

JUDGMENT OF THE COURT (Fifth Chamber)

13 January 2000 *

In Case C-254/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberster Gerichtshof, Austria, for a preliminary ruling in the proceedings pending before that court between

Schutzverband gegen unlauteren Wettbewerb

and

TK-Heimdienst Sass GmbH

on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón (Rapporteur), J.-P. Puissochet, P. Jann and M. Wathelet, Judges,

* Language of the case: German.

Advocate General: A. La Pergola,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Schutzverband gegen unlauteren Wettbewerb, by L. Pflieger, of the Vienna Bar,

- TK-Heimdienst Sass GmbH, by P. Lewisch, of the Vienna Bar,

- the Austrian Government, by C. Stix-Hackl, Gesandte at the Federal Ministry of Foreign Affairs, acting as Agent, and

- the Commission of the European Communities, by R. Wainwright, Principal Legal Adviser, and K. Schreyer, a national civil servant on secondment to its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

- 1 By order of 30 June 1998, registered at the Court on 13 July 1998, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC).
- 2 That question was raised in proceedings between the Schutzverband gegen unlauteren Wettbewerb (hereinafter 'the Schutzverband') and TK-Heimdienst Sass GmbH (hereinafter 'TK-Heimdienst') relating to the latter's sales activities on rounds.

National legislative background

- 3 Under Article 53a(1) of the Gewerbeordnung 1994 (Austrian Code of Business and Industry 1994, hereinafter 'the GewO'), bakers, butchers and grocers are permitted to offer for sale on rounds from locality to locality or from door to door goods which they are authorised to offer for sale under their trading licence. Article 53a(2) of the GewO provides that such sales on rounds may only be carried on in a Verwaltungsbezirk (Austrian administrative district covering several municipalities) by traders who also carry on their trade from a permanent establishment in that Verwaltungsbezirk or in a municipality adjacent thereto. Only goods which are offered for sale at such permanent establishments may be offered for sale on rounds.
- 4 It is clear from the order for reference that, under Austrian case-law, any person who infringes the provisions of Article 53a of the GewO in order to gain a competitive advantage over law-abiding competitors is acting contrary to public

policy for the purposes of Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) if the breach is objectively capable of injuring free competition in the area of the provision of services.

The main proceedings

- 5 TK-Heimdienst, whose registered office is at Haiming in Tyrol and which also has branches in Völs, Tyrol and Wolfurt, Vorarlberg, is a retail trader. It also makes deliveries of deep-frozen goods to consumers. During the course of their rounds, which are arranged according to fixed itineraries laid down in advance and which take place at regular intervals, TK-Heimdienst's drivers distribute catalogues showing the frozen products stocked by TK-Heimdienst and order forms. Orders may be placed at the registered office or with the drivers direct and the delivery is then made in the course of the next round. The delivery vehicles also carry a certain quantity of products for direct sale without prior orders having been placed. There is one such delivery round in the Verwaltungsbezirk of Bludenz which is not, according to the order for reference, adjacent to Haiming, Völs or Wolfurt.
- 6 The Schutzverband, which is an association for the protection of the economic interests of undertakings, one of whose main purposes is to combat unfair competition, brought an action under Article 53a of the GewO seeking, *inter alia*, an order restraining TK-Heimdienst from offering groceries for sale on rounds in a particular Austrian Verwaltungsbezirk in cases where it does not trade from permanent establishments in that Verwaltungsbezirk or in any municipality adjacent thereto.
- 7 That application was granted by the first-instance court, whose decision was upheld by the appeal court. It is clear from the order for reference that the latter

considered Article 53a of the GewO to be merely a means of regulating certain selling arrangements in the sense envisaged in the judgment in *Keck and Mithouard* (Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097) and does not therefore fall within the prohibition laid down in Article 30 of the Treaty.

- 8 Referring to the Court's case-law on Article 30 of the Treaty, and in particular *Keck and Mithouard*, cited above, the Oberster Gerichtshof, before which the case came by way of 'Revision' (appeal on a point of law), considers that the fact that Article 53a is not product-specific but rather regulates a particular mode of selling, that it applies to all relevant economic operators carrying on their activity in Austria, and that it merely has the effect of restricting the pool of authorised sellers, suggests that that provision should be classified as a selling arrangement compatible with Article 30 of the Treaty. According to the national court, the provision in question reflects a peculiarity specific to Austria, since it is designed to protect the supplying of goods at short distance, to the advantage of local businesses, which is an objective whose attainment might otherwise be jeopardised in view of the topographic diversity of Austria.
- 9 However, the Oberster Gerichtshof points out that it could, on the other hand, be argued that the fact that Article 53a of the GewO is capable of amounting to a disguised restriction as defined, in particular, in Joined Cases 87/85 and 88/85 (*Legia and Gyselinx* [1986] ECR 1707) and Case C-239/90 (*Boscher* [1991] ECR I-2023). Unlike Austrian traders, a trader from another Member State wishing to offer goods for sale on rounds in Austria would have to set up and operate at least one other permanent establishment in the Republic of Austria in addition to his business in the Member State where he has his registered office.

- 10 In those circumstances, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 30 of the EC Treaty to be interpreted as precluding legislation under which bakers, butchers and grocers may not offer for sale on rounds from locality to locality or from door to door goods which they are entitled to sell under the terms of their trading licence unless they also carry on their trade from a permanent establishment situated in the administrative district in which they offer the goods for sale in the abovementioned manner or in a municipality adjacent thereto, and furthermore may offer for sale on rounds from locality to locality or from door to door only such goods as are also offered for sale at the said permanent establishment?’

Admissibility

- 11 The Schutzverband submits that the question referred for a preliminary ruling is inadmissible. First of all, Article 53a of the GewO constitutes a selling arrangement and the case-law concerning such arrangements, in particular *Keck and Mithouard*, cited above, and *Commission v Greece* (Case C-391/92 [1995] ECR I-1621), provides an adequate basis for determining whether it is compatible with Community law, without there being any need to refer a question for a preliminary ruling. Secondly, the facts in the case in the main proceedings are not relevant to other Member States.
- 12 It must be observed that the procedure provided for in Article 177 of the Treaty is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, in particular, the order in Case C-361/97 *Nour* [1998] ECR I-3101, paragraph 10).

- 13 It is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59 and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 25).
- 14 In this case, the question referred by the national court is whether the effect of national legislation such as that in point in the main proceedings is confined to the Member State concerned or whether, rather, it constitutes a potential impediment to intra-Community trade capable of falling within Article 30 of the Treaty. The objection raised by the Schutzverband does not therefore relate to admissibility but to the substance of the case.
- 15 It is therefore appropriate to answer the question referred.

Substance

- 16 By its question the national court is essentially asking whether Article 30 of the Treaty precludes national legislation under which bakers, butchers and grocers can make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, only if they also trade from a permanent establishment in that administrative district or an adjacent municipality where they offer for sale the same goods as they do on rounds.

- 17 The Schutzverband and the Austrian Government submit that Article 53a(2) of the GewO merely regulates a selling arrangement and applies to all the relevant economic operators who carry on business in Austria, which is in conformity with the decision in *Keck and Mithouard*, cited above. According to the Schutzverband, that provision merely limits the pool of persons authorised to make sales on rounds.
- 18 The Schutzverband furthermore claims that it is always open to traders in Member States adjacent to Austria to make deliveries direct to Austrian consumers on the other side of the border if they carry on business in a municipality adjacent to the Austrian Verwaltungsbezirk where they intend to make sales on rounds. Traders from other Member States are therefore at liberty to export the goods referred to in Article 53a of the GewO to Austria even if they do not have permanent establishment in Austria.
- 19 TK-Heimdienst argues first of all that Article 53a(2) of the GewO does not fall within the scope of the *Keck and Mithouard* case because, since it reserves the sale of groceries on rounds exclusively to sellers established locally, it is not purely a marketing rule. Secondly, it claims that the provision does not apply without distinction to all the economic operators concerned, contrary to the requirements which, according to that judgment, must be satisfied in order for legislation limiting or prohibiting particular selling arrangements to be valid.
- 20 The Commission, on the other hand, contends that Article 53a(2) of the GewO constitutes a selling arrangement. It in no way seeks to regulate the free movement of goods between Member States. It is not linked to the characteristics of the goods nor does it draw any distinction between goods manufactured in Austria and goods from other Member States. Furthermore, it applies to all relevant economic operators carrying on business in Austria.

- 21 However, TK-Heimdienst argues, as does the Commission, that Article 53a(2) of the GewO constitutes a disguised restriction of intra-Community trade because it constitutes in reality more of a restriction for operators from other Member States, imposing on them additional difficulties or costs, or both (Case 155/82 *Commission v Belgium* [1983] ECR 531; Case 247/81 *Commission v Germany* [1984] ECR 1111; *Legia and Gyselinx*, cited above; and Case C-189/95 *Franzén* [1997] ECR I-5909). A baker, butcher or grocer from another Member State wishing to offer his goods for sale on rounds in Austria would be forced to purchase and retain at least one further establishment in Austria. That would necessarily give rise to additional costs and make that mode of selling unprofitable, particularly for small traders. It would be particularly difficult, if not impossible, for their goods, which come from other Member States, to gain access to the Austrian market.
- 22 It is settled case-law that 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 as measures having an effect equivalent to quantitative restrictions and thus prohibited by Article 30 of the Treaty (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).
- 23 However, the Court held at paragraph 16 of *Keck and Mithouard*, cited above, that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements in the territory of the Member State concerned does not fall within Article 30 of the Treaty so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
- 24 National legislation such as Article 53a(2) of the GewO, which provides that bakers, butchers and grocers may not make sales on rounds in a given

administrative district, such as an Austrian Verwaltungsbezirk, unless they also carry on their trade at a permanent establishment situated in that administrative district or in an adjacent municipality, where they also offer for sale the same goods as they do on their rounds, relates to the selling arrangements for certain goods in that it lays down the geographical areas in which each of the operators concerned may sell his goods by that method.

25 However, it does not affect in the same manner the marketing of domestic products and that of products from other Member States.

26 Such legislation imposes an obligation on bakers, butchers and grocers who already have a permanent establishment in another Member State and who wish to sell their goods on rounds in a particular administrative district such as an Austrian Verwaltungsbezirk to set up or purchase another permanent establishment in that administrative district or in an adjacent municipality, whilst local economic operators already meet the requirement as to a permanent establishment. Consequently, in order for goods from other Member States to enjoy the same access to the market of the Member State of importation as domestic goods, they have to bear additional costs (see *Legia and Gyselinx*, paragraph 15 and *Franzén*, paragraph 71).

27 That conclusion is not affected by the fact that, in each part of the national territory, the legislation affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States

(see Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, paragraph 37). For a national measure to be categorised as discriminatory or protective for the purposes of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products (see Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad and Publivia* [1991] ECR I-4151, paragraph 24).

- 28 That being so, it is of no consequence whether, as the Schutzverband contends, the national legislation in question also applies to economic operators with a permanent establishment in an adjacent municipality in another Member State. Even if it did, it would not cease to be restrictive merely because in part of the territory of the Member State concerned, namely the border area, it affects the marketing of national products and that of products from other Member States in the same manner.
- 29 It follows that the application to all operators trading in the national territory of national legislation such as that in point in the main proceedings in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products (see, to this effect, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 37).
- 30 The restrictive effects of such legislation cannot, contrary to the contention of the Schutzverband, be considered to be of a nature too random and indirect for the obligation which it lays down to be regarded as such as to impede trade between Member States. In that connection, it need merely be observed that goods from other Member States could never be offered for sale on rounds in an

administrative district, such as an Austrian Verwaltungsbezirk, which is not situated in a border area.

- 31 It follows that national legislation prohibiting butchers, bakers and grocers from making sales on rounds in a particular administrative district, such as an Austrian Verwaltungsbezirk, if they do not also carry on business in a permanent establishment situated in that administrative district or in an adjacent municipality, where they also sell the goods offered for sale on rounds, is capable of impeding intra-Community trade.
- 32 However, the national court indicates that the purpose of the national legislation is to protect the supplying of goods at short distance, to the advantage of local businesses, an objective which would otherwise be jeopardised in a country as topologically varied as Austria. It is therefore appropriate to consider whether that legislation is justified on that basis.
- 33 In that connection, it must first be pointed out that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods (see Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39).
- 34 However although in certain circumstances it may be possible to justify an impediment to intra-Community trade on the basis that it is necessary to avoid deterioration in the conditions under which goods are supplied at short distance

in relatively isolated areas of a Member State, legislation such as that in point in the main proceedings, which applies to the whole of the national territory, is in any event disproportionate to that objective.

- 35 The Austrian Government has stated, however, that the purpose of Article 53a(1) of the GewO, which authorises butchers, bakers and grocers to make sales on rounds, is to guarantee short-distance supplies in the extreme conditions created by the varied topography of Austria, whereas the restriction laid down in Article 53a(2) of the GewO is based on hygienic considerations.
- 36 In that connection, it must be observed that, whilst it is true that the protection of public health is one of the grounds capable of justifying derogations from Article 30 of the Treaty, that objective can be attained by measures that have effects less restrictive of intra-Community trade than a provision such as Article 53a(2) of the GewO, for example, by rules on refrigerating equipment in the vehicles used.
- 37 The answer to the question put to the Court must therefore be that Article 30 of the Treaty precludes national legislation which provides that bakers, butchers and grocers may not make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, unless they also pursue their commercial activity

at a permanent establishment situated in that administrative district or in an adjacent municipality, where they offer for sale the same goods as they do on rounds.

Costs

- 38 The costs incurred by the Austrian Government 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 proceedings 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 question referred to it by the Oberster Gerichtshof by order of 30 June 1998, hereby rules:

Article 30 of the EC Treaty (now, after amendment, Article 28 EC) precludes national legislation which provides that bakers, butchers and grocers may not

make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, unless they also pursue their commercial activity at a permanent establishment situated in that administrative district or in an adjacent municipality, where they offer for sale the same goods as they do on rounds.

Edward

Sevón

Puissochet

Jann

Wathelet

Delivered in open court in Luxembourg on 13 January 2000.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber