

JUDGMENT OF THE COURT (First Chamber)

14 October 2004^{*}

In Case C-36/02,

REFERENCE for a preliminary ruling under Article 234 EC,

from the Bundesverwaltungsgericht (Germany), made by decision of 24 October 2001, received at the Court on 12 February 2002, in proceedings between:

Omega Spielhallen- und Automatenaufstellungs-GmbH

v

Oberbürgermeisterin der Bundesstadt Bonn,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), R. Silva de Lapuerta, K. Lenaerts and S. von Bahr, Judges, and

^{*} Language of the case: German.

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 February 2004,

after considering the observations submitted on behalf of:

- Omega Spielhallen- und Automatenaufstellungs-GmbH, by P. Tuxhorn, Rechtsanwalt,

- Oberbürgermeisterin der Bundesstadt Bonn, by F. Montag, Rechtsanwalt,

- the German Government, by W.-D. Plessing, acting as Agent,

- the Commission of the European Communities, by M. Patakia and C. Schmidt, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 March 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

2 The question referred to the Court of Justice by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) was raised in an appeal on a point of law before that court by Omega Spielhallen- und Automatenaufstellungs-GmbH ('Omega'), in which that company challenged the compatibility with Community law of a prohibition order issued against it by the Oberbürgermeisterin der Bundesstadt Bonn ('the Bonn police authority') on 14 September 1994.

Facts, main proceedings and question referred

3 Omega, a German company, had, since 1 August 1994, been operating an installation known as a 'laserdrome', normally used for the practice of 'laser sport' in Bonn (Germany). The installation continued to be used after 14 September 1994, Omega having obtained authorisation to continue its use on a provisional basis by an order of the Verwaltungsgericht Köln (Administrative Court, Cologne) of 18 November 1994. The equipment used by Omega in its establishment, which included sub-machine-gun-type laser targeting devices and sensory tags fixed either in the firing corridors or to jackets worn by players, was initially developed from a

children's toy freely available on the market. That equipment having proved technically inadequate, Omega turned, from a date not specified but later than 2 December 1994, to equipment supplied by the British company Pulsar International Ltd (which subsequently became Pulsar Advanced Games Systems Ltd, hereinafter referred to as 'Pulsar'). However, a franchising contract with Pulsar was not concluded until 29 May 1997.

- 4 Even before the public opening of the 'laserdrome', a part of the population manifested its opposition to the project. At the beginning of 1994, the Bonn police authority ordered Omega to supply it with a precise description of the working of the game intended in the 'laserdrome' and, by letter of 22 February 1994, warned it of its intention to issue a prohibition order in the event of it being possible to 'play at killing' people there. Omega replied, on 18 March 1994, that the game merely involved hitting fixed sensory tags installed in the firing corridors.

- 5 Having noticed that the object of the game played in the 'laserdrome' also included hitting sensory tags placed on the jackets worn by players, the Bonn police authority issued an order against Omega on 14 September 1994, forbidding it from 'facilitating or allowing in its [...] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people', on pain of a DEM 10 000 fine for each game played in breach of the order.

- 6 That order was issued under powers conferred by Paragraph 14(1) of the Ordnungsbehördengesetz Nordrhein-Westfalen (Law governing the North Rhine-Westphalia Police authorities; 'the OBG NW'), which provides:

‘The police authorities may take measures necessary to avert a risk to public order or safety in an individual case’.

- 7 According to the prohibition order of 14 September 1994, the games which took place in Omega’s establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were contrary to fundamental values prevailing in public opinion.

- 8 Omega’s objection against that order was rejected by the Bezirksregierung Köln (Cologne District Authority) on 6 November 1995. By judgement of 3 September 1998, the Verwaltungsgericht Köln (Cologne Administrative Court) dismissed the ensuing court action. Omega’s appeal was also dismissed, on 27 September 2000, by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia) (Germany).

- 9 Omega then appealed on a point of law to the Bundesverwaltungsgericht (Federal Administrative Court). In support of its appeal, it argued, amongst numerous other pleas, that the contested order infringed Community law, particularly the freedom to provide services under Article 49 EC, since its ‘laserdrome’ had to use equipment and technology supplied by the British company Pulsar.

- 10 The Bundesverwaltungsgericht takes the view that, under national law, Omega’s appeal must be dismissed. It is, however, uncertain whether that result is compatible with Community law, particularly Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

- 11 According to the Bundesverwaltungsgericht, the Oberverwaltungsgericht was right to hold that the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic (Constitutional) Law.
- 12 The referring court states that human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment, and that, in national law, the fundamental rights invoked by Omega cannot alter that assessment.
- 13 Concerning the application of Community law, the referring court considers that the contested order infringes the freedom to provide services under Article 49 EC. Omega concluded a franchising agreement with a British company, which is being prevented from providing services to its German customer, whereas it supplies comparable services in the Member State where it is established. There might also be an infringement of the free movement of goods under Article 28 EC, in so far as Omega wishes to acquire in the United Kingdom goods to equip its 'laserdrome', particularly laser targeting devices.
- 14 The national court considers that the case in the main proceedings gives an opportunity to spell out in greater detail the conditions which Community law places on the restriction of a certain category of supplies of services or the importation of certain goods. It point out that, under the case-law of the Court of Justice, obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is

necessary in order to achieve it. It is immaterial, for the purposes of assessing the need for and the proportionality of those measures, that another Member State may have taken different protection measures (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 31, 35 and 36; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 29, 33 and 34).

- 15 The national court queries, however, whether, in the light of the judgment in Case C-275/92 *Schindler* [1994] ECR I-1039, a common legal conception in all Member States is a precondition for one of those States being enabled to restrict at its discretion a certain category of provisions of goods or services protected by the EC Treaty. Should *Schindler* have to be interpreted in that way, it could be difficult to confirm the contested order if it were not possible to deduce a common legal conception as regards the assessment in Member States of games for entertainment with simulated killing actions.
- 16 It states that the judgments in *Läärä* and *Zenatti*, delivered after *Schindler*, could give the impression that the Court of Justice no longer adheres strictly to the need for a common conception of law in order to restrict the freedom to provide services. If that were the case, it argues, Community law would no longer prevent the order in question from being confirmed. By reason of the fundamental importance of the principle of human dignity, in Community law as well as German law, there would be no need to enquire further as to the proportionality of the national measure restricting the freedom to provide services.
- 17 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community

for a particular commercial activity — in this case the operation of a so-called “laserdrome” involving simulated killing action — to be prohibited under national law because it offends against the values enshrined in the constitution?’

Admissibility of the question referred

- 18 The Bonn police authority questions the admissibility of the question referred and, more particularly, the applicability of the rules of Community law on fundamental freedoms in this dispute. In its view, the prohibition order of 14 September 1994 has not affected any operation of a cross-border nature and cannot therefore have restricted the fundamental freedoms guaranteed by the Treaty. It argues that, at the date on which the order was adopted, the installation which Pulsar had offered to supply to Omega had not yet been delivered and no franchising agreement required Omega to adopt the variant of the game concerned by the order.
- 19 It should, however, be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 21; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 24).

20 Moreover, it also follows from that case-law that the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *PreussenElektra*, paragraph 39; *Canal Satélite Digital*, paragraph 19; *Adolf Truley*, paragraph 22; *Kapper*, paragraph 25).

21 That is not the case here. Even if the documents before the Court show that, at the time the order was adopted on 14 September 1994, Omega had not yet formally concluded supply or franchising agreements with the company established in the United Kingdom, it is sufficient to note that, having regard to its forward-looking nature and the content of the prohibition which it lays down, that order is capable of restricting the future development of contractual relations between the two parties. Therefore, the question put by the referring court, which concerns the interpretation of the Treaty provisions guaranteeing the freedom to provide services and the free movement of goods, is not obviously without relation to the actual facts of the main action or its purpose.

22 The question referred by the Bundesverwaltungsgericht must therefore be declared admissible.

The question referred

23 By its question, the referring court asks, first, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible

with Community law, and, second, whether the ability which Member States have, for such reasons, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject, as the judgment in *Schindler* might suggest, to the condition that that restriction be based on a legal conception that is common to all Member States.

24 As a preliminary issue, it needs to be determined to what extent the restriction which the referring court has found to exist is capable of affecting the freedom to provide services and the free movement of goods, which are governed by different Treaty provisions.

25 In that respect, this Court finds that the contested order, by prohibiting Omega from operating its 'laserdrome' in accordance with the form of the game developed by Pulsar and lawfully marketed by it in the United Kingdom, particularly under the franchising system, affects the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services established in another Member State. Moreover, in so far as use of the form of the game developed by Pulsar involves the use of specific equipment, which is also lawfully marketed in the United Kingdom, the prohibition imposed on Omega is likely to deter it from acquiring the equipment in question, thereby infringing the free movement of goods ensured by Article 28 EC.

26 However, where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (see, to that effect, *Schindler*, paragraph 22; *Canal Satélite Digital*, paragraph 31; Case C-71/02 *Karner*, not yet published in the ECR, paragraph 46).

- 27 In the circumstances of this case, the aspect of the freedom to provide services prevails over that of the free movement of goods. The Bonn police authority and the Commission of the European Communities have rightly pointed out that the contested order restricts the importation of goods only as regards equipment specifically designed for the prohibited variant of the laser game and that that is an unavoidable consequence of the restriction imposed with regard to supplies of services by Pulsar. Therefore, as the Advocate General has concluded in paragraph 32 of her Opinion, there is no need to make an independent examination of the compatibility of that order with the Treaty provisions governing the free movement of goods.
- 28 Concerning justification for the restriction of the freedom to provide services imposed by the order of 14 September 1994, Article 46 EC, which applies here by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health. In this case, the documents before the Court show that the grounds relied on by the Bonn police authority in adopting the prohibition order expressly mention the fact that the activity concerned constitutes a danger to public policy. Moreover, reference to a danger to public policy also appears in Paragraph 14(1) of the OBG NW, empowering police authorities to take necessary measures to avert that danger.
- 29 In these proceedings, it is undisputed that the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction. In any event, since measures for safeguarding public policy fall within a derogation from the freedom to provide services set out in Article 46 EC, it is not necessary to verify whether those measures are applied without distinction both to national providers of services and those established in other Member States.
- 30 However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7). In addition, the concept of 'public

policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, *Van Duyn*, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17).

31 The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (*Van Duyn*, paragraph 18, and *Bouchereau*, paragraph 34).

32 In this case, the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.

33 It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines

supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

34 As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

35 Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).

36 However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18).

37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

38 On the contrary, as is apparent from well-established case-law subsequent to *Schindler*, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see, to that effect, *Läärä*, paragraph 36; *Zenatti*, paragraph 34; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 80).

39 In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

40 In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services.

- 41 In the light of the above considerations, the answer to the question must be that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

Costs

- 42 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 of Justice (First Chamber) hereby rules:

Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

Signatures.