OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 15 February 1989 *

Mr President,
Members of the Court,

1. Canvassing at the home is one of the most controversial commercial techniques which have been conceived and developed in this century. A typical effect of surprise by such an approach can be exploited with great success by a skilful and experienced salesman and furthermore the consumer is exposed to a serious risk of fraud for he is taken quite unawares and is often led, especially if he is one of those who for various reasons may be more open to influence, such as the elderly, housewives or immigrant workers, to sign undertakings, the real scope of which eludes him, for goods or services which are often insignificant or in any event much less interesting than he was led to believe. Not infrequently, moreover, the consumer, while appreciating the disadvantageous nature of the transaction proposed by the salesman who arrives unexpectedly at his home, enters out of timidity into undertakings which he would not accept in other circumstances.

2. The repeated abuses which have arisen as part of the sales promotion by canvassing at the home have aroused in many countries the special attention of the legislature, which has often considered it necessary to prohibit or at least strictly regulate the use of that sales technique.

In France, Law No 556 of 12 July 1971 prohibited *inter alia* private bodies providing courses of instruction from canvassing at homes 'with a view to concluding contracts for courses of instruction'.

Since certain bodies attempted to circumvent the prohibition by proposing the sale of educational material at home without linking it to the offer of a 'service' of instruction, Law No 1137 of 22 December 1972 filled the gap by prohibiting 'visiting the home of a natural person . . . to propose the sale . . . of any documents or materials intended to meet the same needs as the supply of a service in respect of which canvassing is prohibited by a special provision of law by virtue of the subject of that canvassing'.

3. Mr Roger Buet, the manager of a company which markets by canvassing educational material for learning English devised by Encyclopaedia Britannica and imported from Belgium, was prosecuted and found guilty by the tribunal de grande instance (Regional Court), Paris, for infringing the provisions of Law No 1137.

* Original language: Italian.

The cour d'appel (Court of Appeal), Paris, while confirming in that respect a judgment at first instance, considered it necessary to refer to the Court of Justice the question of the compatibility of Article 30 of the EEC Treaty with the provisions of the aforementioned French Laws Nos 556 and 1137.

4. It is clear from the order of reference that the question (despite its somewhat unusual wording) is whether a prohibition of the kind I have described above falls within the definition of a measure having an effect equivalent to a quantitative restriction on imports prohibited by Article 30 and whether it is relevant to cite in its justification a mandatory requirement of Community law such as the protection of consumers.

5. It is therefore necessary in the first place to consider whether prohibiting the use of a particularly advantageous commercial technique such as canvassing at private homes may affect trade between Member States.

6. In that respect I must straight away point out that the prohibition involves no discrimination of imported products in so far as the canvassing is prohibited independently of the origin of the products which are subject to it.

7. It is therefore necessary to consider the basis of Mr Buet's argument that the prohibition of canvassing impedes trade between Member States in so far as it forces traders to forego a particularly effective form of distribution and to fall back on other techniques which are not so successful in selling with the result that the volume of products imported for sale in France is considerably reduced or imposes additional costs on the undertaking in order to adopt in one Member State different forms of sale from those it employs in other Member States.

8. The Commission and the Member States which have submitted observations do not agree on that issue.

The Commission cites a passage in the judgment of 15 December 1982 in Case 286/81 *Oosthoek*,[1] which is worded as follows: 'Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction'.

On the basis of that passage, the Commission submits that prohibiting the use of a marketing method is likely to affect the

1 — [1982] ECR 4575

sale of a product and consequently to reduce the volume of imports.

The aforementioned Member States, on the other hand, relied on the judgment of 31 March 1982 in Case 75/81 *Blesgen*, [2] where the Court held that the prohibition by a Belgian law of the sale for consumption on the premises of strong alcoholic beverages in places open to the public had no effect on the free movement of goods going beyond the scope of normal commercial regulation since it did not affect the numerous other forms of marketing the beverages and thus belonged to those measures which, according to Commission Directive 70/50 of 22 December 1969, [3] do not as a general rule have any effect equivalent to quantitative restrictions 'since such effects are normally inherent in the disparities between rules applied by Member States in this respect'. The same observation applies to marketing methods of instruction, in particular methods of teaching languages, which may be done in bookshops, the specialist sections of large stores, by correspondence and by other means.

9. In the light of the case-law of the Court, the answer to the question appears to me to depend essentially on the extent of the restriction which the prohibition of a particular sales method may impose on intra-Community trade.

However, I must confess that the reasoning in *Blesgen* leaves me somewhat puzzled where it states that the restrictions resulting from the prohibition of the sale of alcohol for consumption on the premises does not exceed the normal scope of commercial rules. Reasoning based on the requirements of the protection of public health would seem to me to rest on a more substantial basis, since the statement that prohibiting the consumption on the premises of spirituous beverages does not appreciably affect sales seems to be debatable, and in any event should be verified on the basis of objective assessments of the volume of imports.

As regards canvassing, I do not find the views of the Member States very convincing, since it is clear from the documents in the case and confirmed by general experience that the commercial method in question, apart from the serious and justified reservations to which it gives rise and which I shall discuss later, is assured of success and guarantees a sales volume which no other system even approaches. Mr Buet even stated on the subject that 90% of his turnover comes from canvassing at the home and that prohibiting canvassing would practically destroy his sales possibilities for the product.

I thus share the Commission's view that prohibiting that sales method appreciably affects intra-Community trade.

2 — [1982] ECR 1211.

3 — OJ, English Special Edition 1970 (I), p. 17.

10. Since the leading judgment of 20 February 1979 in *Rewe*,[4] the Court has upheld the view that 'obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of . . . products . . . must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.

11. It is true nevertheless that in the present case the obstacle to intra-Community trade does not arise from any disparity in national laws since it is independent of the fact that the Member State whence the product originates prohibits canvassing, as does France, or, on the contrary, permits it, as the majority of Member States seem to do.

12. The problem which arises here is thus relatively new and consists in establishing whether a mandatory requirement may justify from the point of view of Community law a measure restricting free movement of goods apart from any disparity between the legislation of the exporting Member State and that of the importing Member State.

13. I see no reason for proposing in that case a different answer since the fundamental facts of the problem remain the same and there is still on the one hand a national provision which indirectly impedes free movement and on the other a mandatory requirement which may justify the provision.

14. Of the various mandatory requirements recognized hitherto by the Court of Justice, the one relevant here is the protection of consumers, which subsequently constituted, no doubt also due to the impulse supplied by the same case-law, one of the objectives expressly pursued by the Community legislation and in particular by Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.[5]

15. In the recitals in the preamble to the aforementioned directive, the Council refers to the preliminary programme of the European Economic Community for a consumer protection and information policy and a second, subsequent, programme with the same object and observes that in contracts concluded away from business premises it is as a rule the trader who initiates the contract negotiations, for which the consumer is unprepared and often unable to compare the quality and price of the offer with other offers; it concludes that the consumer should be given a right of cancellation of the contract concluded in those circumstances without in any way affecting the freedom of the Member States to maintain or introduce a total or partial prohibition on the conclusion of contracts away from business premises, inasmuch as they consider this to be in the interest of

4 — Case 120/78 [1979] ECR 649.

5 — OJ 1985, L 372, p. 31.

consumers. Accordingly, Article 8 of the directive expressly provides that the directive 'shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers'.

16. Nor does the defendant in the main proceedings dispute the Member States' power to adopt particularly strict provisions to regulate sales by canvassing at the home to protect the consumer against fraud.

However, he cites the absence in the present case of another condition amply stressed by the case-law of the Court, namely the proportionality of the means adopted in relation to the objective pursued: Member States must satisfy the imperative need to protect consumers, as other imperative needs of Community law, 'by adopting an appropriate measure which impedes trade between Member States as little as possible'. [6]

17. Mr Buet submits that the absolute prohibition of canvassing educational material is clearly disproportionate to the objective pursued if it is borne in mind that the same French legislation permits the canvassing of other goods and services no less 'problematical' than the product in question, such as new cars or life policies, on the basis that the consumer is sufficiently protected in such cases by particularly strict guarantees imposed by specific provisions such as the requirement of a written contract, the customer's right to cancel the contract within a particular period and a ban on the vendor's requiring immediate payment. The special conditions which Law No 556 of 12 July 1971 imposes on bodies providing home study courses and the guarantees to which such contracts are subject, moreover, give the consumer a protection which does not disappear simply because a contract is made at the latter's home.

There is thus a whole series of not insignificant safeguards which might, if necessary, be strengthened, for example, by making it necessary to have contact by telephone with the potential customer to arrange a home visit in advance, without its being necessary to adopt excessively restrictive measures such as an absolute prohibition of home canvassing.

18. In view of that argument it is necessary to determine whether it is in fact possible to achieve the same result by means which are less restrictive of intra-Community trade. Although it is true that in the absence of harmonization of national laws every Member State is free to impose measures ensuring as it pleases a greater or lesser protection of the consumer, the more draconian measures which may be adopted can be justified under the guidelines consistently adopted by the Court only if they appear necessary to ensure such a degree of protection.

6 — See for example the judgment of 1 July 1984 in Case 51/83 *Commission* v *Italian Republic* [1984] ECR 2793.

19. A recent development in the Court's case-law, moreover, allows a fresh approach. Whereas until now the criterion for assessing proportionality was to determine whether having regard to the particular level of protection determined by a Member State, such a level might also be achieved by means less restrictive of intra-Community trade than those adopted by the said State, the judgment of the Court of 20 September 1988 given in Case 302/86 *Commission* v *Kingdom of Denmark* [1988] ECR 4607, on the other hand, assumes that a Member State may not impose absolute observance of an imperative need of protection and of particular rules when the level of protection capable of being achieved by other means suffices. On the basis of that fresh approach it may, for example, be considered whether in the present case a set of measures such as that proposed by the defendant in the main proceedings may allow a sufficiently effective protection which does not expose the consumer to the risk of fraudulent transactions except in isolated cases and in any event limits the seriousness of any fraud.

20. In view of the aforementioned considerations I think it is possible to review the matter very speedily, deciding first of all whether the prohibition of home canvassing is necessary to ensure the protection of the consumer at the level determined by national legislation and, if so, whether in view of Community law a lesser protection than that given by French legislation may also be acceptable.

21. The need to adopt particularly strict measures to ensure full protection of the consumer in the case of home canvassing seems to me particularly justified in the case of the marketing of educational material in general and language courses in particular. To promote the sale of language courses the vendor will contact above all people wishing to learn a language of which they are completely ignorant and who will be able to determine only subsequently whether the teaching method proposed has been satisfactory for their purpose. In contrast to the supply of other goods or services, the supply of educational material, and in particular the supply of language courses, is thus addressed to a potential purchaser who by definition is unable to determine the quality of the goods or services which he is offered and who for that reason may be more easily duped than, for example, the potential purchaser of a new car who will necessarily in most cases have at least some knowledge of the features and functioning of the product 'car'.

22. Another set of considerations which leads me to regard particularly strict measures for the protection of the consumer to be proportionate arises from the psychological situation of many potential purchasers of educational material. They are often students who need to acquire certain knowledge to advance in their studies or workers who hope, as a result of new knowledge, for advancement in their careers. The strong psychological moti-

vation in choice can easily lead such consumers unconsciously to disregard any doubt about the effectiveness of the teaching method or educational material to which they attach their special hopes of success in their studies or career and deliberately not use the guarantee machinery, for example the option to cancel the contract which may be provided for by the law.

23. Finally, as compared with the marketing of other goods and services, the sale of educational material differs in the fact that the poor quality of the material supplied may have very serious consequences both in financial terms, since there is often a considerable expenditure, and in terms of personal commitment since the person concerned must in any event invest much time and intellectual energy in his study which will be wasted if the results should prove to be poor.

24. What I have just said does not exclude, as the defendant in the main proceedings observed, the possibility that there may be sectors in which similar considerations justify just as strict provisions although the national legislatures confine themselves on the contrary to adopting much less restrictive provisions.

However, in the absence of uniform rules the choice of determining the level of protection is within the discretion of the Member States and although it may perhaps be possible to criticize the reasoning which has led a Member State to be more severe in one sector rather than in another, that does not make it possible to challenge the validity of the stricter rules in the light of Community law unless it is proved that the different level of protection is attributable to the latent intention of impeding imports of goods from another Member State.

25. It must therefore be inferred from the aforementioned considerations that the prohibition of home canvassing appears necessary to ensure the protection of the consumer at the level desired by the national legislature and that that is so irrespective of the seriousness of the particular body providing home study courses or the merit of the educational material which it markets, issues on which Mr Buet laid particular stress without, however, being able to show that the possibility of abuse, which in the past had made adoption of strict legislative rules necessary, has henceforth disappeared.

26. It remains for me to consider whether in the light of the recent case-law of the Court it is not possible in the present case to take the view that less extensive protection may also suffice.

27. That question seems to me to call for an answer in the negative. Less strict and absolute protection would in the end expose to the risk of fraudulent transactions precisely those people who for physical or social reasons are the least on their guard and able to defend themselves, such as the elderly or immigrant workers. It is precisely those categories of people who particularly need protection but who appear least able to avail themselves of certain more flexible guarantees such as, for example, the option to cancel the contract within a certain period after its conclusion.

28. In the light of those considerations, I propose that the Court should answer the question referred to it by the cour d'appel, Paris, as follows:

'Article 30 of the EEC Treaty does not preclude the application by a Member State of a domestic provision applicable without distinction to domestic and imported products prohibiting sale by means of canvassing in private dwellings of documents and educational material for learning foreign languages.'