JUDGMENT OF THE COURT (Second Chamber)

30 April 2009 *

In Case C-531/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberster Gerichtshof (Austria), made by decision of 13 November 2007, received at the Court on 29 November 2007, in the proceedings

Fachverband der Buch- und Medienwirtschaft

v

LIBRO Handelsgesellschaft mbH,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, P. Kūris, L. Bay Larsen and C. Toader (Rapporteur), Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2008,

after considering the observations submitted on behalf of:

— Fachverband der Buch- und Medienwirtschaft, by B. Tonninger and E. Riegler, Rechtsanwälte,

— LIBRO Handelsgesellschaft mbH, by G. Prantl, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and G. Thallinger, acting as Agents,

— the German Government, by M. Lumma, acting as Agent,

— the Spanish Government, by J. López-Medel Bascones, acting as Agent,

— the French Government, by G. de Bergues and A.-L. Vendrolini, acting as Agents,

— the Commission of the European Communities, by R. Sauer and B. Schima, acting as Agents,

— EFTA Surveillance Authority, by N. Fenger and F. Simonetti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 3(1) EC, 10 EC, 28 EC, 30 EC, 81 EC and 151 EC.

2 The reference was made in the course of proceedings brought by the Fachverband der Buch- und Medienwirtschaft (trade association for the book and media trade) ('the Fachverband') against LIBRO Handelsgesellschaft mbH ('LIBRO'), seeking an order that that latter cease advertising books for sale in Austria at prices which are lower than

those set by the Federal Law on the obligation to sell books at a fixed price (Bundesgesetz über die Preisbindung bei Büchern, BGBl. I, 45/2000) ('the BPrBG').

National legal context

The BPrBG

3 Paragraph 1 of the BPrBG is worded as follows:

'This Federal Law applies to the publication and importation of, and trade, except for cross-border electronic trade, in German language books and music. Its purpose is to achieve a pricing system which has regard to the status of books as cultural assets, the interests of consumers in reasonable prices for books, and to the commercial characteristics of the book trade.'

4 Paragraph 3 of the BPrBG provides:

'(1) The publisher or importer of goods falling within Paragraph 1 shall fix and publish a retail price for the goods falling within Paragraph 1 which he publishes or which he imports into Austria.

(2) An importer shall not fix a price below the retail price fixed or recommended by the publisher for the State of publication, or the retail price recommended for Austria by a publisher which has its seat elsewhere than in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA), less any value added tax ['VAT'] included in it.

(3) An importer who purchases goods falling within Paragraph 1 in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA) at a price which is lower than the normal price may, notwithstanding subparagraph (2) above, apply a discount to the price fixed or recommended by the publisher for the State of publication, or in the case of re-importation the price fixed by the Austrian publisher, proportionate to the commercial advantage he has obtained.

…

(5) The [VAT] applicable in Austria shall be added to the retail price fixed pursuant to subparagraphs (1) to (4).'

5 Paragraph 5 of the BPrBG provides:

'(1) Retailers may sell goods falling within Paragraph 1 to consumers at a price no more than 5% below the retail price fixed pursuant to Paragraph 3.

(2) Retailers may not, in the course of business and for the purpose of obtaining a competitive advantage, publish any discount given from the fixed price pursuant to subparagraph (1).

(3) Subparagraph (1) does not apply to goods falling within Paragraph 1 if their retail price was first published under Paragraph 4 more than 24 months previously and which were delivered more than six months previously.'

The Sammelrevers scheme (reverse collection system)

6 It is apparent, in particular from the order for reference and the observations of the Commission of the European Communities that, until 30 June 2000, a series of specimen contracts constituting the 1993 Sammelrevers scheme were concluded between the German and Austrian publishers and booksellers. That system concerned the fixing of the price of German-language books and was based, in essence, on the obligation on booksellers to apply the retail price established by the publisher.

7 The Sammelrevers scheme was notified to the Commission, which adopted a statement of objections on 22 January 1998 and subsequently demanded, in an opinion of 8 February 2000, that the Austrian publishers leave the system and that all cross-border impacts be eliminated by 30 June 2000 at the latest. The notifying parties therefore presented, on 31 March and 10 May 2000, a modified version of the Sammelrevers scheme which provided for the termination of the contracts concluded by the Austrian publishers and booksellers, which therefore formally left that system. The new system was then the subject of a negative clearance (Case COMP/34.657 — Sammelrevers, OJ 2000 C 162, p. 25) in which the Commission found a lack of a significant impact on cross-border trade.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The Fachverband has the power to publish the retail prices to which the booksellers are subject pursuant to Paragraph 3(1) of the BPrBG for the sale in Austria of German-language books and to ensure that the retailers respect the retail price in advertisements for those books.

9 LIBRO operates 219 branches in Austria, 80% of the books it sells come from abroad.

10 From August 2006, LIBRO advertised books published in Germany for sale in Austria at prices which were lower than the minimum set for Austria on the basis of German prices.

11 The Fachverband lodged an application for interim measures with the court of first instance seeking an order directing LIBRO to cease such advertising. The court of first instance granted that application holding that even if the Austrian binding price scheme constitutes a restriction on the free movement of goods contrary to Article 28 EC, it is 'justified for cultural reasons and by the need to maintain media diversity'. That decision was confirmed by a judgment of the appellate court.

12 LIBRO lodged an appeal on a point of law ('Revision') against that judgment. In its order for reference, the Oberster Gerichtshof observes that, in the Community case-law on

price arrangements, in particular in Case 229/83 *Association des Centres distributeurs Leclerc and Thouars Distribution* [1985] ECR 1 and Case C-9/99 *Échirolles Distribution* [2000] ECR I-8207, the Court has not yet answered the question whether and, if so, on what conditions, Community law precludes a national statutory binding price scheme such as that at issue in the main proceedings. Furthermore, the Court notes that the Austrian literature is divided concerning the analysis of the compatibility of that scheme with the rules of Community law.

13 Against that background, the Oberster Gerichtshof stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 28 EC to be interpreted as meaning that it precludes the application per se of national provisions which oblige only importers of German language books to fix and to publish a retail price for books imported into Austria which is binding on the retailer, where the importer cannot fix a retail price which is lower than the retail price fixed or recommended by the publisher for the State in which the book is published, or lower than the retail price recommended for his national territory by a publisher whose seat is not in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA), less any [VAT] such price includes, but, by way of exception, permit an importer who purchases in the territory of a Contracting Party to the EEA at a price lower than the usual purchase prices to sell at less than the price fixed or recommended by the publisher for the State of publication — or in the case of re-imports the price fixed by the Austrian publisher — by an amount proportionate to the commercial advantage he has obtained?

2. If the first question is answered in the affirmative:

Is the national statutory obligation to sell books at the fixed price which, according to the first question, is per se incompatible with Article 28 EC — in any event on the basis that it constitutes selling arrangements which infringe free movement of goods — justified by reference to Article 30 EC or Article 151 EC, on the basis that

its purpose is, very generally, described as the need to have regard to the status of books as cultural assets, to consumers' interest in reasonable prices for books, and to the commercial characteristics of the book trade, for example having regard to a general interest in encouraging the production of books, a diversity of titles at regulated prices, and a diversity of bookshops, notwithstanding the lack of empirical data which could prove that a statutory obligation to sell books at the fixed price is a suitable means for achieving the intended purposes?

3. If the first question is answered in the negative:

Is the national statutory obligation to sell books at the fixed price, as described in the first question, compatible with Articles 3(1)(g) EC, 10 EC and 81 EC, notwithstanding that without interruption in terms of time and substance it succeeded the previous contractual obligation on booksellers to sell at prices fixed by publishers for published works (the 1993 Sammelrevers scheme), and replaced that contractual scheme?'

The questions referred for a preliminary ruling

14 Since the dispute in the main proceedings is concerned with the importation by LIBRO of books from another Member State, the Court's answers must deal with the question whether the provisions of the EC Treaty on intra-Community trade preclude those of the BPrBG relating to the importation from another Member State of German-language books.

The first question

15 By its first question, the referring court asks, in essence, whether Article 28 EC must be interpreted as meaning that it precludes national provisions on the price of imported books such as those contained in Paragraph 3(2), (3) and (5) of the BPrBG.

16 In that connection, it should be recalled that, according to the settled case-law of the Court of Justice, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered to be measures having equivalent effect to quantitative restrictions for the purposes of Article 28 EC (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

17 However, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to constitute such a hindrance, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraphs 16 and 17, and Case C-110/05 *Commission* v *Italy* [2009], ECR I-519, paragraph 36).

18 According to the Fachverband and the Austrian, German and French Governments, the legislation at issue in the main proceedings establishes a selling arrangement which is applicable without distinction to national and imported books and which does not

provide for less favourable treatment for the latter because it establishes the obligation to fix a retail price for all German-language books whatever their origin.

19 That argument cannot be accepted. The question referred for a preliminary ruling does not relate to Paragraph 3(1) of the BPrBG which concerns the obligation for publishers and importers to fix a retail price for national and imported books respectively, but relates to Paragraph 3(2) and (3) which applies only to imported books.

20 In so far as the national provisions on book pricing, such as those in Paragraph 3 of the BPrBG, do not concern the characteristics of those goods, but solely the arrangements under which they may be sold, it must be regarded as concerning selling arrangements within the meaning of *Keck and Mithouard*. As is clear from that judgment, however, such a selling arrangement can fall outside the prohibition laid down in Article 28 EC only if it satisfies the conditions stated in paragraph 17 above.

21 In that regard, it should be noted that Paragraph 3(2) of the BPrBG, by prohibiting Austrian importers of German-language books from fixing a retail price below that fixed or recommended by the publisher for the State of publication, less any VAT comprised in it, provides for a less favourable treatment for imported books, as was observed by the Commission and the EFTA Surveillance Authority, since it prevents Austrian importers and foreign publishers from fixing minimum retail prices according to the conditions of the import market, whereas the Austrian publishers are free to fix themselves, for their goods, such minimum retail prices for the national market.

22 Consequently, such provisions are to be regarded as a measure having equivalent effect to an import restriction contrary to Article 28 EC, in so far as they create, for imported

books, a distinct regulation which has the effect of treating products from other Member States less favourably (see, to that effect, *Association des Centres distributeurs Leclerc and Thouars Distribution*, paragraph 23).

23 The German Government contended, at the hearing, that all the considerations concerning the restrictive effects of the Austrian provisions are unfounded because the importation into Austria of books from Germany covers in reality the majority of the Austrian market and that the Austrian market for German-language books cannot be considered independently from the German market. There is, in fact, a single market in which, as the difference in the retail price is minimal, there is no competition between the different editions of the same book sold in those two Member States.

24 These facts, which are, moreover, not contested, cannot be taken into consideration. Even assuming that the publishing houses of German-language books, in particular those established in Germany, are not disadvantaged by the Austrian provisions on the price of imported books, those provisions allow them to exercise control over the prices charged on the Austrian market and also to ensure that those prices are not lower than those charged in the State of publication, such considerations do not allow it to be ruled out that provisions such as those at issue in the main proceedings have the effect of restricting the ability of Austrian importers to compete, as the latter cannot act freely on their market unlike the Austrian publishers who are their direct competitors.

25 The Fachverband and the Austrian Government state furthermore that, in any event, the freedom to fix the retail price is guaranteed by the option, granted to the importer by Paragraph 3(3) of the BPrBG, of applying a price lower than that charged by the foreign publisher, where that reduction corresponds to the commercial advantage it has obtained, as well as by the option, granted to the retailer by Paragraph 5 of the BPrBG, of applying a reduction of 5% to the price fixed for the purposes of Paragraph 3(1) of the BPrBG.

26 LIBRO states, on the other hand, that, as the price of books cannot be known before they are placed on the market, to the extent that, as was stated by the Advocate-General, the prices at which the wholesalers or the retailers buy books from German publishers are, in principle, trade secrets, it is impossible for the importers to calculate the advantage obtained at the time of purchase and therefore to calculate the reduction provided for by Paragraph 3(3) of the BPrBG.

27 In that regard, it should be noted that the possibility of a reduction provided for by that paragraph cannot be considered, as was suggested by the Austrian Government, to be a form of compensation allowing the importer to include in the retail prices all the advantages obtained in the State of exportation according to its own pricing policy. An importer which, like LIBRO, purchases a large number of books cannot, notwithstanding this rule on reductions, freely fix, for all the books imported, prices below those charged in the State of publication. It can apply the reduction only to the books it obtained at a more favourable price.

28 Likewise, the option the retailer has of applying a reduction of 5% of the price fixed by the publishers and by the importers, pursuant to Paragraph 5(1) of the BPrBG, which is granted both for sales of books published in Austria and for those of imported books, cannot to any greater extent constitute a factor justifying the conclusion that the BPrBG guarantees the freedom for all undertakings operating at the different stages of the commercial chain to fix the price of German-language books imported into Austria, since that possibility applies only to the time of the sale to the final consumer and Paragraph 5(2) of the BPrBG does not permit such a reduction to be advertised. The price communicated to the public remains therefore that fixed according to the rules laid down by Paragraph 3 of the BPrBG.

29 In those circumstances, the answer to the first question must be that national provisions, such as those at issue in the main proceedings, which prohibit importers of German-language books from fixing a price lower than the retail price fixed or

recommended by the publisher in the State of publication constitute a 'measure having equivalent effect to a quantitative restriction on imports' within the meaning of Article 28 EC.

The second question

30 By its second question, the referring court asks in essence whether, if the reply to the first question is in the affirmative, national provisions on the price of imported books such as those in Paragraph 3(2), (3) and (5) of the BPrBG, whose purpose is, pursuant to Paragraph 1 thereof, 'to achieve a pricing system [for books] which has regard to the status of books as cultural assets, to the interests of consumers in reasonable prices for books, and to the commercial characteristics of the book trade', can be justified under Articles 30 EC and 151 EC.

31 The Austrian Government states that, in the absence of such a fixed minimum pricing system for imported German-language books, there would be a drop in the prices of books targeted at the general public which would cause the loss of profit margins achieved as a result of the sale of that type of book. As a result of such a loss, it would not be possible to finance the production and marketing of more demanding but economically less attractive works and small booksellers which normally offer a wide choice of books of that type would be driven out of the market by the large booksellers which sell primarily commercial goods. The Austrian Government observes furthermore that, in a market such as the Austrian market which is characterised by a very low number of booksellers and by significant imports from Germany, that system constitutes a proportionate means of achieving overriding objectives in the public interest.

32 In that regard, it must be pointed out, first of all, that the objectives raised by the referring court, such as the protection of books as cultural objects, cannot constitute a justification for measures restricting imports within the meaning of Article 30 EC (see, to this effect, *Association des Centres distributeurs Leclerc and Thouars Distribution*, paragraph 30). The protection of cultural diversity in general cannot be considered to

come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 30 EC.

33 Furthermore, Article 151 EC which provides a framework for the activity of the European Community in the field of culture cannot be invoked, as was observed by the Advocate-General, as a provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade.

34 However, the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it.

35 In that regard, as was observed by the Commission and the EFTA Surveillance Authority, the objective of the protection of books as cultural objects can be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which takes the conditions of that market into account.

36 In those circumstances, the answer to the second question must be that national provisions, which prohibit importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication, cannot be justified under Articles 30 EC and 151 EC or by overriding requirements in the public interest.

37 Having regard to the answer given to the first two questions, it is not necessary to answer the third question referred for a preliminary ruling by the national court.

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

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

1. **National provisions which prohibit importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication constitute a 'measure having equivalent effect to a quantitative restriction on imports' within the meaning of Article 28 EC.**

2. **National provisions which prohibit importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication cannot be justified under Articles 30 EC and 151 EC or by overriding requirements in the public interest.**

[Signatures]