

JUDGMENT OF THE COURT (Fifth Chamber)
25 March 2004 *

In Case C-71/02,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Herbert Karner Industrie-Auktionen GmbH

and

Troostwijk GmbH,

on the interpretation of Article 28 EC,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of C.W.A. Timmermans, acting as President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Herbert Karner Industrie-Auktionen GmbH, by M. Kajaba, Rechtsanwalt,

— Troostwijk GmbH, by A. Frauenberger, Rechtsanwalt,

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

— the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by U. Wölker and J.C. Schieferer, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Herbert Karner Industrie-Auktionen GmbH, represented by M. Kajaba; of Troostwijk GmbH, represented by A. Frauenberger; of the Austrian Government, represented by T. Kramler, acting as Agent; of the Swedish Government, represented by A. Falk; and of the Commission, represented by J.C. Schiefferer, at the hearing on 26 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

- ¹ By order of 29 January 2002, received at the Court on 4 March 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 28 EC.
- ² The question was raised in proceedings between Herbert Karner Industrie-Auktionen GmbH ('Karner') and Troostwijk GmbH ('Troostwijk'), companies authorised to auction moveable property, concerning advertising by Troostwijk for the sale of stock on insolvency.

Legal framework

Community rules

Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Article 30 EC allows such prohibitions and restrictions, however, where they are justified on certain grounds which are recognised as fundamental requirements under Community law and they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) ('Directive 84/450'), defines its purpose in Article 1 as follows:

'The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof...'

Article 2(2) of Directive 84/450 defines 'misleading advertising' as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by

reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor’.

- 6 Article 3 of Directive 84/450 provides that, in determining whether advertising is misleading, account is to be taken of all its features. The provision goes on to list a number of factors to be taken into account, such as, inter alia, the geographical or commercial origin of the goods in question.
- 7 Article 7 of Directive 84/450 states that the Directive is not to preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers and other persons referred to by that directive.

National rules

- 8 Paragraph 2(1) of the Bundesgesetz gegen den unlauteren Wettbewerb (Law on unfair competition) of 16 November 1984 (BGBl., 1984/448, ‘UWG’), lays down a general prohibition on the provision, in the course of trade, of information likely to mislead the public.
- 9 Paragraph 30(1) of the UWG prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate.

Main proceedings and question referred for a preliminary ruling

- 10 The companies Karner and Troostwijk are engaged in the sale by auction of industrial goods and the purchase of the stock of insolvent companies.
- 11 By a sales contract of 26 March 2001, Troostwijk acquired, with the authorisation of the insolvency court, the stock of an insolvent construction company. Karner had also indicated its interest in the purchase of those goods.
- 12 Troostwijk intended to sell the stock from the insolvent estate in an auction sale which was to take place on 14 May 2001. It advertised the auction in a sales catalogue, stating that it was an insolvency auction and that the goods were from the insolvent estate of the company in question. The advertising notice was also posted on the internet.
- 13 In Karner's view, Troostwijk's advertising is contrary to Article 30(1) of the UWG because it gives the public concerned the impression that it is the insolvency administrator who is selling the insolvent company's assets. Irrespective of any risk that the public will be misled, such advertising is both contrary to the competition rules laid down in the EC Treaty and misleading within the meaning of Article 2 of the UWG.

- 14 On 10 May 2001, on application by Karner, the Handelsgericht Wien (Commercial Court, Vienna) (Austria) issued an interim injunction ordering Troostwijk, first, to refrain from referring in its advertising for the sale of the goods to the fact that the goods were from an insolvent company in so far as they no longer constituted part of the insolvent estate and, second, to make a public statement to potential buyers at the auction, informing them in particular that the auction was not being held on behalf or on the instructions of the insolvency administrator.
- 15 Troostwijk appealed against that injunction to the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria), on several grounds and questioned, in particular, the compatibility of Article 30(1) of the UWG with Article 28 EC.
- 16 Following the dismissal of its appeal, on 14 November 2001 Troostwijk brought an action before the Oberster Gerichtshof (Supreme Court). It maintains that the prohibition in Article 30(1) of the UWG is contrary to Article 28 EC and incompatible with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('ECHR'), concerning freedom of expression.
- 17 Taking the view that the Court had not yet ruled on the question of the compatibility of a national provision such as Article 30(1) of the UWG with Article 28 EC, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 28 EC to be interpreted as precluding national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where, in public announcements or

notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate?’

Admissibility

Observations submitted to the Court

Karner submits that the reference for a preliminary ruling is inadmissible. In its view, the facts giving rise to the dispute in the main proceedings relate to a purely internal situation because the parties thereto are established in Austria, the goods in question were acquired following a case of insolvency which occurred in the territory of that Member State and Paragraph 30(1) of the UWG concerns forms of advertising in Austria.

Findings of the Court

It should be borne in mind that Article 28 EC cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State (see Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraph 44).

That principle has been upheld by the Court not only in cases where the national rule in question gave rise to direct discrimination against goods imported from other Member States (*Pistre and Others*, cited above, paragraph 44), but also in situations where the national rule applied without distinction to national and

imported products and was thus likely to constitute a potential impediment to intra-Community trade covered by Article 28 EC (see, to that effect, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraphs 21 and 22).

- 21 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the national court (see *Guimont*, cited above, paragraph 23). Such a reply might help it to determine whether a prohibition such as that provided for in Article 30(1) of the UWG is likely to constitute a potential impediment to intra-Community trade falling within the scope of application of Article 28 EC (see also Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 14).
- 22 It follows from the foregoing considerations that the reference for a preliminary ruling is admissible.

Substance

Observations submitted to the Court

- 23 Karner, the Austrian and Swedish Governments and the Commission submit that the prohibition in Paragraph 30(1) of the UWG is a selling arrangement within the

meaning of that term as described in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. The provision applies without distinction to domestic and imported products and is not by nature such as to impede the latter's access to the market any more than it impeded the access of domestic products. It therefore falls outside the scope of application of Article 28 EC.

- 24 If the Court should nevertheless find that Article 30(1) of the UWG does constitute a measure having equivalent effect within the meaning of Article 28 EC, Karner, supported by the Austrian and Swedish Governments, considers that it is justified by the mandatory requirement of consumer protection within the meaning of the line of case-law initiated in '*Cassis de Dijon*' (Case 120/78 *Rewe-Zentral* [1979] ECR 649). The Swedish Government also refers to the principle of fair trading.
- 25 Referring to the wording of Article 7 of Directive 84/450, the Austrian Government states that Article 30(1) of the UWG is aimed at combatting misleading advertising in the interests of consumers, competing undertakings and the general public.
- 26 Troostwijk maintains that Article 30(1) of the UWG is incompatible with both Article 28 EC and Directive 84/450. The national provision prevents consumers from having the benefit of accurate information and is capable of affecting intra-Community trade. The reference to the origin of goods relates to one of their qualities and not to the marketing of those goods. Such a reference cannot therefore be regarded as a selling arrangement within the meaning of *Keck and Mithouard*, cited above.

- 27 According to Troostwijk, that provision restricts the possibility of disseminating advertising which is lawful in other Member States. It is clear that advertising an offer of sale such as that at issue in the main proceedings cannot be confined to the territory of a single Member State. Varying the information according to the Member States concerned is impossible on the internet, since that mode of communication is not restricted to a single region.
- 28 Regarding the compatibility of Article 30(1) of the UWG with Directive 84/450, Troostwijk submits that that directive establishes partial harmonisation and allows Member States to retain and adopt provisions aimed at ensuring more extensive consumer protection. The goal of consumer protection is not served by the provision in so far as it ‘prohibits truthful assertions in advertisements’.
- 29 Lastly, Troostwijk submits that the provision is not compatible with Article 10 of the ECHR concerning freedom of expression, since restrictions on that right may be justified only if the expression of the truth might, even in a democratic society, seriously jeopardise a high-ranking individual or collective right.

Response of the Court

- 30 The Court notes, as a preliminary point, that the file on the case forwarded to it by the national court shows that Article 30(1) of the UWG is based on the

presumption that consumers prefer to purchase goods sold by an insolvency administrator when a company is wound up because they hope to make purchases at advantageous prices. Where advertising related to the sale of goods from an insolvent estate, it would be difficult to know whether the sale has organised by the insolvency administrator or by a party who had acquired goods from the insolvent estate. The national provision is intended to prevent economic operators from taking undue advantage of that tendency on the part of consumers.

- 31 Although it is true that the national rules governing consumer protection in the event of sales of goods from an insolvent estate have not been harmonised at the Community level, the fact remains that some aspects relating to advertising for such sales may fall within the scope of Directive 84/450.
- 32 It should be borne in mind that that directive is intended to set minimum criteria and objectives on the basis of which it is possible to determine whether advertising is misleading. The Directive's provisions include Article 2(2), which define 'misleading advertising' and Article 3, which states which factors are to be taken into account to determine whether advertising is misleading.
- 33 Without its being necessary to examine in detail the degree of harmonisation achieved by Directive 84/450, it is common ground that Article 7 of that directive allows the Member States to retain or adopt provisions aimed at ensuring more extensive consumer protection than that provided for thereunder.

- 34 It should be remembered, however, that that power must be exercised in a way that 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 any measures having equivalent effect between Member States (see, to that effect, Case C-23/99 *Commission v France* [2000] ECR I-7653, paragraph 33).
- 35 It is appropriate, first of all, to determine whether a national rule such as Article 30(1) of the UWG, which prohibits any reference to the fact that the goods in question come from an insolvent estate where, in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of the insolvent estate, falls within the scope of application of Article 28 EC.
- 36 It is settled case-law that 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 thus prohibited by Article 28 EC (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 25; and *TK-Heimdienst*, cited above, paragraph 22).
- 37 The Court stated in paragraph 16 of *Keck and Mithouard*, cited above, that national provisions restricting or prohibiting certain selling arrangements which 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 are not such as to hinder directly or indirectly,

actually or potentially, trade between Member States within the meaning of the line of case-law initiated by *Dassonville*, cited above.

- 38 The Court subsequently found provisions concerning inter alia the place and times of sale of certain products and advertising of those products as well as certain marketing methods to be provisions governing selling arrangements within the meaning of *Keck and Mithouard*, cited above (see inter alia Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] I-2199, paragraphs 12 to 14; and *TK-Heimdienst*, cited above, paragraph 24).
- 39 The Court notes that Paragraph 30(1) of the UWG is intended to regulate references which may be made in advertisements with regard to the commercial origin of goods from an insolvent estate when they no longer constitute part of that estate. In those circumstances, the Court finds such a provision does not relate to the conditions which those goods must satisfy, but rather governs the marketing of those goods. Accordingly, it must be regarded as concerning selling arrangements within the meaning of *Keck and Mithouard*, cited above.
- 40 As is clear from *Keck and Mithouard*, however, such a selling arrangement cannot escape the prohibition laid down in Article 28 EC unless it satisfies the two conditions set out in paragraph 37 of this judgment.
- 41 As regards the first of those conditions, Paragraph 30(1) of the UWG applies without distinction to all the operators concerned who carry on their business on Austrian territory, regardless of whether they are Austrian nationals or foreigners.

- 42 As regards the second condition, Paragraph 30(1) of the UWG, contrary to the national provisions which gave rise to Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843 and to Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, does not lay down a total prohibition on all forms of advertising in a Member State for a product which is lawfully sold there. It merely prohibits any reference, when a large number of people are targeted, to the fact that goods originate from an insolvent estate if those goods no longer constitute part of the insolvent estate, on grounds of consumer protection. Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and, consequently, also to reduce the volume of sales of goods from other Member States, it nevertheless does not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member State in question. In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition has had such an effect.
- 43 In those circumstances, as the Advocate General stated in paragraph 66 of his Opinion, it must be held that the two conditions laid down by *Keck and Mithouard*, cited above, and referred to in paragraph 37 of this judgment, are fully satisfied in the case in the main proceedings. Accordingly, a national provision such as Paragraph 30(1) of the UWG is not caught by the prohibition in Article 28 EC.
- 44 Second, it is necessary to consider Troostwijk's arguments that Paragraph 30(1) of the UWG, first, restricts the dissemination of advertising which is lawful in other Member States and, second, is incompatible with the principle of freedom of expression as laid down in Article 10 ECHR.

15 Regarding the first argument, it is appropriate to construe it as relating to the question whether Article 49 EC governing the freedom to provide services precludes a restriction on advertising such as that laid down in Paragraph 30 of the UWG.

16 Where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31).

17 In the circumstances of the case in the main proceedings, the dissemination of advertising is not an end in itself. It is a secondary element in relation to the sale of the goods in question. Consequently the free movement of goods aspect prevails over the freedom to provide services aspect. It is thus not necessary to consider Paragraph 30(1) of the UWG in the light of Article 49 EC.

18 Regarding Troostwijk's second argument with regard to the compatibility of the legislation in question with freedom of expression, it should be recalled 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. 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 ECHR 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; and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

- 49 Further, according to the Court's case-law, where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15).
- 50 Whilst the principle of freedom of expression is expressly recognised by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42; and *Schmidberger*, cited above, paragraph 79).
- 51 It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising (see, to that effect, Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 73; judgments of the ECHR of 20 November 1989, *Markt*

intern Verlag GmbH and Klaus Beermann, Reports of Judgments and Decisions series A No 165, paragraph 33; and of 28 June 2001, *VGT Verein gegen Tierfabriken v Switzerland*, Reports of Judgments and Decisions 2001-VI, paragraphs 69 to 70).

In this case it appears, having regard to the circumstances of fact and of law characterising the situation which gave rise to the case in the main proceedings and the discretion enjoyed by the Member States, that a restriction on advertising as provided for in Article 30 of the UWG is reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.

In the light of all the foregoing considerations, the question referred to the Court must be answered as follows: Article 28 EC does not preclude national legislation, which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Costs

The costs incurred by the Austrian and Swedish Governments and by the Commission, which have submitted observation to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the questions referred to it by the Oberster Gerichtshof by order of 29 January 2002, hereby rules:

Article 28 EC does not preclude national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate, where, in public announcements or notices intended for a larger circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Timmermans

Rosas

von Bahr

Delivered in open court in Luxembourg on 25 March 2004.

R. Grass

V. Skouris

Registrar

President