JUDGMENT OF THE COURT (Second Chamber)

17 April 2008 *

In Case C-197/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Voorzitter van de rechtbank van koophandel te Hasselt (Belgium), made by decision of 28 April 2006, received at the Court on 3 May 2006, in the proceedings

Confederatie van Immobiliën-Beroepen van België VZW,

Beroepsinstituut van Vastgoedmakelaars

v

Willem Van Leuken,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann (Rapporteur), J. Makarczyk, P. Kūris and J.-C. Bonichot, Judges,

* Language of the case: Dutch.

Advocate General: P. Mengozzi,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 6 September 2007,

after considering the observations submitted on behalf of:

— the Confederatie van Immobiliën-Beroepen van België VZW and the Beroepsinstituut van Vastgoedmakelaars, by S. Beer, advocaat,

— Mr Van Leuken, by P. Berben and H. Lamon, advocaten,

— the Netherlands Government, by C. Wissels, acting as Agent,

— the Council of the European Union, by F. Florindo Gijón, K. Michoel and A.-M. Colaert, acting as Agents,

— the Commission of the European Communities, by H. Støvlbæk and W. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1) ('Directive 89/48'), and Article 49 EC.

2 The reference has been made in proceedings seeking a declaration of non-compliance with a prohibition order made by decision delivered on 10 January 2003 by the Voorzitter van de rechtbank van koophandel te Hasselt zetelend zoals in kortgeding (President of the Commercial Court of Hasselt, hearing an application for interim relief), brought by the Confederatie van Immobiliën-Beroepen van België VZW (Confederation of Estate Agents of Belgium, a non-profit making association, 'the CIB') and by the Beroepsinstituut van Vastgoedmakelaars (Professional Institute of Estate Agents, 'the BIV') against Mr Van Leuken concerning the latter's exercise in Belgium of certain professional activities falling within the scope of the regulated profession of estate agent.

Legal context

Directive 89/48

3 It is apparent from the third and fourth recitals in the preamble to Directive 89/48 that the purpose of that directive is to introduce a general system for the recognition of diplomas to enable nationals of Community countries to pursue all those professional activities which are dependent, in a host Member State, on the completion of post-secondary education and training.

4 Pursuant to Article 2 thereof, Directive 89/48 is to apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

5 Subparagraph (b) of the first paragraph of Article 3 of that directive provides that, where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State ('the applicant') to take up or pursue that profession on the same conditions as apply to its own nationals, if, first, the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession and, second, he possesses evidence of formal qualifications fulfilling certain criteria.

6 Notwithstanding Article 3 thereof, Article 4 of Directive 89/48 authorises the host Member State, in certain circumstances which are set out in that article, to require

the applicant to provide evidence of professional experience of a specific duration, to complete an adaptation period not exceeding three years or to take an aptitude test ('the compensatory measures'). Article 4 lays down a number of rules and conditions applicable to those compensatory measures.

7 Thus, according to the third subparagraph of Article 4(1)(b) of Directive 89/48, the host Member State which imposes the compensatory measures must, in principle, leave the choice between an adaptation period and an aptitude test to the applicant. Nevertheless, as regards professions 'whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity', the Member State may, by derogation from that principle, stipulate either an adaptation period or an aptitude test.

Belgian law

8 Article 3 of the Framework Law of 1 March 1976 regulating the protection of professional titles and the exercise of service-providing intellectual professions (*Belgisch Staatsblad* of 27 mars 1976, p. 3604), as amended by the Programme Law of 10 February 1998 (*Belgisch Staatsblad* of 21 February 1998, p. 4889) ('the Framework Law'), states:

'No person may exercise in a self-employed capacity, as a principal or as an ancillary occupation, a profession regulated pursuant to this Law or use the professional title of that profession, unless his name has been entered on the register of those exercising that profession or on the list of trainees or unless, being established abroad, he has obtained permission to exercise that profession on an *ad hoc* basis.

Where the regulated profession is exercised by a legal person, the preceding paragraph shall be applicable solely to one or more of those administrators, managers or active partners who personally exercise the regulated activity or who have effective control of the departments exercising it. Where no such person exists, the requirement laid down in the first paragraph shall apply to an administrator, a manager or an active partner of the legal person who has been designated for that purpose.

…'

9 With regard to estate agents, effect was given to the Framework Law by the Royal Decree of 6 September 1993 for the protection of professional titles and of the exercise of the profession of estate agent (*Belgisch Staatsblad* of 13 October 1993, p. 22447), as amended by the Royal Decree of 2 May 1996 (*Belgisch Staatsblad* of 8 June 1996, p. 15773). Article 2 of the Royal Decree, as amended, states that:

'No person may exercise in a self-employed capacity, whether as a principal or as an ancillary occupation, the profession of estate agent or use the professional title of "estate agent authorised by the BIV", or "trainee estate agent", unless his name has been entered on the register of those exercising that profession or on the list of trainees maintained by [the BIV] or unless, being established abroad, he has obtained permission to exercise that profession on an *ad hoc* basis …'

10 Article 6 of the Royal Decree, as amended, states:

'Entry on the register shall be subject to the satisfactory completion of a period of training of one year.

Holders of a [diploma required in another Member State of the European Community or a State party to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) for the taking up or pursuit of the profession of estate agent in its territory] shall be exempted from the requirement of completing a training period. This notwithstanding, in the cases set out in Article 4[(1)(b)] of Directive [89/48], the Executive Body [of the BIV] may make the entry on the register of those exercising the profession subject, at the choice of the applicant, either to the competition of an adaptation period of one year or to an aptitude test.

…'

11 The Law of 14 July 1991 on commercial practices and consumer information and protection (*Belgisch Staatsblad* of 29 August 1991, p. 18712) states in Article 93:

'Any act contrary to fair practice in commercial matters, by which a vendor adversely affects, or may adversely affect, the professional interests of one or more other vendors, shall be prohibited.'

12 The first paragraph of Article 95 of that Law states:

'The President of the Commercial Court shall establish the existence of an act constituting a breach of the provisions of this Law and order its discontinuance, even if it is subject to criminal law.'

Netherlands law

13 It is evident from the submissions made by the Netherlands Government and by the Commission of the European Communities at the hearing that, since 1 March 2001, the profession of estate agent is no longer regulated in the Netherlands.

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

The parties to the main proceedings

14 The CIB is a non-profit making association established under Belgian law the object of which, under its statutes, is to defend the interests of estate agents authorised in Belgium. The BIV is a legal person established under Belgian public law made up of authorised estate agents established in Belgium.

15 Mr Van Leuken is an estate agent established in the Netherlands. He carries on business under the trading name of 'Grensland Makelaars — onderdeel van Van Leuken vastgoed' ('Grensland'). According to the information provided by Mr Van Leuken, which it is for the national court to verify, he specialises in the sale of property situated in Belgium to clients in the Netherlands. He has established his office in a former customs post on the border between the Netherlands and Belgium.

Prohibition proceedings

16 On 11 March 2002, a summons was issued against Mr Van Leuken in an action for a prohibition order brought before the national court by the CIB and the BIV alleging that he was engaging in professional activity as an estate agent in Belgium contrary to Article 3 of the Framework Law, thereby committing an infringement of Article 93 of the Law of 14 July 1991.

17 By decision of 10 January 2003, that action was held to be admissible and in large measure well founded. Mr Van Leuken was prohibited from 'exercising the activity of estate agent and from representing himself orally, in writing or in any other wise whatever, to be a person carrying out the activity of estate agent in regards to the sale, purchase, exchange, renting or disposal of immovable property, rights in immovable property and commercial funds relating to immovable property situate in Belgium, on the understanding that this prohibition is to apply only until such time as [Mr Van Leuken] complies with the applicable Belgian and European legislation'.

18 Mr Van Leuken was, in addition, ordered to pay a penalty of EUR 3 700 in respect of each breach confirmed, to take effect on the first day after the expiry of the period of six months from service of the decision. The penalty to be imposed was set at a maximum of EUR 100 000.

19 In the context of those prohibition proceedings, Mr Van Leuken maintained that, since his office was established in the Netherlands, he had not exercised the activity of estate agent on Belgian territory and that, although he acted as agent for the sale of immovable property situated in Belgium, he advertised solely in the Netherlands. Those arguments were rejected in the following terms:

'It cannot reasonably be contested that [Mr Van Leuken], particularly since it has not been established that he uses local estate agents in the exercise of his activity

as an agent for the purpose of selling immovable property situated in Belgium, also exercises certain of his activities in Belgium, such as accompanying prospective purchasers on visits to properties which are for sale. Accompanying clients can hardly be classified as secondary activity. In view of the nature of the professional activity [concerned], it cannot reasonably be contested that [Mr Van Leuken] exercises in any event an essential part of his activity as an agent at the place where the immovable property is situated, regardless of the address where he has established his office or the media through which he advertises.'

Request for authorisation to exercise the profession of estate agent in Belgium on an ad hoc basis

20 Although the prohibition proceedings were then pending, Mr Van Leuken submitted, on 15 May 2002, a request to the BIV for authorisation to exercise, on an *ad hoc* basis, the profession of estate agent on Belgian territory.

21 The BIV granted that request on condition that Mr Van Leuken successfully complete an aptitude test in nine legal subjects. According to the BIV, the exercise of the profession of estate agent requires a good knowledge of real property law in the broad sense. The BIV also took the view that, in all service professions, the obligation to inform is so essential that the applicant could not be exempted from it. Moreover, the provision of advice and/or assistance concerning Belgian law is an essential and inseparable aspect of the professional activity of an estate agent. Accordingly, the BIV considered that it was necessary to require Mr Van Leuken to take an aptitude test, rather than allowing him to choose between such a test and an adaptation period.

22 In view of the scope of the legal subjects which it covered, Mr Van Leuken decided not to take the aptitude test.

The reorganisation of Mr Van Leuken's activities

23 Mr Van Leuken claims that he reorganised his activities in order to comply with the prohibition order made by the decision of 10 January 2003. In that regard, on 30 September 2003, he concluded a cooperation agreement with Ms van Asten, an estate agent established in Belgium and authorised by the BIV ('the cooperation agreement').

24 Pursuant to that cooperation agreement, Mr Van Leuken thenceforth called on Ms van Asten, who was appointed manager by Grensland and registered in that capacity with the Chamber of Commerce, Eindhoven (Netherlands), to act as an intermediary in the sale of immovable property situated in Belgium. All Grensland's activities were carried out in Belgium either by Ms van Asten or by Mr Van Leuken acting on behalf of Ms van Asten and answerable to her.

Application for a declaratory judgment

25 After the decision of 10 January 2003 was served on Mr Van Leuken, the CIB and the BIV brought, on 27 May 2004, a first application for a declaratory judgment stating the penalties incurred. That application was declared to be well founded in the amount of EUR 14 800 by judgment of 26 November 2004. Mr Van Leuken did not appeal against that judgment and has, moreover, paid the amount in question.

26 On 25 October 2005, the CIB and the BIV again brought the case before the Voorzitter van de rechtbank van koophandel te Hasselt for a finding that Mr Van Leuken had not complied with the prohibition order made by the decision of 10 January 2003 and, accordingly, for a ruling that the definitive amount of the penalty incurred in accordance with that decision amounted to EUR 100 000.

27 The CIB and the BIV base themselves, in that regard, on the advertising relating to the sale of more than 50 residential properties and other immovable property in Belgium appearing on the website www.grensland.nl.

28 They refer also to the statement of a Belgian process-server declaring that Mr Van Leuken guided a prospective purchaser around immovable property situated in Belgium and made technical comments on its construction. During that visit, Mr Van Leuken handed the prospective purchasers a brochure containing information on the property in question and stating that activities governed by Belgian law are carried out by the manager, Ms van Asten, who is authorised by the BIV. That information also appears on Grensland's website.

29 The national court accordingly seeks to determine, in those circumstances, whether an estate agent who is established in the Netherlands and who offers for sale immovable property situated in Belgium infringes the prohibition laid down by the decision of 10 January 2003 if he organises his activity in the form of cooperation with a Belgian estate agent authorised by the BIV.

30 Against that background, the Voorzitter van de rechtbank van koophandel te Hasselt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(a) Must Articles 3 and 4 of Directive 89/48 … be interpreted as meaning that an estate agent who is established in the Netherlands and organises agency activities in Belgium in respect of immovable property is no longer obliged to comply with the conditions laid down by the Belgian legislature pursuant to the aforementioned directive … in the case where he has concluded a cooperation agreement with an estate agent who is established in Belgium and is authorised by the [BIV] and organises his activities in such a way that (i) consumers may always have recourse to this estate agent registered in Belgium for purposes of activities in Belgium and (ii) this collaboration is made clear in publicity, in particular through reference to the intermediary role played by this estate agent authorised in Belgium by the BIV in connection with activities carried out pursuant to Belgian law?;

or

Must Articles 3 and 4 of Directive 89/48 … be interpreted as meaning that an estate agent who is established in the Netherlands and organises agency activities in Belgium in respect of immovable property is in every case obliged to comply with the conditions laid down by the Belgian legislature pursuant to the aforementioned directive …, notwithstanding any cooperation agreement with an estate agent who is authorised in Belgium and provides intermediary services in regard to activities governed by Belgian law?

(b) Should the Court of Justice [uphold the second of those alternatives], does it not then follow that that directive and the national provisions adopted to implement it are contrary to Article 49 EC … inasmuch as, on the basis of the foregoing construction, that directive and the national provisions adopted to implement

it protect the market for estate agency activity in respect of immovable property situate in Belgium, in a manner which is objectionable, artificial and lacking objective justification, against cooperation agreements entered into by independent estate agents established in different Member States (Belgium and the Netherlands), at least one of whom (the Belgian estate agent) satisfies the conditions laid down by the directive and the national provisions, with the result that the requirement that the Netherlands estate agent must additionally also satisfy those conditions … is tantamount to indirect discrimination on grounds of nationality and constitutes at the very least a prohibited non-discriminatory restriction?'

The first question

31 It is apparent from the Court file that the allegation against the defendant in the main proceedings is that, even after the reorganisation of his activities following the conclusion of the cooperation agreement, he exercised, in Belgium, a number of activities falling, pursuant to the Belgian legislation, under the regulated profession of estate agent without having first obtained authorisation to exercise that profession. The activities complained of in the case in the main proceedings are, first, advertising immovable property situated in Belgium on a website and, second, guiding prospective purchasers around property when they visited it, making technical comments on its construction. It is apparent from the Court file and from the observations of the parties to the main proceedings, which it is for the national court to verify, that the other activities, in particular those linked with the legal aspects of the sale, are, by reason of the cooperation agreement, accomplished through the intervention of an estate agent duly authorised in Belgium.

32 Consequently, the first question referred by the national court must be construed as essentially asking whether Articles 3 and 4 of Directive 89/48 preclude legislation of a Member State which makes the performance, on its territory, of activities such as those at issue in the main proceedings by a service provider established in another

Member State and in a situation such as that of the defendant in the main proceedings, subject to obtaining an authorisation the grant of which is conditional upon success in an aptitude test in law.

33 Subparagraph (b) of the first paragraph of Article 3 of Directive 89/48 provides that a Member State may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue a regulated profession on its territory if he fulfils certain criteria relating to his professional qualifications. It was not contested before the Court that Mr Van Leuken fulfilled the criteria in question, this being, none the less, a matter for the national court to verify.

34 Notwithstanding Article 3 thereof, Article 4 of Directive 89/48 authorises the host Member State, in circumstances which are set out in that article, to require the applicant to comply with compensatory measures.

The choice of compensatory measure

35 The third subparagraph of Article 4(1)(b) of Directive 89/48 provides that the host Member State which imposes the compensatory measures must, in principle, give the applicant the choice between an adaptation period and an aptitude test.

36 However, as regards professions 'whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity', the host Member State may, by derogation from the principle laid down in the third subparagraph of Article 4(1)(b) of Directive 89/48, stipulate either an adaptation period or an aptitude test.

37 In the light of the information on the training of estate agents in Belgium submitted to the Court by the Commission at the hearing, which it is for the national court to verify, it does not, however, appear that it is a profession falling within the scope of that derogation. According to that information, it is sufficient to be the holder of a Belgian diploma in civil, agricultural, technical or industrial engineering in order to become a member of the profession of estate agent in Belgium and the education and training leading to those diplomas does not include significant legal training.

38 As the Court has previously held, the content of the education and training required by a Member State which regulates a profession is a criterion which is especially relevant in order to establish the requirements connected to the practice thereof (Case C-149/05 *Price* [2006] ECR I-7691, paragraph 55). Consequently, a profession which is open to persons who have not received significant education and training in law cannot be considered to be one 'whose practice requires precise knowledge of national law'.

The proportionality of the compensatory measures

39 In any event, the scope of Article 4 of Directive 89/48, which expressly authorises compensatory measures, must be restricted to those cases where they are proportionate to the objective pursued (Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* [2006] ECR I-801, paragraph 24).

40 In that regard, it should be pointed out that, as set out at paragraph 31 above, in any event as a result of the reorganisation of his activities by the conclusion of the cooperation agreement, Mr Van Leuken no longer exercised all the aspects of the regulated

profession of estate agent, as it is defined in Belgium, but only certain of the professional activities which constitute that profession. In particular, he claims that he was no longer involved in the legal aspects of sales, those being carried out, in accordance with the cooperation agreement, through the intervention of Ms van Asten, who is an estate agent duly authorised in Belgium. It is for the national court to verify the truth of those matters.

41 In such circumstances, the requirement imposed on a service provider to comply with compensatory measures relating to his knowledge of the law of the Member State in question goes manifestly beyond what is necessary in order to protect the recipients of services such as those at issue in the main proceedings against the risk of inadequate assistance with regard to the legal aspects of the sale. In the light of the business model described in the preceding paragraph, the interests of such recipients are safeguarded by the intervention of an estate agent duly authorised in the Member State in each transaction for the sale of immovable property situated in that State in the same way as they would be in the context of a transaction which had no aspects involving the intervention of an intermediary established in another Member State.

The consequences of a breach of Community law

42 So far as concerns the imposition of a penalty in conditions such as those of the main proceedings, a Member State may not apply a penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of Community law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 69). That is notably the case where compliance with the administrative formality concerned is made subject to conditions which are contrary to Community law.

43 Having regard to all the foregoing, the answer to the first question must be that Articles 3 and 4 of Directive 89/48 preclude legislation of a Member State which makes the performance, on its territory, of activities such as those at issue in the main proceedings by a service provider established in another Member State, and in a situation such as that of the defendant in the main proceedings, subject to obtaining an authorisation the grant of which is conditional upon success in an aptitude test in law.

The second question

44 In the light of the answer given to the first question, there is no need to adjudicate on the second question.

Costs

45 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:

Articles 3 and 4 of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on

completion of professional education and training of at least three years' duration, as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001, preclude legislation of a Member State which makes the performance, on its territory, of activities such as those at issue in the main proceedings by a service provider established in another Member State, and in a situation such as that of the defendant in the main proceedings, subject to obtaining an authorisation the grant of which is conditional upon success in an aptitude test in law.

[Signatures]