JUDGMENT OF THE COURT (Sixth Chamber)
7 May 1998 *

In Case C-350/96,

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

Clean Car Autoservice GmbH

and

Landeshauptmann von Wien

on the interpretation of Article 48 of the EC Treaty and Articles 1 to 3 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen (Rapporteur), G. F. Mancini, J. L. Murray and G. Hirsch, Judges,

* Language of the case: German.

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Clean Car Autoservice GmbH, by Christoph Kerres, Rechtsanwalt, Vienna,

— the Landeshauptmann von Wien, by Erich Hechtner, Senatsrat am Amt der Wiener Landesregierung,

— the Austrian Government, by Franz Cede, Ambassador, Federal Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by Peter Hillenkamp and Pieter Jan Kuijper, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 23 October 1997,

after hearing the Opinion of the Advocate General at the sitting on 4 December 1997,

gives the following

Judgment

1 By order of 8 October 1996, received at the Court on 24 October 1996, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 48 of that Treaty and Articles 1 to 3 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 Those questions were raised in proceedings brought by Fortress Immobilien Entwicklungs GmbH, now Clean Car Autoservice GmbH ('Clean Car'), an Austrian company established in Vienna, against the Landeshauptmann von Wien (Prime Minister of Vienna *Land*), concerning the rejection of an application by Clean Car to register for a trade on the ground that it had appointed as manager a person who did not reside in Austria.

The Austrian legislation

3 Under Paragraph 9(1) of the Gewerbeordnung 1994 (the Austrian Trade Code, hereinafter 'the GewO 1994'), legal persons, commercial-law partnerships (whether general or limited) and registered civil partnerships (whether general or limited) may exercise a trade, provided that they have appointed a manager or tenant in accordance with Paragraphs 39 and 40 of the GewO 1994.

4 Paragraph 39 of the GewO 1994 provides as follows:

'1. The owner may for the exercise of his trade appoint a manager who is responsible to the owner for the proper exercise of the trade and to the authorities (Paragraph 333) for compliance with the provisions of the law on trades; he must appoint a manager if he is not resident in Austria.

2. The manager must satisfy the personal requirements prescribed for the exercise of the trade, be resident in Austria, and be in a position to act accordingly in the business. In the case of a trade for which the production of proof of qualification is prescribed, the manager of a legal person, to be appointed in accordance with Paragraph 9(1), must also:

(1) belong to the statutory representative organ of the legal person or

(2) be a worker employed in the business for at least half the normal weekly working hours and subject to full compulsory insurance in accordance with the provisions of social security law.

The manager of an owner who is not resident in Austria, to be appointed under subparagraph 1 for the exercise of a trade for which the production of proof of qualifications is prescribed, must be a worker employed in the business for at least half the normal weekly working hours and subject to full compulsory insurance in accordance with the provisions of social security law. The provisions of Paragraph 39(2), in force until the coming into force of Federal law BGBl. No 29/1993, shall continue until 31 December 1998 to apply to persons who have been appointed as manager by 1 July 1993.

3. In cases where a manager must be appointed, the owner must make use of a manager who acts in the business accordingly.'

5 Pursuant to Paragraph 370(2) of the GewO 1994, where the appointment of a manager has been notified or approved, any fines regarding the conduct of a trade are to be imposed on that manager.

6 Paragraph 5(1) of the GewO 1994 provides that trades may be exercised on the basis of the application to register the trade in question, pursuant to Paragraph 339, when the general conditions and any specific conditions are fulfilled, subject to certain exceptions which are not relevant in the present case.

7 Under Paragraph 339(1) of the GewO 1994, any person wishing to exercise a trade, other than a trade for which authorisation is required and proof of competence other than a proficiency certificate must be produced, must apply for registration to the administrative authority of the district in which the establishment is situated.

8 Pursuant to Paragraph 340(1) of the GewO 1994, the district administrative authority examines the application for registration for a trade under Paragraph 339(1) to ensure that the statutory conditions for the exercise of the trade applied for are satisfied by the applicant at the location concerned. If they are not, the district administrative authority must, under Paragraph 340(7), make a finding to that effect by administrative decision and prohibit the exercise of the trade in question.

The main proceedings

9 On 13 June 1995, Clean Car applied to the Magistrat der Stadt Wien (Vienna City Council) to register for the trade of 'maintenance and care of motor vehicles (service station) excluding all artisanal activity'. When making that application, it stated that it had appointed Mr Rudolf Henssen, a German national residing in Berlin, as manager in accordance with the GewO 1994; it further indicated that Mr Henssen was actively seeking to rent accommodation in Austria and that the declaration relating to his residence there would be forwarded in due course.

10 By decision of 20 July 1995, the Magistrat der Stadt Wien found that the statutory prerequisites for the exercise of that trade were not satisfied and therefore prohibited it, on the ground that the manager must satisfy the personal conditions laid down for the exercise of the trade in question, must have a residence in Austria and must be in a position to act effectively as manager in the business, in accordance with Paragraph 39(2) of the GewO 1994.

11 On 10 August 1995, Clean Car lodged an administrative appeal against that decision with the Landeshauptmann von Wien, submitting that the person appointed as manager now had a residence in Austria and that, in any event, since the accession of the Republic of Austria to the European Union, residence anywhere in the European Union was sufficient to satisfy the statutory requirements.

12 By decision of 2 November 1995, the Landeshauptmann von Wien dismissed the appeal, principally on the ground that, because of the constitutive nature of the application to register a trade, the material factual and legal situation was that pertaining at the time the application was lodged, when the person appointed as manager did not yet have a residence in Austria.

13 On 21 December 1995, Clean Car brought proceedings before the Verwaltungsgerichtshof, submitting that the arguments based on Community law had been ignored in the decisions of both the Magistrat der Stadt Wien and the Landeshauptmann von Wien. Clean Car referred in particular to Articles 6 and 48 of the EC Treaty and submitted that the person whom it had appointed as manager was entitled, as an employee in its service and thus as a worker, to enjoy the right to freedom of movement established by Article 48.

14 Taking the view that, in order to reach a decision in the case, it must determine whether the Austrian legislation prohibiting the owner of a trade undertaking from appointing as manager an employee not resident in Austria is contrary to Community law as laid down in Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68, the Verwaltungsgerichtshof stayed proceedings and requested a preliminary ruling from the Court on the following questions:

'1. Are Article 48 of the EC Treaty and Articles 1 to 3 of Regulation No 1612/68 to be interpreted as meaning that employers in the host State also derive therefrom the right to employ workers who are nationals of another Member State without being bound by conditions which — even if they do not depend on nationality — are typically linked with nationality?

2. If employers of the host State have the right stated in Question 1: Are Article 48 of the EC Treaty and Articles 1 to 3 of Regulation No 1612/68 to be interpreted as meaning that a provision such as Paragraph 39(2) of the Gewerbeordnung 1994, under which the owner of a trade may appoint as a manager for trade law purposes only a person whose residence is in the host State (Austria), is consistent therewith?'

15 In its order for reference, the national court indicates that the first matter to be considered is whether the provisions of Community law concerning freedom of movement for workers, which are addressed primarily to workers as such, may

also be relied upon by employers. If so, the question then arises whether those provisions preclude a rule such as that in Paragraph 39(2) of the GewO 1994, having regard in particular to the limitations envisaged in Article 48(3) of the Treaty and to the fact that, under Paragraph 370(2) of the GewO 1994, the manager is responsible, in the exercise of the trade, for compliance with the applicable statutory provisions.

The first question

16 By its first question, the national court seeks in substance to determine whether the rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68, may also be relied upon by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State.

17 It should be borne in mind, first of all, that Articles 1 to 3 of Regulation No 1612/68 merely clarify and give effect to the rights already conferred by Article 48 of the Treaty (see, to that effect, Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari* [1994] ECR I-505, paragraph 6).

18 Next, it must be noted that Article 48(1) states, in general terms, that freedom of movement for workers is to be secured within the Community. Under Article 48(2) and (3), such freedom of movement is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, and to entail the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made, to move freely within the territory of Member States for that purpose, to stay in a Member State in order to be employed there under the same conditions as nationals of that State and to remain there after such employment.

19 Whilst those rights are undoubtedly enjoyed by those directly referred to — namely, workers — there is nothing in the wording of Article 48 to indicate that they may not be relied upon by others, in particular employers.

20 It must further be noted that, in order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers.

21 Those rules could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing on employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled under Article 48 of the Treaty.

22 Finally, the above interpretation is corroborated both by Article 2 of Regulation No 1612/68 and by the Court's case-law.

23 It is made explicitly clear in Article 2 of Regulation No 1612/68 that any employer pursuing an activity in the territory of a Member State and any national of a Member State must be able to conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

24 It is, furthermore, clear from, in particular, the judgment in Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraphs 84 to 86, that justifications on grounds of public policy, public security or public health, as envisaged in Article 48(3) of the Treaty,

may be relied upon not only by Member States in order to justify limitations on freedom of movement for workers under their laws, regulations or administrative provisions but also by individuals in order to justify such limitations under agreements or other measures adopted by persons governed by private law. Thus, if an employer may rely on a derogation under Article 48(3), he must also be able to rely on the same principles under, in particular, Article 48(1) and (2).

25 In the light of those considerations, the answer to the first question must be that the rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 of the Treaty, may also be relied upon by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State.

The second question

26 By its second question, the national court wishes to ascertain, in substance, whether Article 48 of the Treaty precludes a Member State from providing that the owner of an undertaking exercising a trade on the territory of that State may not appoint as manager a person not resident there.

27 The Court has consistently held that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see, *inter alia*, Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, paragraph 33).

28 It is true that a provision such as Paragraph 39(2) of the GewO 1994 applies without regard to the nationality of the person to be appointed as manager.

29 However, as the Court has already held (see, *inter alia*, Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraph 28), national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners.

30 A requirement that nationals of the other Member States must reside in the State concerned in order to be appointed managers of undertakings exercising a trade is therefore such as to constitute indirect discrimination based on nationality, contrary to Article 48(2) of the Treaty.

31 It would be otherwise only if the imposition of such a residence requirement were based on objective considerations independent of the nationality of the employees concerned and proportionate to a legitimate aim pursued by the national law (see, to that effect, Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47, paragraph 21).

32 In that context, as stated at paragraph 15 above, the national court has expressly referred in its order for reference to the fact that, under Paragraph 370(2) of the GewO 1994, the person appointed as manager is responsible for compliance with

the applicable statutory provisions in the exercise of the trade concerned and fines may be imposed upon him.

33 In their written observations, the Landeshauptmann von Wien and the Austrian Government have explained that the residence requirement is intended to ensure that the manager can be served with notice of the fines which may be imposed upon him and that they can be enforced against him. The intention is also to ensure that the manager satisfies the other requirement imposed on him by Paragraph 39(2) of the GewO 1994, namely that he must be in a position to act effectively as such in the business.

34 In that regard, the residence requirement must be held either to be inappropriate for ensuring that the aim pursued is achieved or to go beyond what is necessary for that purpose.

35 In the first place, the fact that the manager resides in the Member State in which the undertaking is established and exercises its trade does not itself necessarily ensure that he will be in a position to act effectively as manager in the business. A manager residing in the State but at a considerable distance from the place at which the undertaking exercises its trade should normally find it more difficult to act effectively in the business than a person whose place of residence, even if in another Member State, is at no great distance from that at which the undertaking exercises its trade.

36 Secondly, other less restrictive measures, such as serving notice of fines at the registered office of the undertaking employing the manager and ensuring that they

will be paid by requiring a guarantee to be provided beforehand, would make it possible to ensure that the manager can be served with notice of any such fines imposed upon him and that they can be enforced against him.

37 Finally, it must be added, even such measures as those just indicated are not justified by the aims in question if the service of notice of fines imposed on a manager resident in another Member State and their enforcement against him are guaranteed by an international convention concluded between the Member State in which the undertaking exercises its trade and that in which the manager resides.

38 It must be concluded, therefore, that the residence requirement in question constitutes indirect discrimination.

39 As regards the justifications based on Article 48(3) of the Treaty, to which the national court has also referred, it must be observed that a general rule of the kind in issue in the main proceedings cannot be justified on any grounds of public security or public health.

40 As regards the justification on grounds of public policy, also envisaged in Article 48(3) of the Treaty, the Court has already held (Case 30/77 *R* v *Bouchereau* [1977] ECR 1999) that in so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse to the concept of public policy as used in that provision presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

41 Here, however, it does not appear from the documents in the case that any such interest is liable to be affected if the owner of an undertaking is free to appoint, for the purpose of exercising that undertaking's trade, a manager who does not reside in the Member State concerned.

42 It is thus also impossible for a national provision such as that in issue in the main proceedings, which requires any worker appointed as manager for the exercise of a trade to reside in the State concerned, to be justified on grounds of public policy within the meaning of Article 48(3) of the Treaty.

43 In view of the foregoing considerations, the answer to the second question must be that Article 48 of the Treaty precludes a Member State from providing that the owner of an undertaking exercising a trade on the territory of that State may not appoint as manager a person not resident there.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 8 October 1996, hereby rules:

1. **The rule of equal treatment in the context of freedom of movement for workers, enshrined in Article 48 of the EC Treaty, may also be relied upon by an employer in order to employ, in the Member State in which he is established, workers who are nationals of another Member State.**

2. **Article 48 of the Treaty precludes a Member State from providing that the owner of an undertaking exercising a trade on the territory of that State may not appoint as manager a person not resident there.**

Ragnemalm Schintgen Mancini

Murray Hirsch

Delivered in open court in Luxembourg on 7 May 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber