OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 18 May 1999 *

1. In this case the Oberster Gerichtshof (Supreme Court), Austria, has referred to the Court for a preliminary ruling a question concerning Article 30 of the EC Treaty (now, after amendment, Article 28 EC). The national court asks whether national legislation authorising certain arrangements for selling food products only when the trader has a permanent establishment within the administrative district in which he intends to make the sale, or in a municipality adjacent thereto, is compatible with that provision.

Legislative and factual background to the main proceedings

2. The national legislation applicable in the main proceedings is Article 53a of the Gewerbeordnung (Austrian Code of Business and Industry, hereinafter 'the GewO'). It provides that 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 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. The goods offered for sale on rounds from door to door may only be such goods as are offered for sale at the said permanent establishment. Under Article 50(1)(2) of the GewO, however, traders may make deliveries of goods on order at any place, without any territorial restriction.

In short, the national legislation in question provides that such arrangements for selling food products — namely the so-called 'sale on rounds' — may be made only by traders established in a district adjacent to the area within which they intend to operate using these commercial methods. The exact provision of the Austrian legislation, as described in the order for reference, applies without distinction to Austrian traders and those established in the Member States bordering Austria. [1]

* Original language: Italian.

1 — This point was clarified in the answer given by the Austrian Government, the parties in the main proceedings, and also the Commission, to a written question from the Court.

Infringement of the provisions of the GewO is subject to sanction under national law as unfair competition.

3. The facts which gave rise to the main proceedings fall within the legislative framework described above and can be summarised as follows.

The plaintiff, the Schutzverband gegen unlauteren Wettbewerb (hereinafter 'the Schutzverband') is an association for the protection of the interests of traders, one of whose purposes is to combat unfair competition. [2]

The defendant, TK-Heimdienst Sass GmbH (hereinafter 'TK') is an Austrian company operating in the retail food trade sector. Its registered office is at Heiming, in Tyrol, and it has branches in Völs, Tyrol, and Wolfurt in Vorarlberg. In addition to selling products at its own premises, TK also sells goods on rounds and makes deliveries of deep-frozen goods to customers. The firm's drivers follow a fixed itinerary at regular intervals, during which they distribute catalogues showing the frozen products offered by the company and collect any orders. [3] The drivers also have a supply of goods (not ordered) for direct sale without prior orders having been placed. Sales on rounds are also made in areas of Austrian territory which are not included in, nor adjacent to, those in which the defendant has a permanent establishment.

4. In the main proceedings the plaintiff is seeking to have the defendant prohibited from carrying out door to door sales of food products not ordered in advance. It claims that this activity is contrary to Article 53a of the GewO, as the defendant does not sell food products in a permanent establishment situated in the administrative district in which it makes the rounds or in any municipality adjacent thereto.

The plaintiff's claim was upheld in the first two courts. The appeal court also stated that Article 53a of the GewO did not infringe Community law, since it only regulated certain selling arrangements, as in *Keck and Mithouard*. [4]

2 — It numbers amongst its members many trading associations, societies or guilds, including the Regional Committee for the Retail Trade in Foods and Luxury Foods of the Vorarlberg Chamber of Commerce and the Trade Section of that Chamber of Commerce.

3 — The orders may be placed either by telephoning or sending a form to the registered office, or they may be placed direct with the drivers. Delivery is then made in the course of the next round on that route.

4 — Joined cases C-267/91 and C-268/91 [1993] ECR I-6097.

5. However, the referring court, the Oberster Gerichtshof, considers that there are doubts concerning the compatibility of the national provision with Articles 30 and 36 of the EC Treaty (now, after amendment, Article 30 EC). The Austrian Supreme Court points out that there is no cross-border element in this case. Nevertheless, an assessment by the national court as to whether there is any discrimination against Austrian nationals depends on the question whether Article 53a of the GewO infringes Community law. The referring court notes that, in the view of the Austrian Constitutional Court, it would be contrary to the principle of equal treatment to treat Austrian traders less favourably than traders from other Member States. In the light of these considerations, the Oberster Gerichtshof has submitted 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?'

Jurisdiction

6. Before discussing the substance of the question, we must look at the preliminary point raised by the Schutzverband. It argues that the question referred for a preliminary ruling is inadmissible for two reasons. First, there is no cross-border element in this case, as the facts at issue are not relevant to other Member States. Second, Article 53a of the GewO regulates a selling arrangement and its compatibility with Community law could easily have been assessed on the basis of the case-law relating to Article 30 of the Treaty. [5] Therefore there is in their view no need to refer the question to the Court.

7. I am not convinced by these arguments. With regard to the latter point, Article 177 of the Treaty (now Article 234 EC) always allows national courts to refer questions of interpretation to the Court again even if the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case. [6]

Then, with reference to the allegedly purely domestic nature of the case pending before

5 — It refers, in particular, to *Keck and Mithouard*, cited above.

6 — Joined Cases 28/62, 29/62 and 30/62 *Da Costa and Others* [1963] ECR 36.

the national court, it should be noted that the question referred to the Court relates to Article 30 of the Treaty, a provision which is intended to remove barriers to the free movement of goods in the Community. As the Court stated in *Pistre*, such barriers may exist even if 'all the facts of the specific case before the national court are confined to a single Member State.' [7] In such a situation, 'the application of the national measure may also have effects on the free movement of goods between Member States, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods. In such circumstances, the application of the measure, even if restricted to domestic producers, in itself creates and maintains a difference of treatment between those two categories of goods, hindering, at least potentially, intra-Community trade.' [8]

8. Therefore, under the case-law of the Court, when it is claimed that there is an infringement of Article 30 of the Treaty, the Court has jurisdiction to assess whether the national measure may have an unfavourable effect on the trade of Community goods, even if all the particular elements at issue in the main proceedings are confined to a single Member State. [9]

Substance

9. With regard to the substance of the question, I should point out first of all that, in my opinion, the national provision described by the national court does not conflict with Article 30. I consider that the legislation in question falls into the class of national regulations which the Court, from the judgment in *Keck and Mithouard* onwards, has held to be outside the scope of Article 30. In that case, as we know, the principle was established that '... the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States... 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

7 — Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Pistre* [1997] ECR I-2343, paragraph 44.

8 — Paragraph 45.

9 — However, I do not consider that the case-law referred to by TK in their written observations is relevant for the purpose of asserting the competence of the Court: that is, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003; Case 166/84 *Thomasdünger* [1985] ECR 3001 and Case C-28/95 *Leur-Bloem* [1997] ECR I-4161. In these judgments, Community law was not applicable directly, but only by virtue of a reference in national provisions, which for the regulation of purely domestic situations comply with the solutions adopted by Community law. However, our case is different. This is not — as the referring court seems to believe — a merely domestic case, outside the scope of Community law. The question referred for a preliminary ruling relates to Article 30 of the Treaty and that provision — as stated — is also applicable even if the particular elements which characterise the main proceedings are confined to a single Member State. This case, therefore, does not extend the preliminary ruling mechanism to disputes arising outside the scope of Community law.

in fact, the marketing of domestic products and of those from other Member States.' [10] The reasons behind this line of case-law are well-known. In view of 'the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States...,' [11] the Court wished to bring this provision back to its original *ratio* of protecting *trade* between Member States. Article 30, therefore, does not preclude Member States from adopting regulations of a general nature to regulate commercial activity, when such measures do not specifically impede the access of products from other Member States to the domestic market. In short, for Article 30 to apply, the national measure in question must cause a *specific* decrease in the flow of trade between Member States. [12] This condition is not fulfilled with reference to regulations which do not concern the characteristics of the products but only the arrangements for selling them. In fact, as such regulations apply to all traders operating in national territory, without distinction as to the origin of the products in question, they do not affect the marketing of goods from other Member States differently from that of domestic products. [13]

10. This line of reasoning has been frequently and consistently followed in the case-law. It is sufficient for present purposes to recall that, in addition to the prohibition on resale at a loss at issue in *Keck and Mithouard*, the Court held that Article 30 of the Treaty also did not apply to a rule of professional conduct laid down by a pharmacists' professional body in a Member State, which prohibits all pharmacists within the area over which it has jurisdiction from advertising outside the pharmacy quasi-pharmaceutical products which they are authorised to sell, in so far as that rule, which applies without distinction as to the origin of the products in question, does not affect the marketing of goods from other Member States differently from that of domestic products. [14] The Court has also held that national legislation which reserves the retail sale of manufactured tobacco products, irrespective of their origin, to authorised distributors but does not thereby bar access to the national market for products from other Member States or does not impede such access more than it impedes access for domestic products within the distribution network does not fall within the scope of Article 30. That legislation does not relate to the characteristics of the products but concerns solely the arrangements for their retail sale and the obligation to operate through a system of authorised retailers applies without distinction as to the origin of the products and does not affect the marketing of goods from other Member

10 — Paragraph 16.

11 — Paragraph 14 of *Keck and Mithouard*, cited above.

12 — In Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, the Court showed that the mere fact that generally it causes a drop in the volume of sales, and consequently, a reduction in imports is not sufficient to bring a national measure within the scope of Article 30. There must be a specific decrease in the actual imports.

13 — Case C-387/93 *Banchero* [1995] ECR I-4663, paragraphs 37 and 44.

14 — Case C-292/92 *Hünermund and Others* [1993] ECR I-6787.

States differently from that of domestic products. [15] For the same reasons, national legislation giving pharmacies the exclusive right to distribute processed milk for infants was found not to be contrary to Article 30 of the Treaty. [16]

11. In my view, the case-law referred to above is applicable to this case. First of all, the legislation described by the referring court applies without distinction to Austrian traders and those from other Member States. Traders established in bordering States may carry out sales on rounds in Austrian territory on the same conditions as those imposed on national traders. In that respect, there is therefore no impediment to the import of goods from other Member States.

Above all, the decisive point, in my opinion, is that the legislation in question has neither the aim nor the effect of restricting the volume of imports. In the words of the Court's case-law, it does not relate to the characteristics of food products which may be sold but concerns solely the 'arrangements for their retail sale'. It is therefore a rule on marketing, applicable irrespective of the origin of the goods — whether national or imported — and it does not seem likely in any way to restrict the flow of imports from other Member States. [17]

12. I therefore do not consider that the national legislation at issue in this case is a disguised restriction on trade between Member States, as the Commission and TK suggest in their written observations. They claim that a butcher, baker or any other food retailer from another Member State who wishes to offer his own products for sale on rounds in Austria would have to set up an establishment there, in addition to that of his country of origin. This would involve additional costs and would make this form of sale unprofitable. However, I do not agree with this argument. The Austrian regulation does not concern trade between Member States, nor does it affect the access of foreign products to the domestic market. It is merely a limitation on the scope of retailers authorised to use a particular method of sale, a limitation which, as we have said, is not dependent on the origin of the products. There is therefore no restriction, either clear or

15 — Judgment in *Banchero*, cited above.

16 — Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621.

17 — It should be pointed in this connection that the facts in this case are different from those in *Du Pont de Nemours Italiana*, cited by the Commission (Case C-21/88 [1990] ECR I-889). In that case the Court held that the fact that the restrictive effect exercised by a State measure on imports does not benefit all domestic products but only some cannot exempt the measure in question from the prohibition set out in Article 30. The case concerned a national regulation which reserved a proportion of public supply contracts to undertakings established in certain regions of the national territory; as a result goods processed in a particular region of a Member State were favoured, preventing the authorities and public bodies concerned from procuring some of the supplies they need from undertakings situated in other Member States. This does not apply in the present case, where the restriction on door to door sales is not based on the origin of the products offered for sale. Traders authorised to carry out door to door sales in particular Austrian administrative districts may sell goods from any Member State, and the import of such goods is not subject to special conditions which may be to their disadvantage. In short, the goods are not affected by the Austrian regulation restricting the sales on rounds of particular food products, so that this measure is not liable to impede access to the market for these products or to impede such access more than it impedes access for domestic products.

disguised, on the movement of goods. It is not suggested that the national regulation causes a drop in the general volume of trade within the national territory. Nor, *a fortiori*, can there be a specific effect on the volume of imports which, alone, justifies the application of the prohibition on quantitative restrictions or measures having equivalent effect. Also, it should be noted that the national regulation at issue concerns only the sale on rounds of food products not previously ordered. All the other methods of sale are unaffected. In my view, it is not realistic to argue that imports have fallen because a baker, butcher or any other retailer of food products established, for example, in Brussels, Paris or Berlin, cannot sell products not ordered in advance from his van in Austria, for the simple reason that in commercial practice, there are 'natural limits', so to speak, on the area covered by this form of distribution. Retailers of food products will offer them for sale in the manner laid down in the Austrian legislation only to consumers in the adjacent areas. And that is why this legislation — since traders established in the Member States bordering Austria are assured of being able to sell their goods under the same conditions as domestic traders — is unlikely to affect intra-Community trade. It therefore does not fall within the scope of Article 30 of the Treaty.

Conclusion

13. In light of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Oberster Gerichtshof:

Article 30 of the EC Treaty (now, after amendment, Article 28 EC) should be interpreted as not precluding national 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, situated within national territory or in another Member State.