JUDGMENT OF THE COURT (First Chamber)

26 May 2005 *

In Case C-20/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank van eerste aanleg te Brugge (Belgium), made by decision of 17 January 2003, received at the Court on 21 January 2003, in the criminal proceedings against

Marcel Burmanjer,

René Alexander Van Der Linden,

Anthony De Jong,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), K. Lenaerts, S. von Bahr and K. Schiemann, Judges,

* Language of the case: Dutch.

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 April 2004,

after considering the observations submitted on behalf of:

— Mr Burmanjer, Mr Van Der Linden and Mr De Jong, by A. Van Der Graesen, advocaat,

— the Openbaar Ministerie, by G. Billiouw, premier substitut du procureur du Roi,

— the Belgian Government, by D. Haven, acting as Agent,

— the Commission of the European Communities, by M. van Beek, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC, 39 EC and 49 EC.

2 The reference was made in the course of criminal proceedings against Mr Burmanjer, Mr Van Der Linden and Mr De Jong, Dutch nationals, who were charged with having sold, on the public highway at Ostend (Belgium), without having obtained prior authorisation, subscriptions to periodicals on behalf of Alpina GmbH ('Alpina'), a company incorporated under German law.

Law

3 The Law of 25 June 1993 on the carrying on of itinerant activities and the organisation of public markets (*Belgisch Staatsblad*, 30 September 1993, p. 21526, 'the Law on itinerant activities'), which came into force on 18 June 1995, provides, in the first paragraph of Article 3, that the carrying on of such activities 'on the territory of the Kingdom [of Belgium] is subject to the prior authorisation of the Minister or of a Grade 1 official delegated by him', and that '[s]uch authorisation is temporary, personal and non-transferable'.

4 The first paragraph of Article 2 of the Law on itinerant activities provides that 'any sale, or offer or display for sale of products to a consumer by a trader other than at the premises stated in his registration in the Commercial Register, or by a person who does not have such premises, shall be deemed to be an itinerant activity'.

5 Under Article 5(3) of that law 'the sale of newspapers and periodicals, and the conclusion of contracts for subscriptions to newspapers as part of a regular service for an established local clientele, sales by mail order and sales from automatic vending machines' are not subject to its provisions.

6 Under Article 13(1)(1) and (3) of the Law on itinerant activities, anyone who carries on an itinerant activity without being a holder of a prior authorisation or in breach of the conditions or prohibitions contained therein is liable to imprisonment and/or a fine.

7 The measures implementing the Law on itinerant activities were adopted by the Royal Decree of 3 April 1995 (*Belgisch Staatsblad*, 3 April 1995, p. 16398). It provides that the authorisation to carry on an itinerant activity must expressly state the subject-matter of the activity in question. An authorisation can be valid for a maximum of six years. The holder of an authorisation must be in possession of it while carrying on the activity. The authorisation must be produced on any request by the police, the gendarmerie or officials responsible for monitoring and regulating such an activity.

The main proceedings and the questions referred for a preliminary ruling

8 Mr Burmanjer, Mr Van Der Linden and Mr De Jong were charged with having sold, on the public highway at Ostend, subscriptions to periodicals on behalf of Alpina. It is clear from the information provided to the Court in reply to its written questions, addressed to the parties to the main proceedings and to the Belgian Government under Article 54a of the Rules of Procedure, that the defendants were working for that company as self-employed representatives and that the sales concerned were itinerant sales of subscriptions to periodicals in the Dutch and German languages, published by companies established in the Netherlands and in Germany.

9 Mr De Jong had no authorisation for itinerant sales. Mr Burmanjer's authorisation covered only the sale of stationery and office items and that of Mr Van Der Linden

was limited to sales at consumers' homes. Taking the view that they had contravened various provisions of the Law on itinerant activities, the Openbaar Ministerie (Public Prosecutor's Office) brought criminal proceedings against them before the Rechtbank van eerste aanleg te Brugge (Court of First Instance, Bruges). By judgment in default of 8 May 2002, that court found them guilty of having carried on an itinerant activity without prior authorisation.

10 The defendants having lodged objection to that judgment, the Rechtbank van eerste aanleg te Brugge set it aside and considered the case afresh.

11 Taking the view that the application of the provisions of national law on the basis of which the defendants are charged necessitates the interpretation of certain provisions of Community law, the Rechtbank van eerste aanleg te Brugge decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do Articles 2, 3, 5(3) and 13 of the [Law on itinerant activities], taken individually or in conjunction and interpreted as making the itinerant selling of subscriptions to periodicals on Belgian territory, whether by Belgian nationals or by other [European Union] nationals, subject to prior authorisation by the Minister or a Grade 1 official delegated by him and even making breach of those provisions a criminal offence, infringe Articles [28 EC to 30 EC] ..., Article [39 EC] et seq. ..., or Article [49 EC] et seq. ... where they have the effect that a German company which sells or wishes to sell subscriptions to periodicals in Belgium through vendors established in the Netherlands is required a priori to obtain prior temporary authorisation and breach of those provisions is even a criminal offence, whereas the interests sought to be protected by the legislature could be safeguarded by other less restrictive means?

2. Does it make any difference to the answer to the first question that that law ... does not make the sale of newspapers, periodicals and also subscriptions to newspapers subject to such prior authorisation?'

On the questions referred for a preliminary ruling

12 By its questions, which it is appropriate to consider together, the referring court is asking, in essence, whether Article 28 EC, 39 EC or 49 EC precludes a national regime, such as that laid down by the Law on itinerant activities, which makes an offence of the itinerant sale in Belgium, without prior authorisation, of subscriptions to periodicals (herinafter 'the national rules on itinerant sales').

13 That court is unsure, more particularly, as to the proportionality between those rules and the aim pursued given that, in its view, the interests which the national legislature intends thus to protect could be safeguarded by other less restrictive rules. It draws attention, particularly, to the fact that, under Article 5(3) of the Law on itinerant activities, the sale of newspapers and periodicals and the conclusion of contracts for subscriptions to newspapers, as part of a regular service for an established local clientele, are not subject to prior authorisation.

Observations submitted to the Court

14 The Commission of the European Communities submits that the rules on itinerant activities must be evaluated exclusively in the light of Articles 28 EC to 30 EC. Those rules concern a 'selling arrangement' in the sense given to that expression in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, and can, in

the circumstances laid down by that judgment, fall outside the scope of Article 28 EC.

15 The Commission submits that the decision making the reference does not contain sufficient information to determine whether those conditions are met in the circumstances of the main proceedings. It provides, none the less, certain criteria in that regard. As a general rule, periodicals from Member States other than the Kingdom of Belgium are much less evident on the national market than their Belgian counterparts and consumers are much more familiar with the latter. The itinerant sale of subscriptions to periodicals is an ideal method of bringing periodicals of foreign origin to consumers' knowledge and simplifies, in addition, the formalities of subscribing to them. In the light of those matters, it cannot be excluded that the national rules on itinerant sales are liable to impede the access to the market of products from other Member States more than that of Belgian products. It is, however, for the national court to determine whether that is so in the case before it.

16 The Commission submits that, were the referring court to find that the national rules on itinerant sales come within the scope of Article 28 EC, it would have to establish whether such rules pursue an objective of general interest within the meaning of the line of authority initiated in Case 120/78 *Rewe-Zentral* [1979] ECR 649 ('*Cassis de Dijon*') and whether they comply with the principle of proportionality. It maintains in that regard that the distinction drawn by the Law on itinerant activities between, on the one hand, the itinerant sale of subscriptions to periodicals and, on the other hand, that of subscriptions to newspapers is difficult to understand.

The Court's reply

17 In order to provide the national court with a useful reply, it is important to identify the provisions of the EC Treaty which apply to the circumstances of the main proceedings and to examine the national rules on itinerant sales in the light of those provisions.

18 First, it should be pointed out that, so far as the application of Article 39 EC is concerned, Mr Burmanjer, Mr Van Der Linden and Mr De Jong were acting on behalf of Alpina as self-employed representatives. In consideration of their services, that company paid them commission.

19 According to settled case-law, the essential feature of an employment relationship resides in the fact that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32, and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 55). It is common ground that, in the main proceedings, there was no employment relationship, within the meaning of that case-law, between the defendants and Alpina.

20 Therefore, Article 39 EC does not apply to the case before the referring court.

21 Secondly, as regards the application of Article 28 EC, it should be noted that, under the first paragraph of Article 2 of the Law on itinerant activities, that law covers any sale or offer or display for sale of products to a consumer by a trader other than at the premises stated in his registration in the Commercial Register or by a person who does not have such premises. So far as concerns, more particularly, the national rules on itinerant sales, they are intended to regulate, as regards subscriptions to periodicals, a certain selling arrangement, namely marketing through itinerant activities. It is not disputed that those periodicals are goods. So far as the main proceedings are concerned, they arise from a situation in which a company incorporated under German law sells or intends to sell in Belgium, through self-employed vendors who are Dutch nationals, subscriptions to periodicals published by companies established in the Netherlands and in Germany.

22 In such circumstances, the national rules on itinerant sales relate to the free movement of goods. In that regard, the Court has already had occasion to rule on the compatibility with Articles 28 EC to 30 EC of various national provisions regulating marketing methods (see, in particular, Case 382/87 *Buet and EBS* [1989] ECR 1235, paragraphs 7 to 9; Case C-239/90 *Boscher* [1991] ECR I-2023, paragraphs 13 to 21; Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraphs 29 to 31, and Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 39).

23 To establish whether those rules come within the prohibition laid down by Article 28 EC, it is appropriate to note that, under settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and thus prohibited by that article (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25, and *Karner*, paragraph 36).

24 The Court however stated, in paragraph 16 of *Keck and Mithouard*, cited above, that national provisions restricting or prohibiting certain selling arrangements which apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the line of case-law initiated by *Dassonville*.

25 The Court subsequently found that provisions concerning, in particular, certain marketing methods were selling arrangements within the meaning of *Keck and Mithouard* (see, in particular, Case C-292/92 *Hünermund and Others* [1993] ECR

I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paragraphs 12 to 14, and *TK-Heimdienst*, paragraph 24).

26 As is clear from paragraph 21 of this judgment, the national rules on itinerant sales relate to a marketing method. It is common ground that it is not intended to regulate trade in goods between the Member States. However, it can escape the prohibition under Article 28 EC only if it satisfies the two conditions noted in paragraph 24 above.

27 So far as concerns the first of those conditions, it is clear from the decision of reference and the information provided to the Court by the Belgian Government that the procedure for prior authorisation applies, without distinction based on the origin of the products in question, to all the economic operators concerned carrying on their activity in Belgium and that access to itinerant selling is identical for nationals of Belgium and for those of the other Member States.

28 In those circumstances, it must be held that the first condition stated in *Keck and Mithouard* is satisfied in the circumstances of the main proceedings.

29 As regards the second condition, it should be noted that the national rules on itinerant sales do not impose a total prohibition of a selling arrangement, in a Member State, of a product which is lawfully marketed there. The rules confine themselves to making the itinerant sale, without prior authorisation, of subscriptions to periodicals an offence, and that, according to the Belgian Government, for reasons relating in particular to consumer protection. Furthermore, not all itinerant

sales of subscriptions are covered. That Government submits that the need for special protection does not operate either for sales of subscriptions to periodicals, in particular at annual fairs and exhibitions, or for the conclusion of contracts for subscriptions to newspapers as part of a regular service for an established local clientele.

30 It is common ground that a national system such as the rules on itinerant sales is, in principle, likely to limit the total volume of sales of the goods in question in the Member State concerned and, consequently, also to reduce the volume of sales of goods from other Member States. It is also indisputable that the itinerant sale of subscriptions may be a good way of bringing to consumers' knowledge periodicals from all sources. The Commission submits in that regard that the latter statement is true, in particular, as regards periodicals of foreign origin.

31 However, the information available to the Court does not enable it to establish with certainty whether the national rules on itinerant sales affect the marketing of products from Member States other than the Kingdom of Belgium to any greater degree than that of products from that State. Nevertheless, it seems to follow from the information in the file transmitted to the Court that, if those rules did have such an effect, it would be too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States.

32 In such circumstances, it is for the referring court, before which the main proceedings have been brought and which must assume responsibility for the subsequent judicial decision, to determine, having regard to the facts of the main proceedings and, particularly, in the light of the considerations set forth in paragraphs 29 to 31 of this judgment, whether the application of national law is such

as to ensure that the national rules on itinerant sales affect in the same manner, in law and in fact, the marketing of Belgian products and that of products from other Member States. If that is not the case, it is for that court to establish whether such rules are justified by an objective in the general interest within the meaning of the line of authority initiated by the *Cassis de Dijon* judgment, and whether they are proportional to that objective.

33 Thirdly, as regards the application of Article 49 EC, it should be recalled, as is already clear from paragraph 21 above, that the national rules on itinerant sales concern the conditions laid down for the marketing of a certain type of goods. According to the Court's case-law, such rules are, in principle, subject to the provisions of the Treaty governing the free movement of goods and not to those relating to the freedom to provide services (see, to that effect, *Boscher*, paragraphs 8 to 10).

34 It cannot however be excluded that the sale of a product may be accompanied by an activity with 'services' aspects. None the less, that fact cannot be sufficient, by itself, to classify an economic operation such as the itinerant sales at issue in the main proceedings as a 'provision of services' within the meaning of Article 49 EC. It must be established, in each case, whether that service is or is not wholly secondary in relation to the elements concerning the free movement of goods. In the circumstances of the main proceedings, it appears that the latter aspect prevails over that of the freedom to provide services.

35 In that regard, it is settled case-law that, where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that one of them is entirely secondary in relation to the other and may be

considered together with it (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31, and *Karner*, paragraph 46).

36 In those circumstances, there is no need to consider the national rules on itinerant sales from the point of view of Article 49 EC.

37 Having regard to all the preceding considerations, the appropriate reply to the questions referred is as follows:

— Article 28 EC does not preclude national rules under which a Member State makes an offence of the itinerant sale within its territory, without prior authorisation, of subscriptions to periodicals, where such rules apply, without distinction based on the origin of the products in question, to all the economic operators concerned carrying on their activity within that State, provided that such rules affect in the same manner, in law and in fact, the marketing of products originating in that State and that of products from other Member States.

— It is for the referring court to determine, having regard to the facts of the main proceedings, whether the application of national law is such as to ensure that those rules affect in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States, and, if that is not the case, to establish whether the rules in question are justified by an objective in the general interest within the meaning which the Court's case-law gives to that expression and whether they are proportional to that objective.

Costs

38 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. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 28 EC does not preclude national rules under which a Member State makes an offence of the itinerant sale within its territory, without prior authorisation, of subscriptions to periodicals, where such rules apply, without distinction based on the origin of the products in question, to all the economic operators concerned carrying on their activity within that State, provided that such rules affect in the same manner, in law and in fact, the marketing of products originating in that State and that of products from other Member States.

It is for the referring court to determine, having regard to the facts of the main proceedings, whether the application of national law is such as to ensure that those rules affect in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States, and, if that is not the case, to establish whether the rules in question are justified by an objective in the general interest within the meaning which the Court's case-law gives to that expression and whether they are proportional to that objective.

[Signatures]