

JUDGMENT OF THE COURT (Third Chamber)

23 February 2006 \*

In Case C-441/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Landesgericht Klagenfurt (Austria), made by decision of 13 August 2004, received at the Court on 20 October 2004, in the proceedings

**A-Punkt Schmuckhandels GmbH**

v

**Claudia Schmidt,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissechet and U. Löhmus (Rapporteur), Judges,

\* Language of the case: German.

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Schmidt, by A. Seebacher, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by B. Schima, acting as Agent,

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

gives the following

### **Judgment**

<sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 28 EC and Article 30 EC.

- 2 The reference was made in the context of proceedings between the company A-Punkt Schmuckhandels GmbH ('A-Punkt') and Ms Schmidt seeking to have her prevented from selling silver jewellery door-to-door.

### **The national legal framework**

- 3 Under Paragraph 57(1) of the Austrian Trade and Commercial Regulations (Gewerbeordnung, BGB1. 194/1994, 'the GewO'), collecting orders for or selling certain goods, including silver jewellery, at private homes is prohibited in the following terms:

'Visits to private individuals for the purpose of obtaining orders for the sale of food supplements, poisons, medicines, medical accessories, watches or clocks in precious metals, gold, silver or platinum products, gems or precious stones, arms or munitions, pyrotechnic articles, cosmetic products, tombstones, funerary monuments or their accessories, or wreaths or other grave ornaments are prohibited. Promotional parties, including promotional meetings at which advice is offered, about those goods, organised in private homes and directed at private individuals, whether the promotional party is organised by the trader in person or by a third party, are also prohibited. ...'

### **The main proceedings and the questions referred for a preliminary ruling**

- 4 Ms Schmidt runs an undertaking with headquarters in Germany. She carries out itinerant selling of jewellery in the countries of the European Union, canvassing

individuals in private homes. There, she offers silver jewellery for sale and takes orders for such jewellery. The price charged for each item of jewellery does not exceed EUR 40.

- 5 On 18 December 2003, Ms Schmidt organised a 'jewellery party' in a private house in Klagenfurt, Austria. Following that party, A-Punkt, which has a competing business, brought proceedings against Ms Schmidt before the Landesgericht Klagenfurt (Klagenfurt Regional Court) (Austria) seeking to stop her business on the ground that it is prohibited by Paragraph 57(1) of the GewO.
  
- 6 Ms Schmidt disputes the claims of the applicant in the main proceedings, contending that Paragraph 57 of the GewO is contrary to the free movement of goods as laid down in Article 28 EC. She points out, *inter alia*, that the sale of silver jewellery in private homes is legal in Germany as well as in Italy and the United Kingdom.
  
- 7 In those circumstances, the Landesgericht Klagenfurt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 28 EC and 30 EC to be interpreted as guaranteeing the freedom of the defendant, in the course of her trade, to sell silver jewellery by way of calling on private individuals for the purposes of selling, and collecting orders for, silver jewellery?

- (2) If so, does a rule of a Member State which prohibits the sale of silver jewellery by way of calling on private individuals for the purposes of selling, and collecting orders for, silver jewellery constitute a restriction on the free movement of goods within the meaning of Articles 28 EC and 30 EC?
- (3) If so, is a national rule which, contrary to Articles 28 EC and 30 EC, prohibits the sale of silver jewellery by way of calling on private individuals for the purposes of selling, and collecting orders for, silver jewellery not contrary to the right of an individual to sell silver jewellery by that method?

### **On the questions referred for a preliminary ruling**

- 8 By its three questions, which must be examined together, the national court essentially asks whether Article 28 EC precludes a provision of national law, such as Paragraph 57 of the GewO, which prohibits the selling of, and collecting of orders for, silver jewellery in a doorstep-selling situation.
- 9 First of all, it is appropriate to observe that Paragraph 57 of the GewO effectively excludes a method of marketing that type of jewellery. Furthermore, the main proceedings arise from a situation where a person running an undertaking with headquarters in Germany organised the sale of jewellery at private homes in Austria. In such a situation, the body of national rules prohibiting the sale of jewellery at private homes falls within the scope of the principle of free movement of goods.

- 10 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31) seeks to partially harmonise the rules on consumer protection with respect to certain marketing methods, including sales concluded during a visit made by a trader to a private individual.
- 11 Without there being any need to conduct a detailed analysis of the degree of harmonisation achieved by that directive, it is common ground that Member States have the power, on the basis of Article 8 thereof, to adopt or maintain provisions which are intended to guarantee consumers more extensive protection than is provided for in that directive.
- 12 As is apparent from the case-law of the Court, the Member States can, for that purpose, maintain or introduce a total or partial prohibition on the conclusion of contracts away from business premises (see Case 382/87 *Buet and EBS* [1989] ECR 1235, paragraph 16, and Case C-361/89 *Di Pinto* [1991] ECR I-1189, paragraph 21). That power must, however, be exercised in a way which is consistent with the fundamental principle of the free movement of goods, as expressed in the prohibition contained in Article 28 EC on quantitative restrictions on imports and all measures having equivalent effect between Member States (see, to that effect, Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 34).
- 13 The Court has already given judgment on the compatibility of various national provisions regulating marketing methods with Article 28 EC (see, inter alia, Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 22).
- 14 As the Court has ruled on many occasions, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially,

intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and are thus prohibited by that article (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 25, and *Karner*, paragraph 36).

- 15 However, the Court specified in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder trade between Member States within the meaning of the line of case-law initiated by *Dassonville*, as long as those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see, also, Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 23; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 68; *Karner*, paragraph 37, and *Burmanjer and Others*, paragraph 24).
- 16 The Court subsequently found that provisions concerning certain marketing methods were provisions concerning selling arrangements within the meaning of *Keck and Mithouard* (see, in particular, Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paragraphs 12 to 14; *TK-Heimdienst*, paragraph 24, and *Burmanjer and Others*, paragraphs 25 and 26).
- 17 As appears from paragraph 9 of this judgment, the body of national rules at issue prohibiting selling in private homes is concerned with a marketing method. It is common ground that its purpose is not to regulate trade in goods between Member States. However, it can avoid the prohibition laid down in Article 28 EC only if it satisfies the two conditions set out in paragraph 15 of this judgment.

18 As regards the first condition, it appears that Paragraph 57 of the GewO applies to all relevant traders operating in Austria, whatever their nationality. Thus, the first condition formulated in *Keck and Mithouard* is satisfied.

19 So far as concerns the second condition, it is common ground that the body of rules prohibiting the sale of jewellery in private homes does not make a distinction according to the origin of the products in question.

20 It should next be established whether the general prohibition on selling or collecting orders for silver jewellery in a doorstep-selling situation is not, in fact, liable to impede the access to the market of the products concerned from other Member States more than it does for domestic products.

21 A national provision such as the one at issue in the main proceedings is, in principle, likely to limit the total volume of sales of the relevant products in the Member State concerned and may, consequently, affect the volume of sales of those products from other Member States. Such a finding is not, however, enough for that provision to be considered a measure having equivalent effect (see, inter alia, *Keck and Mithouard*, paragraph 13, and Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to 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, paragraph 24).

22 Admittedly, as observed by the Commission of the European Communities, the sale in private homes of jewellery of low value might seem to be more appropriate and efficient than sale in a fixed commercial structure. In fact, for traders specialising in

jewellery of that value, sale in a fixed commercial structure is liable to give rise to costs that are proportionately very high.

23 Nevertheless, the fact that a marketing method is apparently more efficient and profitable is not a sufficient reason to assert that the national provision prohibiting it is caught by the prohibition laid down in Article 28 EC. Such a provision constitutes a measure having equivalent effect only if the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products.

24 In this respect, it is common ground that the prohibition at issue in the main proceedings does not concern all the ways of marketing the goods in question, but only one of them, and therefore does not exclude the possibility of selling those goods in Austria by other methods.

25 However, the information available to the Court does not allow it to ascertain beyond doubt whether the prohibition on selling in private homes laid down in Paragraph 57 of the GewO affects the marketing of products from Member States other than Austria to a greater degree than it affects the marketing of products from that Member State. In such circumstances, it is therefore for the national court to determine whether that condition is met and to do so, in particular, in the light of the considerations developed in paragraphs 20 to 24 of this judgment.

26 If, following that review, that court finds that the prohibition laid down in Paragraph 57 of the GewO affects products originating from other Member States more than it

affects domestic products as regards access to the domestic market, it will be for that court to establish whether that prohibition is justified by an objective in the general interest within the meaning of the case-law initiated by Case 120/78 *Rewe-Zentral* [1979] ECR 649 (*Cassis de Dijon*), or by one of the objectives listed in Article 30 EC, and whether the prohibition is a necessary and proportionate means to attain that objective.

- 27 In that regard, consumer protection may constitute a justification for the prohibition at issue in the main proceedings, on the twofold condition that the prohibition is appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary to attain that objective.
- 28 The assessment will have to take account of the level of protection enjoyed by consumers under Directive 85/577 in the context of the selling of, and collecting of orders for, the products concerned.
- 29 It will also be necessary in the course of that review to take account of the specific features associated with the sale of silver jewellery in private homes, in particular the potentially higher risk of the consumer being cheated due to a lack of information, the impossibility of comparing prices or the provision of insufficient safeguards as regards the authenticity of that jewellery and the greater psychological pressure to buy where the sale is organised in a private setting.
- 30 In the light of all the preceding considerations, the answer to the questions referred must be that, as regards free movement of goods, Article 28 EC does not preclude a national provision by which a Member State prohibits in its territory the selling of,

and collecting of orders for, silver jewellery in a doorstep-selling situation where such a provision applies to all relevant traders in so far as it affects in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States. It is for the national court to ascertain whether, having regard to the circumstances in the main proceedings, the application of the national provision is liable to prevent the access to the market of products from other Member States or to impede that access more than it impedes the access to the market of domestic products and, if that is the case, to determine whether the measure concerned is justified by an objective in the general interest within the meaning given to that concept in the Court's case-law or by one of the objectives listed in Article 30 EC, and whether that measure is proportionate to that objective.

### Costs

- <sup>31</sup> 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 (Third Chamber) hereby rules:

**Article 28 EC does not preclude a national provision by which a Member State prohibits in its territory the selling of, and collecting of orders for, silver jewellery in a doorstep-selling situation where such a provision applies to all relevant traders in so far as it affects in the same manner, in law and in fact, the marketing of domestic products and that of products from other Member States. It is for the national court to ascertain whether, having regard to the circumstances in the main proceedings, the application of the national provision is liable to prevent the access to the market of products from other Member States or to impede that access more than it impedes the access to the**

**market of domestic products and, if that is the case, to determine whether the measure concerned is justified by an objective in the general interest within the meaning given to that concept in the Court's case-law or by one of the objectives listed in Article 30 EC, and whether that measure is proportionate to that objective.**

[Signatures]