

JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 *

In Case C-205/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van Beroep te Gent (Belgium), made by decision of 20 March 2007, received at the Court on 19 April 2007, in criminal proceedings against

Lodewijk Gysbrechts,

Santurel Inter BVBA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Klučka, and C. Toader (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 May 2008,

after considering the observations submitted on behalf of:

- Santurel Inter BVBA, by H. Van Dooren, advocaat,

- the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,

- the Commission of the European Communities, by B. Stromsky and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of Articles 28 EC to 30 EC.

- 2 The reference was made within criminal proceedings brought against Mr Gysbrechts and Santurel Inter BVBA ('Santurel') for contraventions of the Belgian law on distance selling.

Legal context

Community law

- 3 Article 6 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) provides:

‘1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

The period for exercise of this right shall begin:

- in the case of goods, from the day of receipt by the consumer where the obligations laid down in Article 5 have been fulfilled,

...

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.

...’

4 Article 14 of Directive 97/7 is worded as follows:

‘Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the [EC] Treaty, to ensure a higher level of consumer protection. Such provisions shall, where appropriate, include a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty.’

National law

5 The consumer’s right to withdraw is governed by Article 80 of the [Belgian] Law of 14 July 1991 on commercial practices and consumer information and protection, as amended (‘the Law on consumer protection’).

6 Article 80(3) of the Law on consumer protection provides:

‘Without prejudice to the application of Article 45(1) of the Law of 12 June 1991 on consumer credit, no deposit or any form of payment may be required from the consumer before the end of the withdrawal period of seven working days referred to in paragraph 1.

If the right of withdrawal provided for in paragraphs 1 and 2 is exercised, the vendor shall repay the amounts paid by the consumer, without costs. This repayment shall be made within 30 days of the withdrawal.

The prohibition referred to in the first paragraph shall be waived if the vendor is able to prove that he complies with the rules laid down by the Crown on the repayment of amounts paid by the consumer.’

- 7 The royal decree referred to in the last paragraph of that provision has not yet been adopted.

The main proceedings and the question referred for a preliminary ruling

- 8 Santurel is an undertaking which specialises in the wholesale and retail sale of food supplements. The greater part of its sales are made online by means of the company’s Internet site, and goods ordered are then sent to the purchasers by post.
- 9 Mr Gysbrechts is the founder and manager of that undertaking.

- 10 In 2001, Santurel brought an action against one of its customers, Mr Delahaye, who resided in France, for failure to pay the price of a number of products which had been delivered to him. The outcome of that action was that the judge in Dendermonde (Belgium) who heard the case gave judgment in default against Mr Delahaye.
- 11 Mr Delahaye then lodged a complaint and stated, though he produced no evidence of the fact, that he had returned the products concerned to Santurel. The Belgian Economic Inspection Board then carried out an investigation which established that there had been failures to fulfil the obligations to provide information on the right of withdrawal provided for by the Law on consumer protection. Those failures were brought to Santurel's attention and a request was made that the situation be corrected.
- 12 Santurel therefore altered the information provided on its Internet site to state, *inter alia*, that payment for goods must be made within a week of receipt of the goods. In respect of goods delivered in Belgium, the price may be paid by bank transfer, postal order or by credit card. In respect of other countries, the only acceptable means of payment is credit card. In all cases, when a payment is to be made by credit card, the customer must state on the order form the number and validity period of the card.
- 13 The Belgian Economic Inspection Board considered that that amendment was inadequate and brought charges against Santurel and Mr Gysbrechts as its manager, to the effect that they had committed offences under the provisions on distance selling in the Law on consumer protection. In particular, it was alleged that they had disregarded the prohibition, laid down in Article 80(3) of that law, on requiring that the consumer provide a deposit or any form of payment before expiry of the period of seven working days within which withdrawal from the contract is permitted. According to the Economic Inspection Board, the statement of the credit card number on the order form for goods enables Santurel to collect the price of those goods before expiry of the period for withdrawal of seven working days, which contravenes the requirements laid down by law.

14 The Court of First Instance of Dendermonde found Santurel and Mr Gysbrechts guilty and imposed on each party a fine of EUR 1 250. All parties to the main proceedings brought an appeal against that judgment before the Hof van Beroep te Gent (Court of Appeal, Ghent).

15 The Hof van Beroep te Gent held that the prohibition laid down in Article 80(3) of the Law on consumer protection creates a risk that a Belgian trader will have difficulty in obtaining payment for his goods when they have been delivered to customers established in another Member State, that risk being all the more acute when, as in the main proceedings, the sums involved are relatively small.

16 In those circumstances, that court considers that Santurel and Mr Gysbrechts have an arguable case that the prohibition concerned is an unjustified obstacle to the free movement of goods within the European Community. The court consequently decided to stay the proceedings and referred the following question to the Court for a preliminary ruling:

‘Does the Belgian Law of 14 July 1991 on commercial practices and consumer information and protection constitute a measure having equivalent effect, as prohibited in Articles 28 EC to 30 EC, inasmuch as Article 80(3) of that national law prohibits demands for an advance or payment from the consumer during the compulsory period for withdrawal, as a result of which the actual effect of the Law of 14 July 1991 on the trading of goods in the trader’s own country differs from its effect on trading with nationals of another Member State, and does this give rise in fact to an obstacle to the free movement of goods, a principle enshrined in Article 23 EC?’

The question referred for a preliminary ruling

Observations of the parties

- 17 Santurel claims, in essence, that the interpretation by the Belgian authorities of the provision at issue in the main proceedings, to the effect that a supplier is prohibited from requiring a consumer's payment card number in a distance sale, contravenes the requirements laid down by Articles 28 EC to 30 EC.
- 18 Relying on the principles to be elicited from the judgments in Case 8/74 *Dassonville* [1974] ECR 837 and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, Santurel argues that the actual effect of the prohibition imposed by the provision at issue in the main proceedings is predominantly on the export of national goods and constitutes, therefore, a measure having equivalent effect to a quantitative restriction, which is prohibited by the Treaty.
- 19 According to the Belgian Government, the aim of Article 80(3) of the Law on consumer protection is to ensure a high level of protection of the interests of consumers, pursuant to Article 14 of Directive 97/7. It follows that Article 80(3) ought to be interpreted as imposing on a supplier the obligation to offer a choice of several means of payment, of which at least one should enable the consumer to pay for goods delivered to him after the expiry of the period for withdrawal.
- 20 Furthermore, secure payment systems which make it impossible to collect sums due for delivered goods before expiry of the statutory period for withdrawal are compatible

with the provision at issue in the main proceedings, since the consumer who exercises his right of withdrawal retains the absolute right to obtain repayment of the sum paid from the paying agency. On the other hand, a mere declaration to the effect that the supplier undertakes not to collect the sum due before expiry of the period for withdrawal does not meet the requirements of the Law on consumer protection.

21 The Belgian Government also states, in that regard, that a royal decree, the adoption of which is under way, will in the future lay down rules for a system of payment in distance selling which will protect the consumer from any risk while also protecting the supplier. Within that system, the consumer will pay the purchase price of goods to the account of an independent third party and then, on the expiry of the period for withdrawal, the sum concerned will be transferred to the supplier of the goods.

22 The Belgian Government accepts, in its written observations, that the provision at issue in the main proceedings has a more restrictive effect on transactions entered into with persons established in other Member States. However, according to that government, although the risk assumed by the supplier is greater, that provision remains compatible with Community law.

23 As regards the compatibility of those provisions with Article 28 EC, the Belgian Government submits that the provision at issue in the main proceedings does not constitute a measure having equivalent effect to a quantitative restriction on imports since it does not make access to the Belgian market more difficult for imported goods. On the contrary, it creates a situation which is less favourable for Belgian traders than for traders of other Member States, and that does not contravene the requirements of Article 28 EC.

- 24 In the event that the Court were none the less to hold that the provision at issue in the main proceedings constitutes a measure having equivalent effect to quantitative restrictions, the Belgian Government considers that the measure can be justified on the grounds of consumer protection, in particular, in order to ensure that the consumer can effectively exercise his right of withdrawal provided for by Article 6 of Directive 97/7. The provision is, at the same time, proportionate to the objective pursued. The prohibition on requiring from the consumer an advance or payment before expiry of the period for withdrawal is intended to ensure that that same consumer can effectively exercise his right of withdrawal, specifically by eliminating the possibility that the difficulties inherent in recovery of sums already paid may discourage the consumer from exercising that right.
- 25 As regards the compatibility of the provision at issue in the main proceedings with Article 29 EC, the Belgian Government submits that the provision is applied indiscriminately to sales concluded with persons resident in Belgian territory and to sales involving consumers established in other Member States and, therefore, does not constitute a specific restriction on exports.
- 26 In relation to compatibility with Article 28 EC, the Commission of the European Communities is of the opinion that the provision at issue in the main proceedings concerns all traders active in the national market and that, legally, it affects national goods and imported goods in the same way. Moreover, it is for the national court to assess the actual effect on intra-Community trade. If the national provision were to constitute a measure having equivalent effect to a quantitative restriction, the Commission considers, first, that it is possible to justify it on the grounds of consumer protection, and, secondly, that it is proportionate to the legitimate objective pursued.
- 27 As regards compatibility with Article 29 EC, the Commission argues that the provision at issue in the main proceedings does not constitute a measure having equivalent effect to a quantitative restriction on exports since, in the present case, the measure concerned is not one which either has the specific object or effect of restricting patterns of exports.

28 In the course of the hearing, the Commission none the less put forward the possibility of a revised definition of measures having equivalent effect to quantitative restrictions on exports so as to include measures ‘which have the effect of restricting exports and which create a difference in treatment between trade within a Member State and exports’. According to that new definition, the provision at issue in the main proceedings would constitute such a measure having equivalent effect which could be justified on grounds of consumer protection, but which would not meet the requirements of proportionality.

The Court's reply

Preliminary observations

29 By its question, the referring court asks, in essence, whether Articles 28 EC to 30 EC preclude a provision such as that at issue in the main proceedings relating to distance selling which prohibits a supplier from requiring an advance or any payment before expiry of the period for withdrawal.

30 In that context, it is clear from the Court file, and from the written observations submitted to the Court, that Mr Gysbrechts and Santurel were found to have required consumers not residing in Belgium to provide the number of their payment card before expiry of the period for withdrawal. The Belgian authorities interpret the provision at issue in the main proceedings as meaning that, on the conclusion of a distance contract, the supplier cannot require that the consumer provide his payment card number, even though the supplier undertakes not to use it to collect payment before expiry of the period concerned.

- 31 In order to provide to the referring court all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see Case C-17/06 *Céline* [2007] ECR I-7041, paragraph 29), it is necessary to examine a prohibition such as that at issue in the main proceedings, as described in paragraph 30 of this judgment, also in the light of the Belgian authorities' interpretation of it in the main proceedings.
- 32 Furthermore, it is clear that the prohibition laid down by Article 80(3) of the Law on consumer protection comes within the scope of Directive 97/7.
- 33 In accordance with settled case-law, a national measure in an area which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of that harmonising measure and not those of the Treaty (Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64).
- 34 However, in the present case, it is clear that the harmonisation effected by Directive 97/7 was not exhaustive. In that regard, as is expressly provided by Article 14(1) of that directive, Member States may introduce or maintain, in the area covered by the directive, more stringent provisions to ensure a higher level of consumer protection, provided that power is exercised with due regard for the Treaty (see *Deutscher Apothekerverband*, paragraph 64).
- 35 It follows that such a provision does not dispense with the need to examine the compatibility of the national measure at issue in the main proceedings with Articles 28 EC to 30 EC.

36 As regards the compatibility of Article 80(3) of the Law on consumer protection with the terms of Article 28 EC, a procedure such as that concerned in the main proceedings relates not to imports, but, on the contrary, to exports of goods from Belgium to other Member States.

37 As that analysis of the compatibility of Article 80(3) with Article 28 EC is irrelevant to the subject of the dispute in the main proceedings, the Court need not rule on that aspect of the question referred for a preliminary ruling.

A measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 29 EC

38 To answer the question put by the referring court, it must therefore be determined whether the prohibition laid down by the provision at issue in the main proceedings constitutes a measure having equivalent effect to a quantitative restriction on exports.

39 The compatibility of a provision such as that at issue in the main proceedings with Article 29 EC must be examined by taking into account also the national authorities' interpretation of it, namely that suppliers are not allowed to require that consumers provide their payment card number, even though the suppliers undertake not to use it before expiry of the period for withdrawal.

40 In that regard, the Court has classified as measures having equivalent effect to quantitative restrictions on exports national measures which have as their specific

object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question, at the expense of the production or of the trade of other Member States (Case 15/79 *Groenveld* [1979] ECR 3409, paragraph 7).

41 In the main proceedings, it is clear, as the Belgian Government has moreover noted in its written observations, that the prohibition on requiring an advance payment deprives the traders concerned of an efficient tool with which to guard against the risk of non-payment. That is even more the case when the national provision at issue is interpreted as prohibiting suppliers from requesting that consumers provide their payment card number even if they undertake not to use it to collect payment before expiry of the period for withdrawal.

42 As is clear from the order for reference, the consequences of such a prohibition are generally more significant in cross-border sales made directly to consumers, in particular, in sales made by means of the Internet, by reason, inter alia, of the obstacles to bringing any legal proceedings in another Member State against consumers who default, especially when the sales involve relatively small sums.

43 Consequently, even if a prohibition such as that at issue in the main proceedings is applicable to all traders active in the national territory, its actual effect is none the less greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State.

44 It must therefore be held that a national measure, such as that at issue in the main proceedings, prohibiting a supplier in a distance sale from requiring an advance or any payment before expiry of the period for withdrawal constitutes a measure having equivalent effect to a quantitative restriction on exports. The same is true of a measure prohibiting a supplier from requiring that consumers provide their payment card number, even if the supplier undertakes not to use it to collect payment before expiry of the period for withdrawal.

The possible justification of the measure having equivalent effect

45 A national measure contrary to Article 29 EC may be justified on one of the grounds stated in Article 30 EC, and by overriding requirements of public interest, provided that the measure is proportionate to the legitimate objective pursued.

46 In that regard, none of the grounds referred to in Article 30 EC has any relevance in the circumstances of the main proceedings.

47 It must however be added that, in accordance with settled case-law, consumer protection may constitute a legitimate objective in the public interest capable of justifying a restriction on the free movement of goods (see Case 120/78 *Rewe-Zentral* [1979] ECR 649, paragraph 8, and Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECR I-2093, paragraph 27).

48 In the main proceedings, it is not disputed that the provision at issue was introduced with the aim of ensuring the protection of the consumer and, in particular, the effectiveness of the right of withdrawal guaranteed to him by Article 6 of Directive 97/7.

49 Pursuant to the discretion accorded to Member States by Article 14 of Directive 97/7 to introduce, in the area governed by it, more stringent provisions, the Kingdom of Belgium chose to give greater protection to the consumer by prohibiting suppliers not only from imposing a penalty upon the exercise of the right to withdraw, but also from requiring an advance or any payment before expiry of the period for withdrawal. The provision at issue in the main proceedings is intended to increase in that way the consumer's freedom to terminate a contractual relationship, without his having to worry about repayment of monies which he has paid in advance.

50 It remains to be determined whether that provision, as it is interpreted by the national authorities, is proportionate to the objective pursued.

51 In that regard, according to settled case-law, in order for national rules to comply with the principle of proportionality, it must be ascertained not only whether the means which they employ are suitable for the purpose of ensuring the attainment of the objectives pursued but also whether those means do not go beyond what is necessary to attain those objectives (see Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* [2006] ECR I-8135, paragraph 22).

52 The prohibition on requiring an advance or any payment before expiry of the period for withdrawal and the prohibition on requesting that purchasers provide their payment

card number are capable of ensuring a high level of consumer protection in distance selling, in particular in relation to the exercise of the right to withdraw.

53 It is however necessary to examine whether the national measure at issue in the main proceedings does not go beyond what is necessary to attain the proposed objective and, in particular, whether measures which would have been equally effective in protecting consumers but with a less restrictive effect on intra-Community trade could have been considered.

54 It must be borne in mind that one of the features of distance-selling contracts is the fact that there is often a gap between the performance by each party of his contractual obligations. Thus, the consumer may be induced to pay for the goods before he has received them or, on the contrary, the supplier may be led to deliver the goods without having received the price for them. That gap exposes the contracting parties to a specific risk of non-performance.

55 It falls to the Member States to determine, in compliance with Community law, first, how that risk of non-performance ought to be allocated between supplier and consumer and, secondly, what means should be made available to the contracting parties to protect themselves.

56 Even if the prohibition on requiring a payment during the period for withdrawal increases the uncertainty of suppliers as to whether the price for the delivered goods will be paid, that prohibition is clearly necessary to ensure the level of protection intended by the provision at issue in the main proceedings. In fact, a consumer who has made an advance payment to a supplier will be less inclined to exercise his right of withdrawal, even if he finds the delivered goods to be not entirely in accordance with his requirements.

- 57 As regards more specifically the prohibition on a supplier requiring a consumer's payment card number, it is clear that that prohibition is inseparable from the prohibition laid down in Article 80(3) of the Law on consumer protection.
- 58 First, that prohibition is the consequence of the application, by the competent Belgian authorities, of the prohibition laid down by the provision at issue in the main proceedings and, secondly, it pursues the same objective, namely the effective exercise of the right to withdraw.
- 59 Just like the prohibition laid down by the provision at issue in the main proceedings, the prohibition on a supplier requiring a consumer's payment card number is capable of ensuring the attainment of the objective pursued, as is clear from paragraph 52 of this judgment.
- 60 However, as is made clear in point 85 of the Opinion of the Advocate General, the value of the prohibition on a supplier requiring a consumer's payment card number resides only in the fact that it eliminates the risk that the supplier may collect the price before expiry of the period for withdrawal.
- 61 If, however, that risk materialises, the supplier's action is, in itself, a contravention of the prohibition laid down by the provision at issue in the main proceedings, a prohibition which must be regarded as an appropriate and proportionate measure to attain the objective pursued, as is made clear in paragraphs 54 to 57 of this judgment.

62 It must therefore be held that the imposition on a supplier of a prohibition on requiring that a consumer provide his payment card number goes beyond what is necessary to attain the objective pursued.

63 The answer to the question put by the referring court is therefore that Article 29 EC does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article 29 EC does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card.

Costs

64 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 (Grand Chamber) hereby rules:

Article 29 EC does not preclude national rules which prohibit a supplier, in cross-border distance selling, from requiring an advance or any payment from a consumer before expiry of the withdrawal period, but Article 29 EC does preclude a prohibition, under those rules, on requesting, before expiry of that period, the number of the consumer's payment card.

[Signatures]