JUDGMENT OF THE COURT (Fifth Chamber)

5 October 1994 *

In Case C-55/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the criminal proceedings pending before that court against

Johannes Gerrit Cornelis van Schaik

on the interpretation of Articles 5, 30, 36, 55, 62, 85 and 86 of the EEC Treaty and of Council Directive 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1977 L 47, p. 47),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Johannes Gerrit Cornelis van Schaik, by himself,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by Ernst Röder and Claus-Dieter Quassowski, Ministerialrat and Regierungsdirektor respectively at the Federal Ministry for Economic Affairs, acting as Agents,

— Ireland, by Michael A. Buckley, Chief State Solicitor, acting as Agent,

— the Commission of the European Communities, by B. J. Drijber and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr van Schaik, represented by C. M. Hermand, of the Maastricht Bar, of the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting

as Agent, and of the Commission, represented by P. van Nuffel, acting as Agent, at the hearing on 28 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 9 June 1994,

gives the following

Judgment

1 By judgment of 16 February 1993, received at the Court on 1 March 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Articles 5, 30, 36, 55, 62, 85 and 86 of the EEC Treaty, and of Council Directive 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1977 L 47, p. 47, hereinafter 'the directive').

2 Those questions were raised in the context of an application by Mr van Schaik for review of his conviction for driving a motor vehicle without a valid test certificate, contrary to Article 9a 1 of the Wegenverkeerswet (Road Traffic Law, hereinafter 'the WVW').

3 Articles 9a to 9k were inserted in the WVW by the Law of 26 October 1978 (Staatsblad 595) and amended, before the events in point in the main proceed-

ings occurred, by the Laws of 19 June 1985 (Staatsblad 375) and 2 July 1986 (Staatsblad 389). Those articles, in conjunction with the orders implementing them, are known as the Algemene periodieke keuring van motorvoertuigen, aanhangwagens en opleggers (Netherlands regulations on the periodic testing of motor vehicles, trailers and semi-trailers, hereinafter 'the APK regulations').

4 Mr van Schaik claimed before the national court that the APK regulations were incompatible with Community Law.

5 Under Article 9a(1) of the WVW, it is an offence

(a) to park a motor vehicle on a public road or to drive that vehicle on a public road, or

(b) to tow a trailer or a semi-trailer on a public road by means of a motor vehicle,

unless a test certificate has been issued in respect of that motor vehicle, trailer or semi-trailer and the period of validity of that certificate has not expired.

6 Under Articles 9e and 9g of the WVW, the Minister for Traffic and Waterways may authorize natural or legal persons to issue test certificates for motor vehicles, trailers and semi-trailers registered in the Netherlands. Under Article 16 of the Besluit periodieke keuring van motorrijtuigen, aanhangwagens en opleggers of 28 April 1980 (Decree on the periodic testing of motor vehicles, trailers and semi-trailers, Staatsblad 217), as amended by the Decree of 7 December 1985 (Staatsblad 640),

such authorization may be granted to natural or legal persons who operate either independent testing stations where no maintenance or repair work is undertaken, or garages where those services are provided.

7 Whether the inspection is carried out by an independent testing station or by an authorized garage has no effect whatsoever on the fee charged. However, no fee is due 'if the test is carried out in the framework of a maintenance service which already includes verification of the test requirements' (Article 1(3) of the Order of 9 July 1985 concerning the fees to be charged for the periodic testing of vehicles, which was in force at the material time, Staatscourant 133).

8 According to the findings of the Hoge Raad, it is impossible for persons who operate undertakings established outside the Netherlands to obtain authorization for the purposes of Article 9g of the WVW.

9 At point 6.9 of the judgment making the reference, the national court makes in particular the following observations:

'6.9.2. The APK regulations do not preclude a person who prefers to have his car maintained by a foreign garage from doing so and subsequently from having his vehicle tested in the Netherlands.

6.9.3. The APK regulations may have the effect that car owners may not avail themselves of the — perhaps in many respects cheaper — services of garage businesses abroad, and of the possibility of obtaining the requisite spare parts there,

because it is practical to have maintenance and repairs carried out in a garage in which the periodic vehicle test can be carried out as part and parcel of a repair or a service. Thus intra-Community trade in services and goods may be adversely affected, although that effect, which manifests itself exclusively in the vicinity of the southern and eastern borders of the Netherlands, is only on a limited scale.

6.9.4. The present case concerns a passenger vehicle which, apart from the driver's seat, does not have more than eight seats and is not a taxi.'

10 The Hoge Raad has referred the following questions to the Court for a preliminary ruling:

'1. (a) Must Article 30 of the Treaty be interpreted as meaning that national legislation such as the APK regulations outlined above can be regarded as a measure having equivalent effect within the meaning of that article, in the light of the factors mentioned at point 6.9 [of the judgment]?

(b) Or must Article 30, on the other hand, be interpreted as meaning that national legislation such as the APK regulations does not constitute an infringement thereof, because it seeks to protect a general interest justified under EEC law, is not concerned with trade in spare parts for cars, and its restrictive effect on trade goes no further than is necessary?

2. If Question 1(a) is answered in the affirmative: Must Article 36 of the Treaty be interpreted as meaning that national legislation such as the APK regulations

is nevertheless compatible with Article 30 of the Treaty because it is justified on the ground of the protection of public security and the health and life of humans?

3. (a) Must Article 62 of the Treaty be interpreted as meaning that national legislation such as the APK regulations is incompatible with it since the conditions laid down for the grant of authorization under Article 9(g) of the WVW may, in the sector of the provision of maintenance services, result in a loss of custom for foreign garage undertakings since in the case of Netherlands cars they are unable to grant test certificates?

   (b) Or must Article 62 be interpreted, in the light of Article 55 of the Treaty, as meaning that national legislation such as the APK regulations does not constitute an infringement of that article because the conduct of tests by the authorized garages for the issue of the test certificate is to be regarded as being carried out in the exercise of the State's public powers?

4. (a) Must Articles 5, 85 and 86 of the Treaty be interpreted as precluding national legislation such as the APK regulations which enables garage owners established and authorized in the Netherlands to exempt customers who entrust their cars to them for servicing from the payment of the costs arising in connection with the test and the issue of the test certificate, with the result that owners of motor vehicles are encouraged to give their custom to those garage owners?

   (b) Or are authorized garage businesses to be regarded under Article 90(2) of the Treaty as undertakings entrusted with the operation of services of general economic interest whose fulfilment would be impeded if they were unable to grant the abovementioned cost exemption?

5. To what extent does it make any difference to the reply to the abovementioned questions that the adverse effect of the national legislation on intra-Community trade in goods and services and on intra-Community competition is more or less confined to border areas and manifests itself on a limited scale?

6. To what extent does it make any difference to the reply to the abovementioned questions if the national legislation concerns solely vehicles of categories mentioned in the annex to Council Regulation 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1977 L 47, p. 47), or if it also concerns other vehicles such as passenger vehicles (except taxis) and other light vehicles?'

11 The essence of those questions is whether the provisions of the Treaty relating to the free movement of goods, to the freedom to provide services and to competition or those of Directive 77/143/EEC preclude legislation of a Member State by virtue of which test certificates for vehicles registered in that State may not be issued by garages established in another Member State.

The free movement of goods

12 In Mr van Schaik's view, the APK regulations make it possible to influence trade in used vehicles and constitute a factor that contributes, in the context of the APK test, to causing spare parts to be purchased almost exclusively on the domestic market, since a garage owner established in another Member State cannot be accorded the status of tester, and the purchase abroad of the spare parts necessary

in order to obtain a test certificate entails a higher fee than that payable at a testing station or authorized garage. Thus the APK regulations conflict with Article 30 of the Treaty.

13 In that connection, the Commission has rightly pointed out that, in the course of the roadworthiness test itself, no goods are supplied.

14 With regard to the fact that the servicing of a vehicle in another Member State may involve a supply of goods (spare parts, oil etc.), it should be noted that such a supply is not an end in itself, but is incidental to the provision of services. Consequently, it does not, as such, fall within the scope of Article 30 of the Treaty (see, to that effect, the judgment in Case C-275/92 *Schindler* [1994] ECR I-1039).

The freedom to provide services

15 Mr van Schaik claims that a situation in which the provision of services is contingent upon the authorization of establishment in the Netherlands cannot be compatible with Article 59 of the Treaty. In his view, Article 59 of the Treaty is infringed as a consequence of the fact that recognition as an APK tester is denied to garages established in other Member States.

16 On that point, it need only be observed that the grant by the Netherlands State of recognition for the purposes of Article 9g of the WVW to garages established in other Member States involves the extension outside the national territory of rights

and powers pertaining to the exercise of State authority and, consequently, does not fall within the scope of Article 59 of the Treaty.

17 The national court also raises the question whether the APK regulations are compatible with Article 62 of the Treaty, in so far as those regulations may cause foreign garages loss of custom in the field of maintenance services on account of the fact that they are unable to issue test certificates in the course of maintenance work on vehicles registered in the Netherlands.

18 It is true that regulations such as the APK may lead the owners of cars to dispense with the services of garages established abroad — even if the prices for those services are in certain respects lower — and to forego the opportunity to purchase there any spare parts which may be required, because it is practical and less expensive to have maintenance and repairs undertaken in a garage which, when servicing or repairing the vehicle, can also carry out the periodic test free of charge.

19 Regulations of that kind may be justified, however, by the requirements of road safety, which constitute overriding reasons relating to the public interest, within the meaning of the judgment in *Gouda* (see Case C-288/89 [1991] ECR I-4007, paragraphs 13 and 14).

20 The requirement that vehicles undergo a periodic test serves the interests of road safety. The effectiveness of those tests is assured, in particular, by various requirements relating to the solvency and professional competence of the authorized garages, and by supervision of the tests carried out, which can only be undertaken on Netherlands territory and by the Netherlands authorities.

21 That view is moreover the one which underlies in Directive 77/143, which is based on the premiss that a Member State can only undertake direct supervision of testing establishments which are situated on its own territory. Article 1 of the directive provides that 'in each Member State, motor vehicles registered in that State ... shall undergo periodic roadworthiness tests ...'. Article 4 of the directive further provides that the roadworthiness tests, within the meaning of the directive, are to be carried out by the State or by bodies or establishments designated and directly supervised by the State. Thus the directive imposes a territorial limitation on periodic testing.

22 It should also be noted that, as a result of the incomplete harmonization of the criteria for testing, although the directive requires, in Article 5(3), that each Member State recognize test certificates issued in other Member States to vehicles registered on their territory as proof at least of compliance with its provisions, it does not, on the other hand, oblige each Member State — in view of the large number of verification processes and procedures — to recognize test certificates issued in other Member States in respect of vehicles registered on its own territory.

23 It is true that at the material time in the main proceedings the requirement of a periodic roadworthiness test concerned only vehicles with more than eight seats, excluding the driver's seat. However, Article 3 of the directive allowed Member States to extend the requirement of a periodic roadworthiness test to other categories of vehicles, including passenger cars. By adopting the APK regulations, the Kingdom of the Netherlands exercised that option.

24 It follows that Articles 59 and 62 do not conflict with legislation such as the APK regulations.

The rules on competition

25 In so far as the national court seeks an interpretation of the Community rules on competition, it need only be observed that the purpose of the legislation in question is neither to authorize or reinforce an existing agreement or concerted practice, nor to impose or facilitate such an agreement or practice. As regards the existence of an abuse of dominant position on the market for vehicle testing, no allegation has been made to that effect.

26 Accordingly, it should be stated in reply to the questions put by the national court that neither the provisions of the Treaty relating to the free movement of goods, to the freedom to provide services and to competition nor those of Directive 77/143 preclude legislation of a Member State which does not permit test certificates in respect of cars registered in that State to be issued by garages established in another Member State.

Costs

27 The costs incurred by the Netherlands, German and Irish Governments, and by the Commission of the European Communities, 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 (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 16 February 1993, hereby rules:

Neither the provisions of the Treaty relating to the free movement of goods, to the freedom to provide services and to competition nor those of Council Directive 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to roadworthiness tests of motor vehicles and their trailers preclude legislation of a Member State which does not permit test certificates in respect of cars registered in that State to be issued by garages established in another Member State.

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber