

OPINION OF ADVOCATE GENERAL  
MISCHO

delivered on 3 April 2003<sup>1</sup>

**I — Introduction**

1. The main proceedings are between the Staatsanwaltschaft Augsburg beim Amtsgericht Augsburg (Augsburg Public Prosecutor's Office at the Local Court, Augsburg (Germany)) and Bruno Schnitzer, who is alleged to have infringed the German legislation against black-market work. Mr Schnitzer had engaged a Portuguese undertaking to carry out large-scale plastering work in Germany, which it did without being entered on the German Skilled Trades Register.

2. Asked by the Amtsgericht Augsburg to give a preliminary ruling on a question concerning the interpretation of Articles 49 EC, 50 EC, 54 EC and 55 EC and of Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries),<sup>2</sup> the Court decided initially to give a ruling without hearing oral argument. No party to the

main proceedings had in fact requested that oral argument be heard.

3. I delivered my Opinion in this case on 17 September 2002.

4. By order dated 10 January 2003, the Court decided to reopen the oral procedure on the grounds that the possibility could not be excluded that Mr Schnitzer had not received the written observations lodged in this case and the request to inform the Court whether he wished, in accordance with Article 104(4) of the Rules of Procedure, to present oral argument to it.

5. A hearing was held on 27 February 2003.

6. At the hearing, Mr Schnitzer's lawyer presented a series of arguments alleging that the legislation governing the German Skilled Trades Register lacks clarity and is

<sup>1</sup> — Original language: French.

<sup>2</sup> — OJ, English Special Edition 1963-1964, p. 148.

incompatible with the German constitution. However, the Court must confine itself to an interpretation of the relevant provisions of Community law.

immediately to provide proof that they have carried on the profession in question for six consecutive years either in an independent capacity or as a person responsible for managing an undertaking. This condition is laid down by Article 3 of Directive 64/427, which applied at the material time.

## II — Analysis

7. It should be remembered that the national court asks whether it is 'compatible with EC law on the *freedom to provide services*<sup>3</sup> for a Portuguese undertaking, which in its country of origin fulfils the conditions for carrying on a commercial activity, to have to satisfy further — albeit purely formal — conditions (in this case registration on the Skilled Trades Register), in order to carry on that activity in Germany not just on a short-term basis but for a longer period'.

9. It is not therefore the requirement for registration on the Skilled Trades Register which leads to the delays in question.

8. At the hearing, information was provided by Mr Schnitzer's lawyer concerning the manner in which the disputed legislation is applied in Germany. Since the judgment in *Corsten*,<sup>4</sup> entry on the Skilled Trades Register is free of charge. In addition, the periods of time which may elapse before registration is effective can be explained by the fact that persons providing services are not always in a position

10. In my Opinion dated 17 September 2002, I expressed the view that the relevant provisions of the EC Treaty and of Directive 64/427 do not preclude a requirement of entry on the skilled trades register where entry is not such as to delay or complicate exercise of the right to freedom to provide services and entails neither additional administrative costs nor the compulsory payment of subscriptions to the chamber of trades.

11. It cannot be denied that it is perfectly legitimate to verify that craftsmen who do not hold a professional qualification comply with the conditions laid down by the Directive concerning professional experience.

3 — Emphasis added.

4 — Case C-58/98 [2000] ECR I-7919.

12. So far as the requirement for entry on the skilled trades register is concerned, the Court held at paragraph 38 of the judgment in *Corsten* that the objective of this registration is to guarantee the quality of skilled trade work and to protect those who have commissioned such work.

13. The Court also accepted that this constituted an overriding requirement relating to the public interest capable of justifying a restriction on the freedom to provide services and that the requirement in question appeared appropriate to the achievement of its intended aim.

14. The question therefore remains whether entry on this register goes beyond what is necessary to achieve the intended aim.

15. When registration does not cause, of itself, any additional delay worthy of mention (nennenswerte Verzögerung) over and above the time necessary for an applicant's professional experience to be verified, nor any administrative costs, it cannot be regarded as going beyond what is necessary to achieve the intended aim.

16. I therefore adhere to the first paragraph of the reply which I proposed should be given to the request for a preliminary ruling.

17. At the hearing, arguments were also presented as to the point at which an undertaking became established in the host country.

18. In this regard, I stated at point 65 of my Opinion dated 17 September 2002 that the national court must determine, 'having regard to the duration, regularity, periodicity and continuity of [the Portuguese undertaking's] activities, whether the activity which it pursues in Germany is of a temporary nature for the purposes of the Treaty'.<sup>5</sup> If it became apparent that that activity had at some point ceased to be temporary or that it was entirely or principally directed towards Germany, the requirement of entry on the skilled trades register (including the requirement to pay subscriptions to the chamber of trades) would apply without restriction.

19. The Commission has indicated that it adopted, on 7 March 2002, a proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications (COM(2002) 119 final).

<sup>5</sup> — See the judgment in Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 22.

20. Article 5(2) of this proposal provides:

‘Where the service provider moves to the territory of the host Member State, the pursuit of a professional activity for a period of not more than 16 weeks per year in a Member State by a professional established in another Member State shall be presumed to constitute a “provision of services”.

The presumption referred to in the previous paragraph shall not preclude assessment on a case-by-case basis, for example, in the light of the duration of the provision, its frequency, regularity and continuity.’

21. The proposed Directive shows that a need exists, and the Commission emphasised this point during the hearing, for a clearer line to be drawn separating the freedom to provide services and the freedom of establishment, so that potential service providers know where they stand before beginning operations in another Member State.

22. In the present case, according to the national court, the Portuguese undertaking which worked for Mr Schnitzer carried out large-scale plastering work in southern Bavaria between November 1994 and November 1997. If this activity was carried out continuously, the company greatly exceeded the period of 16 weeks contained in the Commission’s proposal.

23. In any event, it is for the national court to determine, on the basis of all available criteria and, in particular, those set out at point 24 of my Opinion of 17 September 2002, whether this present case involves establishment.

24. All the above leads me also to confirm the second paragraph of my suggested reply to the question referred for a preliminary ruling, set out in my Opinion of 17 September 2002, namely that ‘where the activities of the person or undertaking on the territory of the host Member State have been pursued over a long period, on a virtually continuous basis... under a whole series of contracts, it falls to the competent court to determine at what point in time the situation must be regarded as establishment and must, therefore, give rise to the payment of subscriptions to the chamber of trades’.

25. At the hearing, as in its written observations, the Commission also broached the problem of the severity of the applicable penalties in Germany. In this regard, it is for the national court to determine whether an undertaking whose compliance with the conditions, laid down by Directive 64/427, governing access to the relevant activities has been checked, giving rise to a formal, positive reply, but which has not been registered on the skilled trades register, even after a fairly long period of activity, may be subject to penalties, for black-

market work, as severe as those applicable to an undertaking not subject to that check or which does not even fulfil the necessary requirements of professional experience.

### III — Conclusion

26. For the reasons set out above, I confirm the conclusions to which I came on 17 September 2002, which were as follows:

- (1) Articles 49 EC, 50 EC, 54 EC and 55 EC and Article 4 of Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) do not preclude rules of a Member State which make the carrying out on its territory of skilled trade work by providers of services established in other Member States subject not only to examination of the conditions governing access to the activities concerned but also to a requirement of entry on the skilled trades register where such entry is not such as to delay or complicate exercise of the right to freedom to provide services and entails neither additional administrative costs nor the compulsory payment of subscriptions to the chamber of trades.
- (2) Where the activities of the person or undertaking on the territory of the host Member State have been pursued over a long period, on a virtually continuous basis and under a whole series of contracts, it falls to the competent court to determine at what point in time the situation must be regarded as establishment and must, therefore, give rise to the payment of subscriptions to the chamber of trades.