JUDGMENT OF THE COURT (Fifth Chamber)

11 December 2003 *

In Case C-215/01,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Augsburg (Germany) for a preliminary ruling in the proceedings before that court against

Bruno Schnitzer,

on the interpretation of Articles 49 EC, 50 EC, 54 EC and 55 EC and 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) (OJ, English Special Edition 1963-1964, p. 148),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— the Portuguese Government, by L. Inez Fernandes and A.C. Pedroso, acting as Agents,

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

— the Commission of the European Communities, by M. Patakia and P.F. Nemitz, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2002,

having regard to the order of the Fifth Chamber of 10 January 2003 reopening the oral procedure,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Schnitzer, represented by H. Böttcher, Rechtsanwältin, and the Commission, represented by M. Patakia and P.F. Nemitz, at the hearing on 27 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By order of 26 February 2001, received at the Court on 23 May 2001 and supplemented on 11 July 2001, the Amtsgericht Augsburg (Local Court, Augsburg) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 49 EC, 50 EC, 54 EC and 55 EC and 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) (OJ, English Special Edition 1963-1964, p. 148).

2 The question was raised in proceedings brought before the Amtsgericht Augsburg court against Mr Schnitzer for infringement of German legislation on the combating of black-market work.

Legal context

Community law

3 The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

4 Article 50 EC is worded as follows:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

5 On 18 December 1961 the Council adopted, on the basis of Articles 54(1) and 63(1) of the EC Treaty (now, after amendment, Articles 44(1) EC and 52(1) EC), two general programmes for the abolition of restrictions on freedom of establishment and freedom to provide services (Journal Officiel 1962, 2, pp. 36 and 32; not available in English). In order to facilitate implementation of those programmes, the Council adopted, inter alia, Directive 64/427 on 7 July 1964.

6 That directive essentially lays down a system of mutual recognition of occupational experience acquired in the Member State of origin and is applicable both to establishment and to provision of services in another Member State.

7 Directive 64/427, which was in force at the time material to the main proceedings, was repealed by Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of

qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications (OJ 1999 L 201, p. 77).

National law

8 In Germany, skilled trades are regulated by the Handwerksordnung (Skilled Trades Order, hereinafter 'the Order'), the version of which applicable to the main proceedings is that of 24 September 1998 (BGBl. 1998 I, p. 3074). Under the first sentence of Paragraph 1(1) of the Order, only natural or legal persons or partnerships entered on the Handwerksrolle (skilled trades register) are authorised to pursue a skilled trade activity in an independent capacity. Such registration corresponds to grant of authorisation to carry on the activity.

9 The first sentence of Paragraph 7(1) of the Order provides that 'any person who has passed the master's examination in the skilled trade to be carried on by him or in a related craft or trade shall be entered on the skilled trades register...'.

10 The first sentence of Paragraph 8(1) provides that 'in exceptional cases authorisation to be entered on the skilled trades register shall be granted if the applicant is able to show the knowledge and skill required to pursue in an independent capacity the skilled trade to be carried on by him'.

11 Paragraph 9 authorises the Federal Minister for Economic Affairs to determine the conditions under which nationals of the other Member States may obtain such exceptional authorisation to be entered on the skilled trades register beyond

the cases provided for in Paragraph 8(1) of the Order. On the basis of that provision, on 4 August 1966 that minister adopted a regulation governing the conditions for entering nationals of other Member States on the skilled trades register (BGBl. 1966 I, p. 469). The regulation transposed Articles 3 and 4(2) and (3) of Directive 64/427 into German law.

The main proceedings and the question referred for a preliminary ruling

12 By decision of 28 August 2000, the City of Augsburg imposed an administrative fine on Mr Schnitzer for infringement of German legislation on the combating of black-market work.

13 According to the decision, the company of which Mr Schnitzer is the legal representative as its managing director had instructed Codeigal-Construção, Decoração e Isolamentos de Portugal L^{da} to carry out large-scale plastering work in southern Bavaria from November 1994 to November 1997. Since that undertaking established in Portugal was not entered on the German skilled trades register, it had provided services falling within the German plastering sector without having the authorisation required for that purpose. The decision concerns the period from November 1996 to October 1997, the month in which the undertaking established in Portugal applied for entry on the German skilled trades register. It was entered on the register on 27 November 1997.

14 Mr Schnitzer is challenging the decision before the Amtsgericht Augsburg. That court notes that the Court of Justice has already ruled, in Case C-58/98 *Corsten* [2000] ECR I-7919, on the question whether an obligation to be entered on a trades register owed by an undertaking established in a Member State and

intending to provide services in another Member State only occasionally, or even a single time, is compatible with Community law. It considers it possible that the Court of Justice regards such an obligation to be entered on the register as equally unjustified where the person providing services operates in the host Member State in a repeated or more or less regular manner.

15 In those circumstances, the Amtsgericht Augsburg decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is it compatible with EC law on the freedom to provide services 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?'

Consideration of the question referred for a preliminary ruling

Observations submitted to the Court

16 The Portuguese Government contends that the question referred for a preliminary ruling raises two issues: (i) whether an undertaking which is established in a Member State and fulfils the conditions necessary in order to pursue its activity in

that Member State must comply with other, purely formal, conditions when it provides services in another Member State and (ii) whether or not the answer to the first part of the question is different where the services are provided over an extended period.

17 As regards the first issue, the Portuguese Government, referring in particular to the judgment in *Corsten*, cited above, submits that freedom to provide services, as a fundamental freedom guaranteed by the Treaty, cannot be restricted by national measures unless there are overriding requirements relating to the public interest applying uniformly to all businesses, the public interest is not already guaranteed by the legislation of the Member State of establishment and the principle of proportionality is complied with. In the Portuguese Government's submission, those conditions are not met in the present case.

18 As regards the second issue, the Portuguese Government contends that the fact that services are provided over an extended period does not justify an interpretation different from that supplied in *Corsten*. It would be impossible to determine the moment at which entry on the trades register becomes obligatory.

19 The Austrian Government submits that the period over which services are provided, even if it is a prolonged period, cannot constitute sufficient grounds for departing from the solution adopted in *Corsten*. There is no typical period on the basis of which an activity may be classified as the provision of services. Where activities are of longer duration, that may indicate at most that it is rather activities covered by freedom of establishment that are involved, a question which must be assessed on a case-by-case basis.

20 In any event, the Austrian Government contends that even if services provided over a longer period are involved, a requirement to be entered on the trades register is contrary to Community law in so far as it delays or complicates pursuit of the activities at issue in the main proceedings or entails administrative expense or an obligation to pay subscriptions to the chamber of trades.

21 The Commission notes as a preliminary point that Directive 64/427 has been replaced by Directive 1999/42 and, specifically, that Article 4 of Directive 1999/42, in conjunction with List I in Annex A thereto, corresponds to Article 3 of Directive 64/427. Although Directive 64/427 was repealed on the day upon which Directive 1999/42 entered into force, that is to say on 31 July 1999, and the period for implementing Directive 1999/42 did not expire until 31 July 2001, the Commission takes the view that there is no gap jeopardising the continuity of the obligations imposed by Directive 64/427 and reproduced in Directive 1999/42.

22 The Commission submits that the question whether an obligation to be entered on the trades register, in circumstances such as those at issue in the main proceedings, is compatible with freedom to provide services, which is of fundamental importance in the internal market, should be considered in the light of the criteria laid down by the Court in paragraph 46 of the judgment in *Corsten*.

23 However, it is difficult to apply those criteria to the main proceedings. It is possible that an activity which subsequently appears as a continuous activity of long duration was not envisaged in that way originally or, at the very least, during an initial period, and it may very well have altered later, having regard to the commercial success of the initial services provided.

24 It is also necessary to prevent any legal uncertainty as to the precise date on which the obligation to be registered has arisen from having adverse consequences for the person in question providing the services. That is all the more important where, as in the main proceedings, registration, although purely formal in nature, is none the less a requirement whose breach is punishable by administrative fines so deterrent in amount that undertakings may be prevented from exercising their fundamental freedoms.

25 The Commission therefore takes the view that the solution adopted in *Corsten* is also applicable to circumstances where the activity in question is pursued over a long period, but without the Treaty provisions on the right of establishment being applicable. In its submission, it is for the court adjudicating on the facts to determine, in respect of services provided over a long period, the moment from which the obligation to be entered on the trades register is without doubt compatible with the Treaty. That court's analysis regarding the duration of the activity in question must be conducted in the light of the initial intentions, established on the basis of objective facts, of the person providing the services.

The Court's answer

26 According to the case file, the undertaking instructed by Mr Schnitzer to do plastering work is established in Portugal and it carried out the work for remuneration in Germany. The services involved are therefore services to which the provisions of the chapter of the Treaty relating to services apply, unless the undertaking concerned should be considered to be established in Germany so that those services are, by virtue of the first paragraph of Article 50 EC, governed by Articles 43 EC to 48 EC on the right of establishment.

27 The third paragraph of Article 50 EC states that the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. In so far as pursuit of the activity in that Member State remains temporary, such a person thus continues to come under the provisions of the chapter relating to services.

28 The Court has held that the temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. The fact that the activity is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 27, and Case C-131/01 *Commission* v *Italy* [2003] ECR I-1659, paragraph 22).

29 The Court has distinguished that situation from that of a Member State national who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that Member State. The Court has drawn the conclusion that such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services (see *Gebhard*, cited above, paragraph 28).

30 Thus, 'services' within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in

one or more other Member States, for example the giving of advice or information for remuneration.

31 No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty.

32 It follows that the mere fact that a business established in one Member State supplies identical or similar services with a greater or lesser degree of frequency or regularity in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, is not sufficient for it to be regarded as established in the second Member State.

33 In the main proceedings, although this is a matter for the national court to determine, the Portuguese undertaking does not appear to have an infrastructure in Germany allowing it to be regarded as established in that Member State, or to be seeking illegitimately to evade the obligations imposed by that Member State's national legislation.

34 So far as concerns entry on the trades register, the Court has held that the requirement imposed on an undertaking established in one Member State which wishes, as a provider of a service, to carry on a skilled trade activity in another

Member State to be entered on the latter's trades register constitutes a restriction within the meaning of Article 49 EC (*Corsten*, paragraph 34).

35 While a restriction on freedom to provide services may admittedly be justified by overriding requirements relating to the public interest, such as the objective of guaranteeing the quality of skilled trade work and of protecting those who have commissioned such work, the application of national rules to providers of services established in other Member States must be appropriate for securing attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (*Corsten*, paragraph 39).

36 In consequence, the authorisation procedure set up by the host Member State must neither delay nor complicate exercise of the right of persons established in another Member State to provide their services on the territory of the first State if examination of the conditions governing access to the activities concerned has been carried out and it has been established that those conditions are satisfied (*Corsten*, paragraph 47).

37 Once those conditions are satisfied, any entry required on the trades register of the host Member State cannot be other than automatic, and that requirement cannot constitute a condition precedent for the provision of services, result in administrative expense for the person providing them or give rise to an obligation to pay subscriptions to the chamber of trades.

38 That applies not only to providers of services who intend to supply services in the host Member State only occasionally, or even a single time, but also to those who supply or wish to supply services in a repeated or more or less regular manner.

39 At the moment when a provider of services envisages supplying services in the host Member State and examination of the conditions governing access to the activities concerned is carried out, it is often difficult to say whether those services are going to be supplied just once or very occasionally or whether, on the other hand, they will be supplied in a repeated or more or less regular manner.

40 The answer to the question referred for a preliminary ruling must therefore be that Community law on freedom to provide services precludes a business from being subject to an obligation to be entered on the trades register which delays, complicates or renders more onerous the provision of its services in the host Member State if the conditions prescribed by the directive governing recognition of professional qualifications which is applicable to pursuit of that activity in the host Member State are satisfied.

The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, cannot be sufficient for it to be regarded as established in the second Member State.

Costs

41 The costs incurred by the Portuguese and Austrian Governments and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Amtsgericht Augsburg by order of 26 February 2001, hereby rules:

Community law on freedom to provide services precludes a business from being subject to an obligation to be entered on the trades register which delays, complicates or renders more onerous the provision of its services in the host Member State if the conditions prescribed by the directive governing recognition of professional qualifications which is applicable to pursuit of that activity in the host Member State are satisfied.

The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, cannot be sufficient for it to be regarded as established in the second Member State.

Edward La Pergola von Bahr

Delivered in open court in Luxembourg on 11 December 2003.

R. Grass

Registrar

V. Skouris

President