraph 144(3) of the Bundes-Verfassungsgesetz (Constitution). In the supplemented appeal it is argued *inter alia* that refusal of authorisation from the land transfer authority is contrary to the provisions of the EEA Agreement on the free movement of capital.

26. The Verwaltungsgerichtshof subsequently submitted the following questions to the Court of Justice for a preliminary ruling by an order of 19 October 2001, received at the Registry of the Court on 21 November 2001:

'1. Are Article 12 EC (ex Article 6 of the EC Treaty) and Article 56 EC et seq. (ex Article 73b et seq. of the EC Treaty) to be interpreted as meaning that rules whereby transactions in agricultural and forestry plots are subject to restrictions imposed by the administrative authorities in the public interest of preserving, strengthening or creating a viable agricultural community are also permitted in relation to Member States of the EEA as "third countries" under Article 56(1) EC ... having regard to the fundamental freedoms guaranteed by an applicable law of the European Union, in particular the free movement of capital?

2. In the event that the first question is answered in the affirmative, are Article 12 EC ... and Article 56 EC et seq. ... to be interpreted as meaning that the fact that the appellant must, in the case of transfers of agricultural and forestry plots, undergo an "authorisation procedure" even before the property right is entered in the land register, pursuant to the (Vorarlberg) Gesetz über den Verkehr mit Grundstücken (Land Transfer Law — VGVG 1993) published in Vorarlberg LGBl.

No 61/1993, entails an infringement of Community law and of one of the appellant's fundamental freedoms guaranteed by the law of the European Union, which is also applicable to Member States of the EEA as "third countries" under Article 56(1) EC ...?'

27. Written observations were submitted to the Court by the first appellant, the Governments of Austria, Liechtenstein and Norway, the EFTA Surveillance Authority and the Commission. A hearing was held in this case on 7 January 2003.

V — The first question

A — *General observations*

28. By the first question the national court essentially asks the Court to clarify the extent to which the free movement of capital, which is guaranteed between the Member States by Article 56 EC et seq., is applicable to movements of capital between a Member State of the European Union and a country which is party to the EEA Agreement but is not a Member State of the European Union. In particular, the following questions must be dealt with in succession:

— Article 56 EC and the movement of capital to and from third countries. In that respect I will also consider the meaning of Article 56 EC in connection with the completion of economic and monetary union. This raises the question whether residents of third countries derive rights from Article 56 EC.

— In the event that this question is answered in the affirmative, I will consider the interpretation of the standstill clause contained in Article 57(1) EC. Whether or not this case concerns a restriction on the movement of capital which already existed on 31 December 1993 is also relevant in this regard. It is also necessary to consider whether the fact that the Principality of Liechtenstein is a party to the EEA Agreement has any bearing on its classification as a third country within the meaning of Article 57 EC.

— The third question concerns the rights which stem from Article 40 of the EEA

Agreement, in particular in respect of nationals of EEA countries which are not Member States. Do such persons derive rights from Article 40 of the EEA Agreement which they may invoke before a court of law? Does the existence of such rights have consequences for a Member State which maintains a provision on the basis of the standstill clause contained in Article 57(1) EC? In other words, must Article 57(1) be disapplied in such circumstances?

29. This brings me to a preliminary observation. The Court examines the acquisition of real property primarily in the light of the free movement of capital, as is clear from *Konle* and *Reisch and Others*.[9] In *Konle* the Court refers also to the possible relevance of freedom of establishment but does not examine this matter further. In my opinion in *Reisch and Others*[10] I argued that national legislation which seeks to prevent secondary residences should be examined in the light of freedom to provide services. In my view, the capital transaction constituted primarily the consideration for a service that had been supplied.

30. In this case, however, the circumstances of the main proceedings give no grounds for also including in the assessment other fundamental freedoms under the EC Treaty. Whatever the purpose of the VGVG, the transaction in question relates primarily to investment in real property and not to cross-border establishment or provision of services. Therefore, an examination in the light of the other freedoms would be hypothetical in respect of the main proceedings. It is obvious that the other provisions of Community law referred to above cannot apply, either directly or indirectly, to the circumstances of the case.[11] Therefore, I will not consider the possible infringement of other fundamental freedoms under the EC Treaty. This applies also to the observations which the first appellant submitted to the Court in this regard.

B — *Article 56 EC*

31. Article 56(1) EC, which contains the principal rule on the free movement of capital, has two essential characteristics. Firstly, the provision has direct effect. Secondly, it has 'erga omnes' effect. It draws no distinction between the internal movement of capital within the European Union and the movement of capital to and from third countries.

9 — Cited in footnotes 2 and 3 above respectively.

10 — See, in particular, point 67 et seq. of that opinion.

11 — See the case-law of the Court concerning the obligation to give a preliminary ruling on questions submitted, for example Case C-130/95 *Giloy* [1997] ECR I-4291.

32. In *Sanz de Lera and Others*[12] the Court placed the following interpretation on first essential characteristic of Article 56 EC: 'Article 73b(1) of the Treaty (now Article 56 EC) lays down a clear and unconditional prohibition for which no implementing measure is needed. The expression "within the framework of the provisions set out in this Chapter" in Article 73b relates to the whole chapter in which it appears. The provision must therefore be interpreted in that context.'

33. As regards the second essential characteristic, Article 56 EC has 'erga omnes' effect in that unlike the other fundament freedoms of movement under the EC Treaty it also relates to movement to and from third countries. The applicability of Article 56 EC to movement to and from third countries is unique. The free movement of capital essentially establishes a necessary condition for the other three freedoms under the Treaty relating to persons, goods and services. These other freedoms lose in importance if the movement of capital — and also the movement of payments — is not free.

34. The free movement of capital not only constitutes a condition for the establishment of the internal market but also gives expression to the principle of an open market economy with free competition which is referred to in Articles 4 EC and 105 EC. This open market economy is not restricted by the physical borders of the territory of the European Union.

35. However, this still does not mean that the free movement of capital, which has direct effect, has the same effect within the European Union and externally. There is a difference in the extent of this freedom. Within the European Union this freedom is virtually complete. Externally there are exceptions. Articles 57 EC, 59 EC and 60 EC provide for possible restrictions on the free movement of capital which may be applied only to the movement of capital to and from third countries. In addition to the standstill clause contained in Article 57(1) EC, which is at issue in this case, the questions also concern the powers of the Council and the Member States to restrict the freedom granted in the Treaty under certain well-defined circumstances.

36. These differences are linked to the context in which the free movement of capital must be placed. In that respect I should note that the Maastricht Treaty established the free movement of capital having direct effect which is set out in Article 56 EC. The entry into force of Article 56 EC (and the following articles) was set at 1 January 1994 — and thus after the entry into force of the Maastricht

12 — Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821.

Treaty itself — that is to say, the date on which the second stage of economic and monetary union began. The date referred to in Article 57(1) EC must also be viewed in this context. The free movement of capital must be regarded as a constituent element of economic and monetary union.

37. Now that economic and monetary union has been completed, restrictions under public law on capital transactions within the eurozone are no longer conceivable. Monetary policy is set by the European Central Bank and this presupposes complete unity in terms of the movement of money and capital. Where monetary policy is centralised, there can no longer be any distinction between cross-border transactions and transactions effected within the national sphere of a Member State. In terms of powers, this means that within a completed monetary union the Member States have renounced their monetary sovereignty. Therefore, they are also no longer able to invoke the power to apply protective measures where balance of payment difficulties arise. Article 119(4) EC and Article 120(4) EC stipulate this expressly.

38. As regards the relationship between monetary union and the Member States which have not — yet — become part thereof, those Member States do still have the power to invoke Articles 119 EC and 120 EC where balance of payment difficulties arise. Under these articles, either they can be authorised to take protective measures or take protective measures independently where a sudden crisis in the balance of payments occurs. However, these Member States are required to coordinate their exchange-rate policy. This requirement is laid down in Article 124 EC and developed in the so-called EMS II.[13] This coordination requirement is necessary because the monetary union and the abovementioned Member States share a common capital market.

39. None of these requirements applies to the movement of capital to and from the EFTA countries. I should point out that as regards monetary policy the EEA Agreement provides for only a very limited form of cooperation relating to the exchange of information (Article 46 of the EEA Agreement).

40. I take the view that these differences in the level of monetary integration have a bearing on the interpretation of Article 56 EC and Article 40 EC of the EEA Agreement. In brief, although Article 56 EC draws no distinction between the movement of capital within the European Union and the movement of capital to and from third countries outside, that does not mean that the prohibition on restrictions has the same effect on both situations. Exceptions to the prohibition based on monetary

13 — The Second European Monetary System outlined in the resolution of the European Council on the establishment of an exchange-rate mechanism in the third stage of economic and monetary union of 16 June 1997 (OJ 1997 C 236, p. 5).

considerations may be applied only to the external movement of capital. The exceptions laid down in Article 40 et seq. of the EEA Agreement are covered by this. These exceptions — see in particular Article 43 of the EEA Agreement — are broader than the exceptions under the EC Treaty.

41. This brings me to the external movement of capital itself. The movement of capital has also been liberalised worldwide, albeit not completely. To bring about this worldwide liberalisation a number of instruments of international law have been adopted within the framework of *inter alia* the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO), and the International Monetary Fund (IMF).

42. With regard to the relationship between Article 56 EC and these instruments of international law it should be noted that Article 56 EC contains an unqualified freedom having direct effect and thus also an unconditional prohibition on the Member States restricting that freedom, [14] subject to certain exceptions set out explicitly in the EC Treaty. The instruments which have been adopted within the framework of the OECD, the WTO and the IMF do not have such far-reaching effect. In the context of the OECD a code has been adopted which seeks to liberalise capital movements. [15] The code contains binding, non-discriminatory rules. Article 10 of the code allows the Member States — *inter alia* in connection with the European Union — to liberalise further the movement of capital amongst themselves. As regards the WTO, I refer to the Annex on Financial Services attached to the GATS which allows the States to take restrictive measures to ensure the integrity and stability of the financial system. [16] In that context the IMF Agreement seeks primarily to remove obstacles to international payments. However, the agreement does allow countries to take measures necessary to survey international movements of capital. [17]

43. The agreements concluded in connection with the various international organisations with a view to liberalising the movement of capital are indeed relevant to the interpretation of the exceptions to the free movement of capital to and from third countries laid down in Article 57 EC et seq. These exceptions cannot be applied so broadly that they give rise to inconsistency with the obligations under international law of the European Community and its Member States.

14 — See *Sanz de Lera and Others*, cited in footnote 12 above, paragraph 41.

15 — OECD Code of Liberalisation of Capital Movements. The present version updated on 1 January 2003 is to be found on the OECD website.

16 — Appendix 2 to the General Agreement on Trade in Services.

17 — Article VI, Section 3, of the IMF Agreement.

44. It is also in this light that I consider the relevance of the EEA Agreement to the present case. Reliance by a Member State on the exception provided for in Article 57(1) EC may not result in nationals of a State party to the EEA Agreement being unable to exercise, or unable to exercise in full, their rights stemming from that agreement. It is therefore necessary to establish which rights may be derived from the relevant provisions of the EEA Agreement. I will examine this matter in Section D below.

45. I will now consider the extent to which nationals of third countries may rely on Article 56 EC. Article 56 EC grants them that right. Under this provision, the movement of capital itself may not be subject to restrictions. The Treaty creates no subjective right which is limited to nationals of the Member States. In this sense Article 56 EC differs from, for example, Article 18 EC, which grants the citizens of the European Union the right to move and reside freely within the territory of the Member States, or Article 39 EC, which relates to the workers of the Member States. [18] The same type of restriction applies *ratione personae* to the freedom to provide services and freedom of establishment.

46. Consequently, the free movement of capital applies to all capital transactions within the European Union and to the European Union from third countries and vice versa. Nor does the territoriality principle, as laid down in Article 299 EC, restrict the applicability of EC law. Where a legal transaction is effected in the territory of the European Union, Community law can apply irrespective of the place of residence or nationality of the person entitled.

47. To sum up, nationals of third countries and legal persons established in third countries may invoke the free movement of capital by virtue of the EC Treaty. If, in a specific case, Community law provides for an exception in relation to them, it is necessary to consider the extent to which that exception restricts a right which they enjoy in accordance with an obligation on the European Community under international law.

C — *Article 57(1) EC*

48. In *Sanz de Lera and Others* [19] the Court holds as follows in respect of Article 57(1) EC: 'The exception provided for in Article 73c(1) of the Treaty [now Article 57(1) EC] concerning the application to non-member countries of the restrictions existing on 31 December 1993

18 — Article 39(2) EC provides as follows: 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards ... .'

19 — Cited in footnote 12 above, paragraphs 44 and 47.

under national law or Community law regarding the capital movements listed in it to or from non-member countries is precisely worded, with the result that no latitude is granted to the Member States or the Community legislature regarding either the date of applicability of the restrictions or the categories of capital movements which may be subject to restrictions. ... It follows that that exception cannot preclude Article 73b(1) of the Treaty from conferring on individuals rights which they can rely on before the courts.' In my view, *Sanz de Lera and Others* forms the starting point for consideration of certain particular elements of Article 57 EC.

49. Article 57(1) EC is a standstill clause in nature. Where national legislation restricting the free movement of capital existed in a Member State on 31 December 1993, that Member State is under no obligation to adapt that national legislation in order to thus to promote liberalisation of the movement of capital. Such an obligation can arise only from measures which the Council adopts pursuant to Article 57(2) EC. On the other hand, a Member State is not permitted to adopt new legislation restricting the free movement of capital to and from third countries after the above-mentioned date.

50. This brings me to the relevance of the EEA Agreement in this context. In these proceedings the EFTA Surveillance Authority has contended that as a consequence of the entry into force of the EEA Agreement the States party to that agreement cannot be regarded as third countries within the meaning of Article 57(1) EC. I consider that this view is incorrect. As *Sanz de Lera and Others* confirmed, it is a precisely worded exception which grants no latitude. Moreover, according to the Court's established case-law, exceptions to the fundamental freedoms enshrined in the EC Treaty must be interpreted strictly.

51. Any State which is not a Member State of the European Union is a third country. The EEA Agreement does not alter this fact in any way. Even though nationals of States party to the EEA Agreement derive rights from that agreement which are similar or even identical to the rights which citizens of the European Union derive from the EC Treaty, the fact remains that those countries are not Member States of the European Union. In that respect the EEA Agreement is no different from other association agreements which the European Community has concluded with non-member States, such as the countries of central and eastern Europe. Nationals of these countries can also derive from these agreements rights which they may exercise in the Member States of the European Union.

52. As I emphasised at point 49 above, the Member States are under no obligation at all to adapt restrictions on the movement of

capital where the national legislation already existed on 31 December 1993. Furthermore, in *Konle* the Court stated that national legislation adopted after 31 December 1993 can also be covered by the standstill clause. This is not automatically excluded from the standstill clause by the fact that it entered into force at a later date. Where national legislation is adopted after 31 December 1993 and such legislation is similar, in substantive terms, to the legislation prior to 31 December 1993, it also constitutes 'existing legislation'. The measure must be, in substance, identical to the previous legislation. It can also reduce or eliminate an obstacle to the exercise of Community rights and freedoms in the earlier legislation. On the other hand, new legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of accession. [20]

53. In more general terms, Member States are empowered to adapt existing legislation by virtue of the standstill clause without altering the existing legal situation. In that respect account must also be taken of existing administrative practice and it must also be possible to deduce from the established facts that the new national legislation does not alter the existing legal situation. [21]

54. Moreover, the Member States have the option of abolishing the exception. They are entitled to decide to abolish it in part or progressively. I also regard as a partial abolition any amendment to the law by which the national legislature eliminates obstacles to the exercise of Community rights and freedoms in the earlier legislation. [22] The greater power will usually include the lesser. The situation is different, however, if a Member State applies afresh in a wider manner an exclusion whose use was limited at a given moment by a legal provision. [23]

55. The VGVG was not yet in force on 31 December 1993. In principle the standstill clause could not be applied in such a case. However, if the new national legislation brings about no change to the existing legal situation, the standstill clause remains applicable. The observations of the Austrian Government, which are not disputed, state that the forerunner to the VGVG, the Grundverkehrsgesetz, [24] was, in substance, almost identical to the VGVG and pursued the same objective. Only the obstacles to the exercise of Community rights and freedoms in the earlier legislation are eliminated. As stated in *Konle*, in

20 — *Konle*, cited in footnote 2 above, paragraph 53.

21 — Opinion of Advocate General Geelhoed in Case C-409/99 *Metropol Treuhand and Stadler* v [2002] ECR I-81, points 36 and 37.

22 — See, to this effect, also *Konle*, cited in footnote 2 above.

23 — Joined Opinions of Advocate General Geelhoed in Case C-345/99 *Commission* v *France* [2001] ECR I-4493, and Case C-40/00 *Commission* v *France* [2001] ECR I-4539, for example at paragraph 63.

24 — LGBl. 1977/18 and LGBl. 1987/63.

such a case the derogation laid down in Article 57(1) EC can be applied.[25]

56. I therefore conclude that the relevant provisions of the VGVG may be maintained by virtue of the standstill clause in Article 57(1) EC. The amendment of national legislation in Austria after 31 December 1993 falls within the discretion which Member States have in accordance with Article 57(1) EC. The Principality of Liechtenstein must be regarded as a third country to which Article 57(1) EC applies.

D — *The EEA Agreement*

Observations submitted

57. The observations submitted to the Court have examined in detail the direct effect of Article 40 of the EEA Agreement and the associated question whether or not Article 56 EC and Article 40 of the EEA Agreement must be interpreted in the same way.

58. The first appellant considers that under Article 40 of the EEA Agreement no restrictions to the movement of capital are possible in the territory of the EEA. Article 40 of the EEA Agreement has direct effect. Therefore, the question whether or not Liechtenstein is a third country within the meaning of Article 56 EC is irrelevant in this case.

59. In the view of the Norwegian Government, the EEA Agreement is applicable to this case. Despite the fact that the wording of Article 40(1) of the EEA Agreement and Article 56 EC are not entirely identical, they must be interpreted in the same way save where there are reasons for interpreting them differently. Since there are no such reasons, the grounds for restrictions permitted under Article 56 EC are also permitted under Article 40(1) of the EEA Agreement. Therefore, it follows that the States party to the EEA Agreement must be treated in the same way as Member States.

60. In the view of the Liechtenstein Government, Article 40 of the EEA Agreement stipulates that the movement of capital relating to persons in Member States or in States party to the EEA Agreement may not be subject to restrictions or discrimination based on nationality or on place of residence. Article 40 of the EEA Agreement has, in conjunction with Annex XII, direct effect since, having regard to its wording

25 — Cited in footnote 2 above, paragraph 52.

and the purpose and nature of the agreement, it contains a clear and well-defined obligation for whose implementation and operation no further action is required.

61. The Liechtenstein Government considers that Article 40 of the EEA Agreement and Article 56 EC are, in substantive terms, comparable since both provisions prohibit any restriction on the movement of capital. In order to ensure an unequivocal interpretation of the provisions of the EC Treaty and the EEA Agreement, which are substantively the same, account must be taken *inter alia* of the Court's case-law concerning Article 56 EC.

62. The Commission takes the view that Article 40 of the EEA Agreement is applicable. Article 40 of the EEA Agreement is essentially identical to Article 56 EC. The restrictions on the free movement of capital brought about by restrictions to the transfer of property are authorised between the Member States under certain circumstances. They are also authorised in respect of movements to and from third countries and consequently in respect of movements to and EEA countries which are not Member States.

63. The EFTA Surveillance Authority considers that it follows from the EEA Agreement that EEA countries must participate in the internal market as if they were Member States of the European Union. The EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement.[26] If follows from Article 6 of the EEA Agreement and case-law that Article 40 of the EEA Agreement, read in conjunction with Directive 88/361, must be interpreted in the light of the Court's case-law concerning Article 56 EC.

64. The Austrian Government has put forward a different view. It considers that the EEA Agreement is not relevant to the assessment of the present case. In the alternative, the Austrian Government contends that agriculture does fall under the free movement of capital provided for in the EEA Agreement. Article 42 of the EEA Agreement talks of movements of capital liberalised 'in accordance with the provisions of this agreement'. Agricultural policy does not fall within the scope of the EEA Agreement and therefore the free movement of capital is not applicable in respect of agriculture.

65. In the further alternative, the Austrian Government takes the view that the restrictions on the acquisition of agricultural and forestry plots are consistent with the EEA Agreement. It refers to Article 6 of the EEA Agreement from which it follows, in its view, that no account may be taken of rulings of the Court concerning the EC Treaty prior to the date of signature thereof, that is to say 2 May 1992. It considers that Article 67 EC, as worded

26 — The Authority refers to Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 107. See, in greater detail in that respect, point 70 below.

prior to the entry into force of the Maastricht Treaty, merely contained a prohibition on discrimination in respect of the movement of capital between the Member States. Therefore, the subsequent rulings of the Court, in which a parallel is drawn between the free movement of capital and other fundamental freedoms of movement, cannot be applied to the free movement of capital in the EEA Agreement.

Appraisal

66. I will begin by making certain remarks on the interpretation which must be placed on the EEA Agreement. Article 6 of this agreement provides that the provisions thereof which are identical in substance to the provisions of the EC Treaty must be interpreted in conformity with the case-law of the Court as it stood at the time the EEA Agreement was signed. The EEA Agreement contains no similar provision relating to subsequent case-law. As is clear from Opinion 1/92 of the Court, nor is such provision specifically envisaged. [27]

67. However, the EEA Agreement must be interpreted in as uniform a manner as possible, as follows from Article 105 et seq. thereof. The Court of Justice has jurisdiction to interpret the EEA Agreement with regard to the territory of the Community and the EFTA Court has jurisdiction to do so as regards its application in the EFTA States. [28] In that respect the agreement provides for cooperation between the Court of Justice and the EFTA Court. In that regard I consider that it is for the Court of Justice to ensure not only that uniformity is safeguarded as regards the interpretation of the EEA Agreement itself, but also that an interpretation is given which is uniform as regards the interpretation of identical or comparable provisions of the EC Treaty. In this connection Advocate General Cosmas stated in his Opinion in *Andersson and Wåkeråss-Andersson* [29] that a uniform interpretation must be placed on the various rules which are to be applied within the Member States of the Community.

68. In its observations the Commission refers to *Pokrzeptowicz-Meyer*. [30] In that judgment the Court notes that '[a]ccording to settled case-law, a mere similarity in the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Community and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the Treaties ... . According to that case-law, the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends on, inter alia, the aim pursued by each

27 — Opinion 1/92 [1992] ECR I-2821.

28 — See, to that effect, Case C-321/97 *Andersson and Wåkeråss-Andersson* [1999] ECR I-3551, paragraph 28.

29 — Opinion in the case cited in footnote 28 above, point 30.

30 — Case C-162/00 [2002] ECR I-1049, paragraphs 32 and 33.

provision in its own particular context. A comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard.'

69. According to the preamble to the EEA Agreement, one of its principal aims is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area. Thus, the EEA Agreement seeks to extend the internal market established within the European Union territorially to the EFTA countries. Therefore, the objectives and context of the agreement must be compared with those of the EC Treaty.

70. I find support for this view in *Opel Austria* v *Council* [31] in which the Court of First Instance ruled as follows: '... the EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement. Thus, as is clear from Article 1(2), the EEA involves, *inter alia*, the free movement of goods, persons, services and capital ... . The rules applicable to relations between the Contracting Parties in the fields covered by the agreement essentially correspond to the parallel provisions of the EC and ECSC Treaties and the measures adopted in pursuance of those treaties.'

31 — Cited in footnote 26 above.

71. Consequently, I take the view — *inter alia* in the light of the case-law of the Court of Justice and the Court of First Instance — that the provisions of the EEA Agreement relating to the free movement of capital must, as far as possible, be interpreted in the same way as the corresponding articles of the EC Treaty. This applies both to the content of the freedom itself and to the grounds on which Member States may restrict these freedoms to which the second question referred by the national court relates. Therefore, I do not agree with the Austrian Government's view that the Court of Justice's rulings on the free movement of capital given prior to 2 May 1992 may not be taken into account.

72. The following section concerns the content of the EEA Agreement. Article 40 of the EEA Agreement is comparable in substance to Article 56(1) EC. Restrictions on the free movement of capital are prohibited and there is no discrimination on grounds of nationality or place of residence. It is true that the group of persons who may take advantage of this prohibition is limited, that is to say persons resident in the European Economic Area. Furthermore, the final sentence of Article 40 of the EEA Agreement refers to the provisions necessary to implement that article. This final sentence might indicate that, unlike Article 56 EC, Article 40 of the EEA Agreement does not have direct effect. In my view, this interpretation is incorrect. The reference to Annex XII - which implements this article — is relevant only to capital transactions covered by the free-

dom. Where a transaction is referred to in the annex, a prohibition on restricting the freedom applies directly to it. This is also the case in respect of transactions by which non-residents invest in real property in the territory of a Member State.

73. Consequently, I consider groundless the comparison which the Austrian Government draws between Article 40 of the EEA Agreement and Article 67 EC, as worded prior to the entry into force of the Maastricht Treaty. [32] Article 67 EC did not directly require the Member States to abolish restrictions on the free movement of capital. I refer to the wording of the two abovementioned articles. Whilst Article 40 of the EEA Agreement states that there must be no restrictions on the movement of capital, (former) Article 67 EC states that the Member States must progressively abolish restrictions on the movement of capital. Furthermore, the scope of the obligation on the Member States varied in time and depended on an assessment of the requirements of the common market. [33] The liberalisation of capital movements was increased considerably through secondary law such as Directive 88/361. Citizens derived their direct rights primarily from secondary law and not from Article 67 EC itself.

74. In brief, the nationals of States party to the EEA Agreement derive from this agreement rights which they may exercise in the Member States of the European Union.

75. The question is now how far do the rights of these citizens actually extend. At issue here is the relevance of Article 40 of the EEA Agreement. Nationals of the States party to the EEA Agreement also have rights in the territory of the European Union which they may exercise directly by virtue of Article 56 EC. Moreover, as I stated above, Article 56 EC is subject to fewer restrictions.

76. However, this case concerns a situation in which a specific provision of Community law — Article 57(1) EC which contains an exception to the principal rule contained in Article 56(1) EC — makes it impossible to exercise rights stemming from Article 40 of the EEA Agreement. In this respect I should note that the EEA Agreement contains no standstill clause comparable to Article 57(1) EC. The standstill clauses contained in Annex XII to the EEA Agreement — the annex which implements Article 40 of the EEA Agreement — have much a more limited scope and period of validity. Furthermore, and this is most important here, it is of no relevance to the present case. Nor

32 — Moreover, the EFTA Court also compares Article 40 of the EEA Agreement with (former) Article 67 EC. It notes that the two provisions have similar wordings. However, the EFTA Court (implicitly) acknowledges the direct effect of Article 40, read in conjunction with Annex XII to the EEA Agreement. See Case E-1/00 *Íslandsbanki-FBA* [2000] EFTA Court Rep. 2000-2001, 8, paragraph 16 et seq. of the judgment.

33 — Case 203/80 *Casati* [1981] ECR 2595, paragraph 10.

are the exceptions to the free movement of capital, as provided for *inter alia* in Article 143 of the EEA Agreement, relevant to this case.

77. I now come to the relationship between international agreements concluded by the European Community and the substantive provisions of the EC Treaty. According to established case-law, international agreements are an integral part of the Community legal order and it is the task of the Community institutions, including the Court of Justice, to ensure that they are observed. In particular, the European Community is bound by the EEA Agreement following the approval thereof on behalf of the European Community by Decision 94/1/ECSC, EC. [34] The agreement must be regarded as an agreement establishing an association within the meaning of Article 310 EC [35] which — *inter alia* — involves reciprocal rights and obligations. Under this agreement, the Community institutions and the Member States are required to ensure that the rights enjoyed by nationals of the EEA countries can be exercised in the territory of the European Community. This is not altered by the fact that, under internal Community law, these rights are not enjoyed by nationals of EEA countries other than Member States. Nor is it relevant whether or not these rights are enjoyed by nationals of the Member States under internal Community law.

78. That having been said, I conclude that Article 57(1) EC must be disapplied in circumstances such as those in the main proceedings where reliance on this provision by a Member State leads to a national of an EEA country being unable to exercise a right which he enjoys under the EEA Agreement.

79. I should also point out that my assessment also means that nationals of the Member States can rely on the EEA Agreement. Where they exercise the freedom to move capital in connection with a capital transaction to or from a — third — country which is party to the EEA Agreement but is not a Member State of the European Union, Article 57(1) EC cannot be applied if there is inconsistency with Article 40 of the EEA Agreement.

80. I make two further remarks for the sake of completeness. Firstly, the significance of my assessment of the operation of the Community legal system must not be overestimated. It is not often that the EEA Agreement grants citizens of the European Union substantive rights which they do not enjoy under Community law. Secondly, my assessment is essentially that although countries which are party to the EEA Agreement but are not Member States of the European Union have the status of third countries within the meaning of Article 57(1) EC, in practice they are generally treated as Member States. This

34 — Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1).

35 — This article also formed (*inter alia*) the legal basis for Decision 94/1/ECSC, EC.

situation is in keeping with the particular nature of the EEA Agreement, as stated correctly by the Court of First Instance in *Opel Austria* v *Council*,[36] that is to say 'a high degree of integration, with objectives which exceed those of a mere free-trade agreement'.

VI — The second question

A — *General observations*

81. This question need be answered only if the Court shares my view that the obstacle to the free movement of capital in this case is not justified by Article 57(1) EC.

82. The second question essentially concerns a classic problem of Community law. Under Article 295 EC, the rules governing property ownership are reserved for the Member States. However, this does not mean that national rules which reserve ownership of real property for persons displaying certain qualities are exempt from the fundamental rules of the EC Treaty,[37] such as the prohibition on discrimination and the protection of the four freedoms. The same applies *mutatis mutandis* to Article 125 of the EEA Agreement to which the Norwegian Government refers. More specifically as regards this case, it is for the *Land* of Vorarlberg to lay down the conditions governing the acquisition of real property. However, these conditions must be examined in the light of the free movement of capital.

83. Since there is no doubt that the VGVG constitutes an obstacle to the free movement of capital guaranteed by the EC Treaty — in that investment in real property is subject to conditions — it is necessary to determine whether or not this obstacle is permissible.

84. I will assess the permissibility of the VGVG on the basis of the established case-law of the Court as expressed *inter alia* in *Gebhard*,[38] according to which 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective

36 — See point 72 above.

37 — See Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7, and *Konle*, cited in footnote 2 above, paragraph 38.

38 — Case C-55/94 [1995] ECR I-4165, paragraph 37.

which they pursue; and they must not go beyond what is necessary in order to attain it'. Furthermore, in the more recent judgment in *Reisch and Others* the Court used the two latter criteria to examine the principle of proportionality. [39]

85. In *Konle* and *Reisch and Others* the Court set out the criteria concerning the permissibility of national laws which subject to restrictions the acquisition of real property in a Member State. In particular, it provided an interpretation of the principle of proportionality which can form the basis for the assessment in the present case. This applies to a lesser extent to the objective in the public interest which must provide grounds for the obstacle to the free movement of capital. The principal objective of the VGVG is to protect the interests of - small-scale - agriculture whilst regional planning was the principal issue in the other two cases.

86. I will continue my opinion with the observations that have been submitted and then go on the context surrounding the national measure, that is to say agricultural policy. In Section D I will then come to my actual appraisal of the VGVG.

39 — Cited in footnote 3 above, paragraph 33.

B — *Observations submitted*

87. The Austrian Government provides extensive justification for the legislation at issue. In view of the importance thereof to the answer to the second question I will first set out the main points of this justification. I will then briefly examine the most important arguments which are put forward by other parties in the proceedings and which in part support the Austrian position.

88. The objectives of the VGVG — expressed *inter alia* in Paragraph 1(3)(a) and Paragraph 5(1)(a) — stem from the agricultural and geographic structure of Austria. They seek to bring about small-scale farming. The *Land* of Vorarlberg is mountainous. Cultivation of these areas cannot be increased endlessly. Population growth is rising sharply in comparison with the Austrian average. This is resulting in a considerable increase in the price of land. The problems associated with the shortage of land cannot be resolved by leaving matters to market forces because land ownership and long-term investment are in great demand. Competition and free trade will not bring about the desired result.

89. Paragraph 5 of the VGVG precludes major land ownership. A judgment of the

Austrian Verfassungsgerichtshof of 22 March 1993 held that the objective pursued by the Vorarlberg legislature, that is to say to prevent the concentration and monopolisation of agricultural and forestry land, is a legitimate policy goal which does not give rise to any problems of constitutional law. The creation of a healthy agricultural community is possible only if the agricultural and forestry land is owned by those who can cultivate it effectively. Moreover — and *inter alia* in order to avoid high transport costs — it is important that the land to be cultivated be near the agricultural establishment concerned. Furthermore, milk production requires particularly high levels of investment.

90. In brief, the restrictions placed on the acquisition of agricultural plots ensure that these plots do not end up in the wrong hands. It is necessary to prevent the public interest being undermined where:

— the shortage of land is misused for speculative purposes and farmers can, for economic reasons, have at their disposal only the value of their revenue;

— non-farmers are able to expand their holdings because they have substantial financial resources and do not have to take account of further economic management;

— the land is not cultivated properly or not cultivated at all. This poses a danger to neighbouring land (weeds, pests and disease);

— the maintenance of the different plots in a favourable agricultural structure is jeopardised because the formation of enclaves and fragmentation of plots is prevented. An unfavourable agricultural structure hinders the effective cultivation of the land;

— the objectives of regional planning are undermined if plots are not cultivated.

91. If a foundation wishes to acquire such agricultural and forestry land, the Austrian Government considers that it is necessary to examine the objective pursued by that foundation. In the case of a legal person it is the subordinates or employees who have to cultivate the land.

92. In the view of the Austrian Government, the residence requirement laid down in Paragraph 5(1)(a) of the VGVG does not have discriminatory effect, as is clear from *Fearon*.[40] Furthermore, the public interest safeguarded by the VGVG is consistent with the objectives of the common agricultural policy.

40 — Cited in footnote 37 above.

93. The Austrian Government describes the prior authorisation procedure as a preservation procedure. The criteria relating to persons resident in Austria and EC nationals and EEA nationals are the same. This authorisation procedure relating to the acquisition of agricultural and forestry land is proportionate. It is not possible to control the acquisition of agricultural and forestry land through the submission of a notification because the authorities are unable to check whether or not a notification is plausible. The agricultural structure and the countryside cannot endure long-term damage. It is only possible to establish that the land is not being cultivated effectively after several years. Such an undesirable situation can last for several years and nothing can be done about it.

94. Under Paragraph 5 VGVG the authorities have no latitude and the criteria for obtaining authorisation are not contrary to the free movement of capital. In brief, the prior authorisation procedure is objective, non-discriminatory and in the public interest.

95. I now come to the other most important observations.

96. The first appellant considers that Paragraph 4 of the VGVG is discriminatory because potential acquirers from other Member States can acquire agricultural land in Vorarlberg only if they cultivate the land themselves and have their permanent place of residence in Vorarlberg. The Norwegian Government, the Liechtenstein Government, the Commission and the EFTA Surveillance Authority, on the other hand, take the view that the provisions of the VGVG are not discriminatory. Austrian residents and non-residents are treated in the same way.

97. The first appellant also considers that the provision is not justified by imperative requirements in the general interest because agricultural policy falls within the exclusive competence of the Community. The Member States have only implementing powers. Article 32 EC et seq. already take account of small and medium-sized family businesses. Consequently, there are no imperative requirements in the general interest because provision for the protection of the agricultural community is already made at Community level.

98. The Commission, on the other hand, sees no reason to conclude that preserving, strengthening or creating a viable agricultural community are less important objectives than regional planning or protection of the environment. The provisions are also consistent with Article 33(2) EC. Furthermore, the provision are necessary to

safeguard town and country planning objectives such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions.

99. The first appellant considers that the VGVG is not suitable for securing the attainment of the objective which it pursues. The legislation on land transfers in no way alters the fact that the agricultural community is declining. As a result, more land is becoming available on the market and there are fewer farmers who are able to acquire this available land with the result that the number of major landowners is increasing.

100. The first appellant considers that the measure is also not proportionate. Less restrictive measures are conceivable. The rule that farming land must remain in farming hands stems from a time when farmers were exploited. However, this is no longer the case. It is not the acquisition of ownership but access to the land which must be ensured. The following are examples of measures which pose less of an obstacle to the free movement of capital: adapting rent legislation, regional planning, countryside protection, and making it more difficult to terminate lease agreements.

101. Within the European Community and the various EEA countries, it is generally accepted, in the view of the Norwegian Government, that farmers should own their own land in order to prevent a feudal system. The Norwegian Government considers that the requirement that the acquirer himself cultivate the plot as part of an agricultural establishment does not go beyond what is necessary in order to attain the objective, that is to say to preserve a healthy agricultural community. Consequently, the objective pursued by the law cannot be attained by less restrictive measures.

102. The Liechtenstein Government considers that on account of its particular importance as a supply source in a country agriculture is fundamentally important to the existence of the country and the survival of its people. For the abovementioned reasons, Article 40 of the EEA Agreement does not preclude a prior authorisation procedure in respect of the acquisition of agricultural plots.

103. In the view of the Liechtenstein Government, Article 40 of the EEA Agreement does, however, preclude the condition that the acquirer must himself cultivate the plot. This excludes legal persons from the possibility of acquiring agricultural land. The abovementioned condition is not necessary to ensure the objective pursued and goes beyond what is necessary in order to attain it. Farmers who are financially unable to acquire agricultural land will also be unable to lease it as a result of this measure.

Permitting legal persons to acquire agricultural land is less restrictive. In that case farmers with fewer financial resources are enabled to lease the land. The question whether or not the authorisation procedure is lawful is answered in the negative *inter alia* in *Konle* and *Reisch and Others*. However, in the view of the Commission, this procedure is indeed justified in the present case because the VGVG has complex objectives, retrospective checks are likely to be too late and as a consequence thereof harm may be caused which is difficult or impossible to repair. The prior authorisation procedure is a preservation procedure which involves a restriction on the free movement of capital.

104. The EFTA Surveillance Authority also considers that the procedure is suitable and proportionate to safeguard the public interest. The Norwegian Government expresses a similar view. A procedure whereby authorisation is granted retrospectively cannot prevent acquirers from failing to fulfil their obligations. Acquirers could also incur unnecessary losses if authorisation were not obtained retrospectively. The Liechtenstein Government does not share this view and points out that an authorisation system of necessity presupposes the exercise of a certain discretion. Such a system is a source of legal uncertainty for traders. It makes the free movement of capital subject to the approval of the administration and could therefore render this freedom illusory.

C — *The context: the common agricultural policy and the VGVG*

105. Agriculture has, for a long time, constituted one of the main areas of Community intervention. The particular nature of agriculture means that the production and structure of the sector is not left completely to market forces. Article 32 EC et seq. form the basis for this intervention. In the context of this case, which does not concern the organisation of agricultural markets but the structure of the agricultural sector, I refer to the objective of the common agricultural policy set out in Article 33(1)(b) EC, that is to say to ensure a fair standard of living for the agricultural community. It is also relevant that under Article 33(2) EC account must be taken, as regards the common agricultural policy, of 'the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions.'

106. As part of the reform of the common agricultural policy, much of which has been implemented in Agenda 2000,[41] the emphasis is being placed less and less on the actual organisation of agricultural markets and more and more on measures to improve agricultural structures, such as income support for farmers and rural development. In Agenda 2000 rural development policy is regarded as the second

41 — COM(1997) 2000 final.

pillar of the common agricultural policy. Within the framework of this second pillar certain areas are designated less-favoured areas because there agriculture is more difficult on account of natural handicaps. The mountainous areas, of which there are many in the *Land* of Vorarlberg, are referred to specifically in that regard.

107. An important element of rural development policy, as laid down in Regulation No 1257/1999, [42] is that it does not consist solely of Community measures but that the Member States may take complementary measures. For example, the Member States may increase the aid from Community resources by using their own resources. [43]

108. It should be emphasised that the intensity of the intervention of the European Community does not mean that agricultural policy falls within the exclusive competence of the European Community. On the contrary, there is indeed scope for additional national measures in the field of agricultural structural policy which takes account of the particular circumstances in which agriculture has to be engaged in in various regions of the European Union. This applies not only to the grant of subsidies but also to all kinds of other legislative measures which support the objectives of the common agricultural policy. Consequently, the first appellant's view that the Member States have only implementing powers is incorrect.

109. Therefore, in my view, national legislation which restricts the acquisition of land by non-farmers in the interest of the agricultural community in a particular region can also constitute support for the objectives of the common agricultural policy.

110. In so far as such legislation hinders the freedom of establishment guaranteed by the EC Treaty, it should be noted that when the EC Treaty was adopted provision was made for the possible concurrence of the acquisition and use of land and buildings situated in the territory of another Member State, on the one hand, and the particular nature of agricultural activity as referred to in Article 33(2) EC, on the other. Article 44(1) EC, read in conjunction with Article 44(2)(e) thereof, provides that where directives which seek to attain freedom of establishment and which relate to the acquisition and use of land and buildings are adopted, they must not conflict with the principles laid down in Article 33(2) EC. However, no such directive has been adopted.

42 — Cited in footnote 8 above.

43 — See Articles 51 and 52 of Regulation No 1257/1999.

111. I set out this context to show that agriculture is not regarded as a normal economic sector where the viability of undertakings is determined strictly by the laws of the market and where the EC Treaty seeks precisely to prevent national legislative measures which hinder the operation of the market within the Community. On the contrary, the intensity of public intervention is high. This applies to public measures both at Community and national level. Secondly, I should point out the different objectives of the common agricultural policy where the stress is being placed less and less on increasing agricultural productivity. Instead, rural development and the protection of agriculture in sensitive areas are assuming ever greater importance.

112. This leads me to conclude that the objectives pursued by the VGVG are not contrary to the objectives of the common agricultural policy, in particular in view of the way in which it is now being implemented. In that connection, I refer to the first objective of the VGVG, as set out in Paragraph 1(3) thereof, namely the preservation of agricultural and forestry plots by family farming establishments in the interest of improving their structural circumstances in accordance with natural circumstances. Furthermore, the VGVG does not interfere with the allocation of powers between the Community and the Member States as regards the implementation of the common agricultural policy.

113. I should add that Community law does not preclude legislation in which a particular form of agricultural activity is given preference over another. According to *Denkavit*,[44] such different treatment cannot be regarded as constituting discrimination prohibited by the EC Treaty, provided that it is not arbitrary and is based on objective criteria. In that judgment the Court recognised as an objective criterion the difference to which an activity is subject to the risks inherent in working agricultural land. A similar criterion is relevant in the present case. The VGVG protects — and thereby gives preference to — agricultural traders in areas with a natural handicap.

D — *Appraisal of the VGVG*

The content of the VGVG

114. Although it is not for the Court to interpret national legislation, I consider that it is necessary to analyse briefly the main points of the VGVG in order to answer the second question referred by the national court. This analysis is intended to enable the Court to specify the limits on the scope of national policy where national legislation makes the acquisition of real property subject to conditions and thus hinders the free movement of capital. In

44 — Case 139/77 [1978] ECR 1317, paragraph 15.

this analysis of the VGVG I will examine only the transfer of ownership of agricultural and forestry plots. The VGVG also contains provisions on the transfer of other rights of lien and rights of usufruct but they are not relevant to the main proceedings. In my analysis I will draw a distinction between the objectives of the law and the instruments intended to attain those objectives.

115. Paragraph 1 of the VGVG sets out the purpose thereof. In so far as is relevant here, the law has two objectives. Firstly, the law seeks to preserve the existing small-scale agricultural structure in accordance with the natural factors prevailing in the *Land* of Vorarlberg (Paragraph 1(3)(a)). The second objective relates to the protection of property ownership in the interest of — as the Austrian Government describes it — a healthy agricultural community (Paragraph 1(3)(c)).

116. Furthermore, in its observations the Austrian Government does not draw a sharp distinction between the two objectives. On the contrary, it is at pains to accentuate precisely the connection between them. I also take the view that the two objectives must be viewed in relation to each other. The law seeks primarily to preserve the existing production structure and existing property ownership both in the interest of using agricultural land on a permanent basis and to protect small-scale family establishments. In this sense the reservation of ownership for which the law provides is not so much an objective of the law as an instrument for attaining that objective.

117. This brings me to the instruments of the law which are to be found in Paragraph 5. I will draw a distinction between the substantive requirements contained in Paragraph 5(1) and Paragraph 5(2) of the VGVG and then come to the chosen instrument of administrative law, that is to say prior authorisation of transfer.

118. Paragraph 5(1) provides, as a principal rule, that the acquirer of a plot must reside on it and cultivate it himself. The law makes an exception to this second requirement, that is to say in a situation where it is not contrary to the preservation and creation of an economically healthy, medium and small-scale agricultural estate.

119. Paragraph 5(2) sets out a number of substantive requirements which the acquisition of the plot must fulfil. These conditions are intended to prevent a number of undesirable situations such as speculation, major land ownership and non-use of the plot. In its observations the Austrian Government emphasised that these conditions

ensure that agricultural plots do not end up in the wrong hands.

120. I find that the requirements contained in Paragraph 5(1) entail a more extensive obstacle than those contained in Paragraph 5(2). The requirement to reside on the plot and work the farm in person goes somewhat further than an assessment of whether or not the objectives of the VGVG are attained.

121. Under the law, it is prohibited to acquire ownership of real property without prior authorisation. Such authorisation for transfer is issued only if the acquisition conforms with the requirements laid down in Paragraph 5(1) of the VGVG. The requirements laid down in Paragraph 5(2) of the VGVG must also be fulfilled.

122. The restrictive effects of the VGVG can be illustrated by applying the law to the main proceedings. The following situation then arises. The Schlössle Weissenberg Familienstiftung plans to lease plots of land to two agricultural establishments which it owns. There is no change in the cultivation of the relevant agricultural plots as a result. However, this arrangement is prohibited under the VGVG even though the purpose of the law, as set out above, remains safeguarded. Nor does the arrangement result in any of the undesirable situations set out in Paragraph 5(2) of the VGVG.

123. For the sake of completeness, I should point out that the exceptions to the principal rule laid down in Paragraph 5(1) of the VGVG are clearly not sufficient for authorisation to be granted in respect of a transaction such as that at issue in the main proceedings in which the factual situation remains unchanged. I would not rule out the possibility that the Austrian court could, having regard to the exceptions provided for in the VGVG and in particular the unchanged use of the relevant agricultural plots, also have come to a different conclusion in this case. However, in appraising the proportionality of the legislation in particular, I will take as a basis the wording of the national legislation as interpreted by the competent national authorities.

Discrimination

124. According to established case-law, only national provisions which provide for different treatment on the basis of nationality are formally discriminatory. Where, on the other hand, legislation is intended to apply to all those who carry on the activity concerned in the territory of a particular Member State, it is regarded as applicable without distinction, even where that legislation expressly lays down a

residence or establishment requirement. Furthermore, national measures may have discriminatory effect even though they are applied without distinction.

125. In the same way as the Austrian Government did in its written observations, I draw a comparison with *Fearon*.[45] As in the present case, the residence requirement in *Fearon* did not apply to the entire national territory (of Ireland) but was limited geographically to a particular area. The requirement could be fulfilled only if the persons concerned, including Irish nationals, resided within three miles of the plot concerned. In the present case this requirement is fulfilled where the persons concerned reside on the plot of land itself.

126. In *Jokela and Pitkäranta*[46] a residence requirement was laid down as a condition for the grant of a compensatory allowance. The compensatory allowance was intended to ensure the continuation of farming and thereby maintain a minimum population level and conserve the viability of the countryside. The Finnish Government granted a compensatory allowance to farmers who lived within 12 kilometres of the farm. The appellant in that case claimed that by laying down a condition of residence within 12 kilometres of the farm, the Finnish Government in actual fact laid down the condition of residence in Finland. However, the Court considered that a farmer who lives in Finland but more than 12 kilometres away from his farm is in the same position as one who lives in another Member State, since both must satisfy the particular conditions laid down in the paragraph at issue in order to qualify for the compensatory allowance. Comparable situations were not treated differently.

127. However, the two abovementioned judgments do differ from the present case in another respect. The right to carry on an economic activity was not subject to a residence requirement either in *Fearon* or *Jokela and Pitkäranta*. *Fearon* related to an exemption from compulsory acquisition measures and *Jokela and Pitkäranta* to an allowance. In the present case the right to engage in agriculture as an economic activity is subject to a residence requirement. I do not consider that this difference is decisive as to whether or not there is prohibited discrimination. Both situations concern an advantage which the legislature grants to persons who live in (or move to) a particular place. Provided that this place of residence is relevant to the advantage to be gained and, furthermore, does not impli-

45 — Cited in footnote 37 above.

46 — Joined Cases C-9/97 and C-118/97 [1998] ECR I-6267.

citly involve preferential treatment for the residents of a particular Member State, there is no discrimination.

128. I therefore conclude that Paragraph 4 of the VGVG is not a discriminatory provision. An Austrian farmer who lives outside Vorarlberg is in the same position as one who lives in another Member State. Nor is the non-differentiating measure indirectly discriminatory.

Imperative requirements in the general interest

129. In *Konle*[47] the Court accepted that national legislation imposes restrictions on the possibilities of acquiring real property on account of a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector. In *Reisch and Others*[48] the Court added that protection of the environment may also be taken as a basis for those same measures. I place a board interpretation on this basis in keeping with the objectives of Article 174 EC. It can be the intention to restrict the emission of pollutants in a particular region but also the preservation of assets of nature or the countryside.

130. The objectives which the Court accepted in *Konle* and *Reisch and Others* are also relevant in the present case. As is clear from the observations submitted by the Austrian Government in these proceedings,[49] the VGVG serves *inter alia* interests of regional planning, the maintenance of a permanent — in this case agricultural — population, the preservation of particular economic activities, and the protection of the environment in connection with the dangers posed to neighbouring plots in the event of improper use.

131. However, the principal issue is the objective of preserving the existing production structure and the existing property ownership both in the interest of using agricultural land on a permanent basis and to protect small-scale family establishments. As I have already stated in points 105 to 113 above, national legislation with such an objective constitutes support for the common agricultural policy, particularly having regard to the way in which this is now implemented. As I have also set out above, rural development and the protection of agriculture in sensitive areas have assumed ever greater importance.

47 — Cited in footnote 2 above, paragraph 40.

48 — Cited in footnote 3 above, paragraph 34.

49 — See points 87 to 94 above.

132. That leads me to conclude — without considering a more in-depth examination to be necessary — that the national legislation at issue is justified by an imperative requirement in the general interest. Since the Court accepted more general objectives of regional planning and protection of the environment in *Konle* and *Reisch and Others*, it is difficult to conceive of a different conclusion in the case of legislation which also pursues such objectives and, in addition, primarily supports the common agricultural policy.

Proportionality

133. The Member States have a wide diseration in the forming of legislation but must take account of the requirements of freedom of movement. National legislation is covered by the prohibition on restrictions on the free movement of capital in particular where the objective pursued by the legislation can be protected equally effectively by measures less restrictive of intra-Community trade.

134. It is in this light that I also consider the operation of the principle of proportionality. This principle does not provide that two matters of interest have to be weighed one against the other but focuses only on the choice of measure which has been or is being adopted. Is this measure suitable and is any other — less intrusive — measure available which would provide equally good protection for the objective pursued?

135. The assessment of the proportionality of the measure involves two elements in this case. The first relates to the question whether the substantive requirements of Paragraph 5(1) and (2) of the VGVG respectively are proportionate to the objective pursued by the law. In this regard it is necessary in particular to ask whether the requirements of Paragraph 5(1), which entail a more extensive obstacle than the requirements of Paragraph 5(2),[50] are proportionate. Could and should the Austrian legislature not have limited itself to the provisions of Paragraph 5(2)?

136. The second element relates to the proportionality of the formalities which must be completed before acquiring real property. This is the instrument of administrative law of prior authorisation, as laid down in the VGVG.

137. As regards the first element, it must first be established whether or not Paragraph 5(1) of the VGVG is suitable. As in

50 — See point 120 above.

the case of the assessment of possible discrimination, a comparison with *Fearon* should obviously be drawn here. That judgment related to national Irish legislation whose purpose was to increase the size of holdings of land which, if that were not done, could not be exploited on an economic basis, to prevent land speculation, and — in this respect the analogy with the present case is evident — to ensure as far as possible that the land belongs to those who work it. The Court held that an obligation to reside on or near land can be imposed within the framework of such legislation. [51]

138. The VGVG differs from the abovementioned Irish legislation in that its purpose is precisely to preserve small agricultural establishments by ensuring that the farmers own the real property belonging to those establishments. The suitability of this measure is called into question both by the first appellant and the Liechtenstein Government.

139. In my view, the argument put forward by the first appellant is unconvincing. Her argument is essentially that the agricultural community is declining in any case and that therefore the measure — as I interpret the argument — is seeking to reverse an inevitable trend. Whatever the case may be, the Vorarlberg legislature considers that this trend is undesirable and is taking measures to combat it. I do not see why legislation aimed at keeping farm land in farmers' hands should not be able to help strengthen the position of small-scale farmers.

140. The situation is different as regards the argument put forward by the Liechtenstein Government in so far as it states that farmers who do not have the financial resources to acquire ownership of land will also be unable to lease it as a result of the measure. The circumstances in the main proceedings are a good illustration of the relevance of this argument. The land at issue is owned by a non-farmer, the first appellant in the main proceedings, who leases it to (two) agricultural establishments. If, for whatever reason, the owner is compelled to dispose of the land, agricultural activity can be promoted if the land is transferred to a third party with which the lease can be continued. The acquisition of ownership per se does not necessarily serve the interests of agriculture. The Vorarlberg legislature is concerned about small-scale farmers who may not have the necessary financial resources. If they are deprived of a possibility of using the land as tenants and they do not possess the necessary resources to acquire ownership thereof, there is a real danger, in my view, that the land will be lost to agriculture.

51 — Cited in footnote 37 above, paragraph 10. However, the Court does lay down the condition that such an obligation must not discriminate on grounds of nationality.

141. What is more, I consider that the requirement that the acquirer reside on and cultivate the plot himself is contrary to the objective pursued by the legislation. I reiterate that the Vorarlberg legislature wishes to protect the existing small-scale agricultural structure. A rule such as Paragraph 5(1) of the VGVG, which essentially restricts the possibilities of funding this small-scale agricultural structure — by preventing private investment in agricultural establishments — makes small-scale agriculture more, rather than less, difficult.

142. I will illustrate this by the situation in the main proceedings. The Schlössle Weissenberg Familienstiftung plans to lease plots of agricultural land which it owns to two agricultural establishments. The restrictions contained in the VGVG render this arrangement impossible and the question is whether this means that the agricultural establishments concerned can now acquire the land themselves and continue to cultivate it as landowners.

143. I conclude that the requirements that the acquirer reside on and cultivate the plot himself contained in Paragraph 5(1) of the VGVG is not suitable in respect of the objective pursued.

144. The situation is different as regards the requirements of Paragraph 5(2) of the VGVG. In my view, these requirements are suitable. In brief, they constitute a specific expression of the objective pursued by the law and provide the competent authorities with a criterion by which to assess whether the acquisition of a plot is consistent with these objectives. These requirements can strengthen the position of small-scale farmers and also serve the interest of legal certainty.

145. If the Court does not share my view as to the suitability of Paragraph 5(1) of the VGVG, I consider that this provision is not proportionate for another reason. That is because it is possible to conceive of less restrictive measures which would provide equally good protection for the objective pursued.

146. In my view, there is asymmetry between the content and the effect of Paragraph 5(1) of the VGVG and the objective pursued by that measure. Less restrictive means could be used to prevent farmers being exposed to market forces. Therein lies the danger claimed by the Austrian Government. If these small-scale farmers were compelled to compete with major landowners and/or speculators, the continued existence of the agricultural structure would be jeopardised.

147. One conceivable less restrictive measure would be to make it more difficult to terminate a lease agreement, as the first appellant proposed. However — and I consider this to be decisive in respect of my view — the requirements relating to the acquisition of land contained in Paragraph 5(1) of the VGVG could also attain the objectives of the law independently and have a less restrictive effect. These conditions prohibit *inter alia* the withdrawal of the plot from agriculture use (subparagraph a), land speculation (subparagraph b) and the formation or extension of large estates. The requirements laid down in Paragraph 5(1) of the VGVG that the acquirer reside on the plot and cultivate it himself are not necessary to attain the objectives of the law.

148. In my view the objective pursued by the VGVG would not be jeopardised if the land were leased to farmers who could cultivate it effectively. The situation in the main proceedings makes this clear. I refer to point 143 above. Therefore, freedom of movement is hindered also in cases in which the transfer of ownership does not undermine the interest claimed.

149. I therefore conclude that restrictions on the acquisition of ownership contained in Paragraph 5(1) of the VGVG are not proportionate to the objective pursued.

150. This does not apply to Paragraph 5(2) of the VGVG. In this respect I can be brief. As I stated at point 144, Paragraph 5(2) of the VGVG constitutes a specific expression of the objective pursued by the law which provides the competent authorities with a criterion by which to assess whether the acquisition of a plot is consistent with this objective. Furthermore, the provision also creates legal certainty for the acquirer of the plot in terms of what is required of him. In brief, Paragraph 5(2) of the VGVG is proportionate.

151. I will examine the second element of the proportionality on the basis of the considerations which the Court took as a basis in *Reisch and Others*. [52] As the Court states, prior examination in respect of the acquisition of real property has the advantage over supervision procedures which are applied only *a posteriori* in that it provides the acquirer of title with an element of legal certainty. Moreover, this may be better suited to preventing certain damage which is reparable only with difficulty. *Reisch and Others* concerned the danger of damage caused to regional planning by hastily completed building projects. In the present case damage could arise if agricultural land were withdrawn from agricultural use.

52 — Cited in footnote 3 above, paragraphs 36 to 38.

152. I would go one step further. In respect of the acquisition of real property, prior formalities generally constitute, in my view, a less serious obstacle to the free movement of capital than *a posteriori* supervision procedures. The acquirer must be able to assume that he is able to enjoy peacefully the real property that he has acquired. The acquisition of real property generally involves a legal transaction which is effected with a view to acquiring long-term ownership.

153. That is not to say that the requirement of prior authorisation, as contained in Paragraph 4 of the VGVG, is proportionate. On the contrary, in *Konle* the Court points out [53] 'that provisions making currency exports conditional upon prior authorisation, in order to allow Member States to exercise supervision, may not cause the exercise of a freedom guaranteed by the Treaty to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory ... . The Court has stated that the restriction on the free movement of capital resulting from the requirement of prior authorisation could be eliminated, by virtue of an adequate system of declaration, without thereby detracting from the effective pursuit of the aims of those rules ... .' [54] In *Konle* the Court subsequently concluded that prior authorisation for the acquisition of land is not proportionate to the objective pursued by the legislation concerned. The Court draws a similar conclusion in *Reisch and Others*. In that respect the Court considers that the prior authorisation procedure concerned may be initiated on the basis of mere presumptions on the part of the administration.

154. I infer from this case-law that the Court's objections to prior authorisation relate primarily to the discretion enjoyed by the administration. Although, as the Court has also held, a system of authorisation always involves a certain degree of discretion, [55] an authorisation procedure where the administration is bound by well-defined and well-known criteria is not, in my view, per se contrary to Community law. That is because such a procedure serves to provide legal security for the acquirer of the real property. In my view, such a procedure is disproportionate only if the substantive criteria which the acquisition of the land must satisfy go beyond the objective pursued by the measure concerned. Moreover, that is the first element of the proportionality that I examined above. For the sake of completeness, I also note that the bureaucratic formalities associated with the authorisation procedure must naturally not go beyond the limits of what is reasonable. The same

53 — Cited in footnote 2 above, paragraph 44.

54 — In this judgment the Court confirmed the previous judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 34; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 25 and 27; and *Sanz de Lera and Others*, cited in footnote 12 above, paragraphs 25 to 27.

55 — See *inter alia* Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 18.

applies to the period within which authorisation is granted.

155. In his Opinion in *Salzmann* [56] Advocate General Léger points out that an authorisation requirement is not justified precisely where imprecise criteria leave the administration a certain latitude. In that case the person entitled is overly dependent on the approval of the administration. This view appears to me to be correct per se. However, in such a situation in particular it would appear useful if the person entitled could be certain as to his legal position before he acquired the land. A system requiring prior authorisation can be helpful in that regard.

156. This brings me to the authorisation system in the VGVG. I find that the criteria contained in Paragraph 5(2) of the VGVG are clearly defined. Nevertheless, they give the administration the necessary latitude. I point in particular to the criteria such as 'without sufficient reason' (subparagraph a), 'considerably' (subparagraph b), 'it must be concluded that' (subparagraphs c and d), and 'favourable land ownership arrangement' (subparagraph e).

157. The foregoing leads to the following conclusion: in view of the existence of a wide diseration on the part of the authorities I consider that the obligation to obtain authorisation contained in Paragraphs 4 and 5 of the VGVG is not proportionate to the objective pursued by the legislation and thus contrary to Community law.

158. This view is in part determined by the fact that there is an obvious alternative to authorisation, that is to say a prior notification in which the person concerned states that he will use the land in a particular way. *Reisch and Others* related to such a notification. [57] The Court considered that a notification was an effective means which had a less restrictive effect than an authorisation requirement.

159. In my view, a system involving mandatory prior notification can provide equally good protection for the objective pursued by the VGVG. In this sense the rules of the VGVG are no different than the Salzburger Grundverkehrsgesetz 1997 which subjected the acquisition of land in the *Land* of Salzburg to restrictions and which formed the subject-matter of *Reisch and Others*. I consider that the Austrian Government's arguments, which are essentially that a notification cannot be verified, are irrelevant.

56 — Opinion in Case C-300/01 [2003] ECR 4899, point 67 et seq.

57 — Cited in footnote 3 above, paragraph 36.

VII — Conclusion

160. On the basis of the foregoing considerations, I propose that the Court should answer the questions of the Verwaltungsgerichtshof as follows:

(1) As regards the first question: the free movement of capital guaranteed by Article 56 EC applies to movement of capital to and from third countries. The exception to this freedom permitted under Article 57(1) EC must be disapplied in circumstances such as those in the main proceedings in which the reliance by a Member State on the exception results in a national of an EEA country being unable to exercise a right stemming from the Agreement on the European Economic Area.

(2) As regards the second question: the obligations contained in the Grundverkehrsgesetz of the *Land* of Vorarlberg of 23 September 1993, whereby the acquirer of a plot must himself cultivate the plot he has acquired as part of an agricultural establishment and move to that establishment, are not proportionate to the objective pursued by this law and thus contrary to Community law. The same applies to the requirement of a prior authorisation for transfer contained in this law.