

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 16 December 2004¹

1. Does Community law preclude national legislation which makes the exercise of an itinerant activity involving the offer and conclusion of contracts for subscriptions to periodicals subject to the acquisition of prior administrative authorisation, and which at the same time prohibits, on pain of criminal penalties, the exercise of such an activity by a person not holding such an authorisation?

2. That, in essence, is the question which has been referred by the *Rechtbank van eerste aanleg te Brugge* (Bruges Court of First Instance) (Belgium) following the commencement of criminal proceedings against three Netherlands nationals under the contested national legislation.

I — The national legislation

3. Article 3(1) of the Law of 25 June 1993 on the carrying on of itinerant activities and the

organisation of public markets ('the Law on itinerant activities')² establishes the principle that the exercise of itinerant activities on Belgian territory is subject to the acquisition of prior administrative authorisation from the Minister for small and medium-sized businesses, or from a Grade 1 official delegated by him.

4. The first paragraph of Article 2 states that 'any sale, or offer or display for sale of products to a consumer by a trader other than at the premises stated in his registration in the Commercial Register, or by a person who does not have such premises, shall be deemed to be an itinerant activity'.

5. However, under Article 5(3) of that law, certain itinerant activities are exempt from the requirement of prior administrative authorisation. That is the case, *inter alia*,

¹ — Original language: French

² — *Belgisch Staatsblad*, 30 September 1993, p. 124. This law entered into force on 13 June 1995, following the adoption of the Royal Decree of 3 April 1995 implementing the Law of 25 June 1993 on the carrying on of itinerant activities and the organisation of public markets (*Belgisch Staatsblad*, 8 June 1995, p. 126, 'the Royal Decree').

with 'the sale of newspapers and periodicals, ... the conclusion of contracts for subscriptions to newspapers as part of a regular service for an established local clientele, sales by mail order and sales from automatic vending machines'.

a person responsible for the day-to-day management of a company or as an active member of a company. The same applies to a person under the age of 16 where that person intends to exercise the itinerant activity in question as a helper or employee.

6. Where authorisation is required, it is issued, in accordance with the Royal Decree, subject to the following procedural and substantive conditions.

10. Likewise, under Article 14 of the Royal Decree, '[the] authorisation to exercise an itinerant activity may in some cases, after consultation with the Public Prosecutor's Office, be denied to persons who have been convicted by a judgment having the force of *res judicata*, with the exception of convictions leading to penalties for minor offences'.

7. A person requesting the issue of such an authorisation must, after filling in the appropriate form and paying for a revenue stamp, send his application to the municipal council. The municipal council forwards the application to the authority responsible for issuing the authorisation (the Minister for small and medium-sized businesses, or an official delegated by him).

11. Article 16(1) of that decree further provides that '[a]ny person wishing to exercise an itinerant activity in a regulated field pursuant to the Law of 15 December 1970 on the exercise of occupational activities in small and medium-sized undertakings in the business and craft sectors may, if subject to that legislation, obtain authorisation only if he satisfies the provisions regulating that type of activity'.

8. The requested authorisation may be refused on account of the age or criminal record of the applicant.

9. Thus, authorisation cannot be granted to a person under the age of 18 where that person intends to exercise the itinerant activity in question on his own behalf or as

12. The applicant is informed of the decision refusing or granting the requested authorisation by the municipality to which the application was submitted. If granted, the authorisation is not actually issued to the person concerned until he has paid for a further revenue stamp.

13. An authorisation to exercise an itinerant activity is valid only in respect of the products or services specified in it and in respect of the type of selling (door-to-door or on the public highway) to which it refers. An authorisation is valid for a maximum of six years.

14. The holder of an authorisation must have it in his possession when exercising an itinerant activity. He must produce it when so requested by the police, the gendarmerie, or officials responsible for monitoring and regulating such an activity.

15. Under Article 13(1)(1) and (2) of the Law on itinerant activities, the exercise of an itinerant activity without possession of such an authorisation or in breach of the conditions or prohibitions to which it refers is punishable by imprisonment and a fine, or by only one of those two penalties.

II — Facts and main proceedings

16. On 6 September 2001, Mr Burmanjer, Mr Van der Linden and Mr De Jong (who are Netherlands nationals resident in the Netherlands) offered contracts for subscriptions

to various Dutch- and German-language periodicals published by Netherlands and German companies³ on the public highway in Ostend (Belgium), and managed to secure the conclusion of several such contracts by passers-by.

17. The written answers given by the parties to the main proceedings to the questions put by the Court, and the documents forwarded on that occasion, show that the three persons in question carried on such itinerant activities as self-employed representatives, albeit acting 'on behalf of'⁴ the German company Alpina GmbH⁵ under a relationship established during the year 2000.

18. More specifically, their role was to offer passers-by the opportunity to enter into contracts for subscriptions to periodicals in a given subject category and to fill in the corresponding order forms with those wishing to enter into such contracts. Those contracts bound the subscribers to Alpina.

3 — The origin of the periodicals concerned was indicated by the parties to the main proceedings in the written answers to the questions put to them by the Court. Those answers also show that the periodicals offered were classified by subject category (women's fashion, family hobbies, family reading, gardening and nature, and motoring).

4 — I have adopted the expression used by the national court in paragraph 4 of its order for reference.

5 — Hereinafter 'Alpina'.

19. It is clear from the standard form which was sent to the Court in response to its written questions that the order forms, to be completed in duplicate, contained a number of sections relating to the identity of the salesman through whom the subscription transaction had been carried out, the identity and contact details of the customer and the method by which the latter intended to pay Alpina the fee for the subscription selected. It is also clear from the standard form that the order forms in question included a statement to the effect that the customer concerned had the right to withdraw from such a contract within seven working days from its signature.

20. Once the order form had been duly completed, the salesman was required to give one copy to the customer and send the other copy to Alpina, so that the latter could honour the order in question by posting to the customer the periodical he had chosen.

21. In return for their services, the salesmen concerned received from Alpina a commission calculated on the amount of the fees for the subscription contracts they had been involved in concluding.

22. The order for reference shows that, on 6 September 2001, Mr De Jong did not have any prior administrative authorisation to

exercise an itinerant activity. Moreover, although, on that date, the other two persons concerned did each have such an authorisation, neither of those authorisations would appear at first sight to relate to the contested activity, since Mr Burmanjer's concerned only the selling of stationery and office items, and Mr Van der Linden's concerned exclusively selling at the consumer's home.

23. Consequently, by judgment of 8 May 2002, the *Rechtbank van eerste aanleg te Brugge* found each of them guilty of exercising an itinerant activity without having obtained the necessary or appropriate prior administrative authorisation. Mr Burmanjer and Mr Van der Linden were sentenced to a fine of EUR 247.89 or a term of imprisonment of 15 days in default of payment. Mr De Jong was sentenced to a fine of EUR 991.57 or a term of imprisonment of two months in default of payment.

24. The three persons concerned lodged an opposition to that judgment, which had been delivered in absentia. Having received that opposition, the same court that delivered the contested judgment asked the Public Prosecutor's Office to undertake additional inquiries to determine the exact scope of the authorisation issued to Mr Burmanjer in relation to the reference to the products concerned (stationery and office items). That court also decided to submit to the *Arbitragehof* (Court of Arbitration) (Belgium)

questions concerning the conformity of the contested requirement of prior administrative authorisation with the Belgian Constitution, to be examined, if appropriate, in conjunction with certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular as regards freedom of expression.

(freedom to provide services) where they have the effect that a German company which sells or wishes to sell subscriptions to periodicals in Belgium through vendors established in the Netherlands is required a priori to obtain prior temporary authorisation and breach of those provisions is even a criminal offence, whereas the interests sought to be protected by the legislature could be safeguarded by other less restrictive means?

III — The questions referred

25. At the same time, the *Rechtbank van eerste aanleg te Brugge* decided to refer the following questions to the Court for a preliminary ruling:

(2) Does it make any difference to the answer to the first question that that law of 25 June 1993 does not make the sale of newspapers, periodicals and also subscriptions to newspapers subject to such prior authorisation?

'(1) Do Articles 2, 3, 5(3) and 13 of the Belgian law of 25 June 1993 on the carrying on of itinerant activities and the organisation of public markets, taken individually or in conjunction and interpreted as making the itinerant selling of subscriptions to periodicals on Belgian territory, whether by Belgian nationals or by other EU nationals, subject to prior authorisation by the Minister or a Grade 1 official delegated by him and even making breach of those provisions a criminal offence, infringe Articles 30 to 37 (free movement of goods) of the EC Treaty, as applicable on 6 September 2001, Article 48 et seq. of that Treaty (freedom of movement for persons), or Article 59 et seq. thereof

26. By those questions, which should be examined together, the national court essentially seeks to ascertain whether Community law is to be interpreted as precluding national legislation which makes the exercise of an itinerant activity involving the offer or conclusion of contracts for subscriptions to periodicals subject to the acquisition of prior administrative authorisation, and which at the same time prohibits, on pain of criminal penalties, the exercise of such an activity by a person not having the required authorisation.

IV — Analysis

27. In order to answer that question, it is important first of all to identify the rules of Community law capable of being applied to the situation in the main proceedings. Not until those rules have been identified will it be possible to examine whether they are to be interpreted as precluding the application in the main proceedings of the national legislation at issue.

A — Identification of the rules of Community law capable of being applied to the situation in the main proceedings

28. Before an examination of whether certain rules of the EC Treaty are capable of being applied to the situation in the main proceedings, it is important to ascertain whether an answer to the question referred can be found in an act of secondary Community legislation.

29. In this regard, it should be pointed out that, contrary to the view taken by the Commission, Council Directive 85/577/EEC of 20 December 1985 to protect the con-

sumer in respect of contracts negotiated away from business premises⁶ is applicable to the contested itinerant activity.⁷

30. However, that directive is essentially limited to guaranteeing consumers a right to withdraw from their contractual undertakings. Accordingly, it does not contain any provision intended to cover the exercise of the itinerant activity giving rise to the making of such undertakings, as the national legislation at issue does. That directive is therefore not relevant in an assessment of that legislation in the light of Community law.

31. This finding holds true even though Article 8 of Directive 85/577 provides that the latter does not prevent Member States from adopting or maintaining more favour-

6 — OJ 1985 L 372, p. 31.

7 — In contrast to the view taken by the Commission, Directive 85/577 is not limited to contracts concluded by means of doorstep selling. As the third recital in the preamble to that directive states, the element of surprise (which is the reason for the adoption of specific measures to protect consumers) exists not only in the case of contracts concluded by means of doorstep selling, but also in the case of other forms of contract concluded on the trader's initiative away from his business premises. That clarification of the scope of the directive must be set alongside the various situations set out in Article 1. I take the view that the itinerant activity at issue here falls within the ambit of the first of those situations, since it gives rise to 'contracts under which a trader supplies goods or services to a consumer and which are concluded ... during an excursion organised by the trader away from his business premises', it being noted that Article 2 of that directive defines a trader as 'a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader', which is what the three defendants in the main proceedings were doing on the date of the offences with which they are charged.

able provisions to protect consumers. After all, Article 8 cannot be interpreted as authorising Member States to adopt any legislation whatsoever in the area of consumer protection. They are still required to comply with the fundamental freedoms guaranteed by the Treaty.⁸

32. Thus, although the national legislation at issue, in accordance with Article 8 of Directive 85/577, lays down provisions to protect consumers which are more favourable than those laid down by that directive, it is still necessary to examine the compatibility of that national legislation with the fundamental freedoms guaranteed by the Treaty.

33. For the sake of thoroughness, I would add that the same would be true even if the Belgian authorities were required to make a comparison between the diplomas or qualifications required under national law in order to exercise the contested itinerant activity and the professional skills acquired in another Member State.

34. Although it is common ground that the conditions of access to the contested itinerant activity have not been harmonised at Community level, it has been submitted that, under Belgian law, access to that activity is subject to the fulfilment of certain professional requirements,⁹ and that the competent national authorities are therefore required to make a comparison between the diplomas or qualifications so required under national law and the professional skills acquired in another Member State.¹⁰

35. It is not for the Court but the national court alone to verify the accuracy of the national law cited by the Belgian Government. Nevertheless, I would point out in this regard that, even if the law cited is accurate and professional skills are indeed compared against national requirements as part of the

8 — See, to this effect, inter alia, Case C-510/99 *Tridon* [2001] ECR I-7777, paragraph 53, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraphs 63 to 65, and Case C-71/02 *Karner* [2004] ECR I-3025, paragraphs 31 to 34.

9 — This was what the Belgian Government submitted in response to the written questions put by the Court. It contends that, in order to exercise the contested itinerant activity in Belgium, a person must have acquired a basic knowledge of business management recognised, inter alia, by a qualification the equivalence of which is attested by the competent authority. The Commission, which was the only party to attend the hearing, has contested that presentation of Belgian law.

10 — The Belgian Government submits that the competent national authorities (of the host Member State) are required to carry out such a comparison, whether pursuant to the rule in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16, or pursuant to a directive concerning the recognition of qualifications. I would point out that 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) is applicable to the itinerant exercise of certain activities, such as the buying and selling of goods by itinerant tradesmen, hawkers or pedlars. Since that kind of itinerant activity does not correspond exactly to the activity at issue in the main proceedings, Directive 1999/42 would not in any event appear to be applicable in this case.

contested prior administrative authorisation procedure, the national authorities in question are still required to comply with the fundamental freedoms guaranteed by the Treaty.

followed in order to fulfil such an obligation. Thus, in that event, it would still be necessary to examine the national legislation at issue in the light of the fundamental freedoms guaranteed by the Treaty.

36. In its judgment in *Canal Satélite Digital*, the Court accepted that, where a directive imposes on Member States a specific obligation without specifying the detailed administrative rules to be used to implement that obligation, Member States are free to establish an administrative procedure for that purpose.¹¹ However, the Court held that ‘... where they establish such an administrative procedure, Member States must at all times comply with the fundamental freedoms guaranteed by the Treaty’.¹²

38. It falls now, therefore, to identify the rules of the Treaty in the light of which the national legislation at issue should be examined in the situation in the main proceedings.

39. In this regard, although the rules of the Treaty concerning the free movement of persons were expressly referred to by the national court in the wording of its first question, they must be disregarded from the outset, in view of the characteristics of the situation in the main proceedings.

37. That rule would apply if the Belgian authorities were required to make a comparison of professional skills against national requirements, whether pursuant to the rule in *Vlassopoulou*, cited above, or pursuant to a directive concerning the recognition of qualifications, since neither that case-law nor such directives state specifically or exhaustively which administrative rules are to be

40. It is clear from the answers to the questions put by the Court to the parties to the main proceedings, and from the documents sent to it on that occasion, that, at the time of the offences with which they are charged, Mr Burmanjer, Mr Van der Linden and Mr De Jong had the status of self-employed representatives, and did not therefore exercise the contested itinerant activity in the context of a relationship of subordination to Alpina.

¹¹ — Case C-390/99 [2002] ECR I-607, paragraph 27.

¹² — Paragraph 28. See also to this effect Case C-246/00 *Commission v Netherlands* [2003] ECR I-7485, paragraph 66, with reference in particular to points 48 and 49 of my Opinion in that case, *Karner*, cited above, paragraphs 33 and 34, and Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 30.

41. It follows from the judgment in *Asscher* that, where a person does not exercise his activity in the context of a relationship of subordination, he cannot be regarded as a 'worker' within the meaning of Article 39 EC.¹³

42. There is therefore no need to examine the national legislation at issue in the light of the rules of the Treaty relating to the free movement of persons in order to resolve the dispute in the main proceedings.

43. It should, however, be determined whether, in circumstances such as those of this case, that national legislation must be examined in the light of the rules of the Treaty relating to the free movement of goods or of those relating to the freedom to provide services.

44. In this connection, it must be stated that, by imposing on those who wish to exercise an itinerant activity involving the offer and conclusion of contracts for subscriptions to periodicals the obligation to obtain a prior administrative authorisation, on pain of

criminal penalties, the national legislation at issue relates, in the circumstances of this case, to both the free movement of goods and the freedom to provide services.

45. The subscription contracts for which the salesmen charged in this case were seeking to secure signatures related to periodicals, in other words, goods. It is clear from the answers given by the parties to the main proceedings to the questions put by the Court that the periodicals concerned originated mainly, if not exclusively, from the Netherlands and Germany, in other words, from Member States other than that on whose territory the contested activity was exercised. It may therefore be assumed that those periodicals had to be imported into Belgium in order to be delivered to the subscribers.

46. It follows that, in circumstances such as those of the main proceedings, the national legislation at issue relates to the free movement of goods.

47. That legislation also relates to the freedom to provide services. After all, an itinerant activity involving the offer and conclusion of contracts for subscriptions to periodicals is an activity involving the provi-

¹³ — Case C-107/94 [1996] ECR I-3089, paragraph 26 (concerning the director of a company of which he is the sole shareholder). See, to the same effect, my Opinion in that case, points 28 and 29, and Case C-337/97 *Meusen* [1999] ECR I-3289, paragraphs 15 to 17.

sion of services within the meaning of Article 50 EC where, as in this case, it is cross-border in nature¹⁴ and is carried out for remuneration in the form of a commission.¹⁵

48. Thus, in the context of the situation in the main proceedings, the national legislation at issue relates to both the free movement of goods and the freedom to provide services.

49. It is clear from recent, and now settled, case-law that, where a national measure restricts both the freedom to provide services and the free movement of goods, the Court will in principle examine it in relation to only one of those fundamental freedoms where it is shown 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.¹⁶

14 — I would point out that, at the time of the offences with which they are charged, the defendants were resident in a Member State (the Netherlands) other than that on whose territory the contested itinerant activity was exercised (Belgium).

15 — The commission paid to the salesmen in consideration for their services constitutes remuneration within the meaning of Article 50 EC, even though it is not paid by the recipients of the services but by Alpina. According to settled case-law, Article 50 EC does not require the service to be paid for by those for whom it is performed (see, *inter alia*, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16, and Case C-422/01 *Försäkringsaktiebolaget Skandia and Ramstedt* [2003] ECR I-6817, paragraph 24).

16 — See to this effect Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22, *Canal Satellite Digital*, cited above, paragraph 31, *Karner*, cited above, paragraph 46, and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26.

50. The Commission takes the view that the national legislation at issue should be assessed only in the light of the rules of the Treaty relating to the free movement of goods, to the exclusion of those relating to the freedom to provide services, since the aspect concerning the free movement of goods is predominant.

51. I am not entirely persuaded by such an analysis.

52. I would point out first of all that the contested itinerant activity involved the offer and conclusion of contracts for subscriptions to periodicals, not the sale of periodicals.¹⁷ In fact, the actions of the salesmen (who are the only defendants in the main proceedings) came at a stage significantly removed from the process of selling and distributing the periodicals.

53. That process primarily involved Alpina, since it bought the periodicals concerned from Netherlands or German publishers and then distributed them to individuals in

17 — The expression used by the national court, and adopted by the Commission, to refer to the contested activity (the 'sale of subscriptions to periodicals') suggests that that activity concerns the sale of goods. However, that is not the case. Moreover, the prior administrative authorisation required by the contested national legislation for the conclusion of subscriptions to periodicals does not apply to the sale of periodicals or newspapers (see point 5 of this Opinion). That is why I prefer to speak of an activity involving the offer or conclusion of contracts for subscriptions to periodicals.

accordance with the relevant subscription contracts. Those contracts were binding only on Alpina and the subscribers. The salesmen, who worked on a self-employed basis, were on no occasion parties to such contracts. As has already been noted,¹⁸ their role was confined to offering passers-by the opportunity to sign the contracts, filling in the corresponding order forms with them, and sending a copy of those forms to Alpina so that it could honour the orders by posting to subscribers the periodicals they had chosen.

teaching material),¹⁹ *BE&Q*,²⁰ *Marchandise and Others* (legislation prohibiting or restricting retail trading on Sundays),²¹ *Boscher* (legislation governing the sale by public auction of luxury and second-hand motor cars),²² *Familiapress* (legislation prohibiting the sale of periodicals containing prize competitions),²³ *TK-Heimdienst* (legislation governing the itinerant sale of food products),²⁴ and *Karner*, cited above (legislation prohibiting any information which states that goods on sale originate from an insolvent estate).

54. Accordingly, that aspect of the national legislation at issue which relates to the free movement of goods is not of direct or actual concern to the defendants in the main proceedings. In those circumstances, it would be surprising for anyone to take the view that the aspect relating to the free movement of goods predominates over the aspect concerning the freedom to provide services, when it is precisely the latter aspect and that alone which is of direct or actual concern to the defendants.

55. In this respect, the national legislation at issue, as it is presented in the main proceedings, can be distinguished from that examined by the Court in *Buet and EBS* (legislation prohibiting the door-to-door selling of

56. In all those cases, the persons involved in the main proceedings had participated directly, or at least very closely, in the process of selling or distributing goods. In such circumstances, the situation of the persons concerned left no doubt that the national legislation at issue had to be examined solely in the light of the rules of the Treaty relating to the free movement of goods.

19 — Case 382/87 [1989] ECR 1235, paragraphs 7 to 9.

20 — Case C-145/88 [1989] ECR 3851.

21 — Case C-332/89 [1991] ECR I-1027, paragraphs 9 and 15.

22 — Case C-239/90 [1991] ECR I-2023, paragraphs 7 to 10.

23 — Case C-368/95 [1997] ECR I-3689.

24 — Case C-254/98 [2000] ECR I-151, paragraph 24.

18 — See points 18 to 20 of this Opinion.

57. The situation in the main proceedings of this case is different. The question therefore arises whether the national legislation at issue should not rather be examined solely in the light of the rules of the Treaty relating to the freedom to provide services, to the exclusion of those relating to the free movement of goods.²⁵

58. Moreover, if the national legislation at issue were regarded as operating a restriction on the importation of goods, such an effect would be purely secondary, since it would be nothing more than an automatic or unavoidable consequence of the restriction imposed on those who wished, as providers of services, to exercise an itinerant activity of the kind at issue in the main proceedings. Chronologically, any effect on the free movement of goods would thus be exclusively secondary, indirect or incidental in relation to the effect on the freedom to provide services.²⁶

25 — For a comparable line of reasoning, see the Opinion of Advocate General Alber in *Karner*, cited above, points 90 to 99.

26 — For a comparable line of reasoning, see *Omega*, cited above, paragraph 27. It is true that, although the same reasoning could be put forward in respect of national legislation prohibiting door-to-door selling, the Court held in *Buet and EBS*, cited above, that such legislation falls within the scope of the rules of the Treaty relating to the free movement of goods. However, I do not consider that judgment to be decisive. The question whether the national legislation at issue should be assessed in the light of the rules of the Treaty relating to the free movement of goods or in the light of those relating to the freedom to provide services did not arise in that case. Moreover, the judgment in *Buet and EBS* was delivered several years before the judgment in *Schindler*, cited above, which opened the way to an approach more favourable to taking into account the aspect of a piece of national legislation that may relate to the freedom to provide services.

59. The question thus arises once again whether the national legislation at issue ought not to be examined solely in the light of the rules of the Treaty relating to the freedom to provide services, to the exclusion of those relating to the free movement of goods.

60. Having said that, while the question of which rules of the Treaty are capable of being applied to the situation in this case is not without interest, its importance is relative. Irrespective of the fundamental freedom in relation to which the national legislation at issue should be assessed, the outcome of that assessment, as will be seen in points 83 to 90 of this Opinion, is in any event very likely to be the same, that is to say that Community law precludes the application of that legislation in the main proceedings.

B — The existence of a restriction on the freedom to provide services or on the free movement of goods and the justification, if any, for such a restriction

61. In respect of the freedom to provide services, I would point out that, according to

settled case-law,²⁷ 'Article 59 of the Treaty [now, after amendment, Article 49 EC] requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies to national providers of services and to those of other Member States alike, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services'.²⁸

62. Clearly, the requirement of prior administrative authorisation such as that laid down by the national legislation at issue has the effect of impeding or rendering less advantageous the exercise of the contested itinerant activity, which, as I have already stated in this Opinion, constitutes an activity involving the provision of services.²⁹

63. After all, quite apart from the uncertainty and waiting which applicants may have to put up with before their applications for authorisation are approved, they are compelled by that requirement to carry out various administrative formalities including, *inter alia*, the payment of revenue stamps. The requirement is particularly restrictive given that failure to comply with it is a criminal offence and may even, in the event of conviction, preclude the issue of any further authorisations in future.³⁰

64. Consequently, national legislation such as that at issue in the main proceedings should be regarded as constituting a restriction falling within the scope of the prohibition laid down in Article 49 EC.

65. However, according to settled case-law, national legislation falling within an area which has not been harmonised at Community level and applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned may, notwithstanding its restrictive effect on the freedom to provide services, be justified, provided that it meets an overriding requirement relating to the public interest that is not safeguarded by the rules to which the

27 — To date, the Court has never clearly or explicitly ruled on the question whether the rule in *Keck and Mithouard* (first established in the judgment in Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097), which is applicable to the free movement of goods, can be transposed to the freedom to provide services. See the judgments in Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 33 to 39, and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraphs 36 to 39, in which the question was expressly raised. In that regard, see also, *inter alia*, Da Cruz Vilaça, J.L., 'On the Application of Keck in the Field of Free Provision of Services', *Services and Free Movement in EU Law*, edited by Mads Andenas and Wulf-Henning Roth, Oxford University Press, 2002, p. 25 et seq.; Poiarses Maduro, M., 'Harmony and Dissonance in Free Movement', *ibid.*, p. 41 et seq. Since that question remains open, I shall leave it aside in order to concentrate on the current status of the case-law.

28 — See, *inter alia*, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16, with further references, and Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paragraph 20. See, to the same effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12.

29 — See point 42 of this Opinion.

30 — This possibility follows from Article 14 of the Royal Decree (see point 10 of this Opinion).

provider of the service is subject in the Member State in which he is established, is appropriate for securing the attainment of the objective which it pursues, and does not go beyond what is necessary in order to attain it.³¹

66. Therefore, it is now appropriate to examine whether the national legislation at issue is capable of satisfying each of those conditions.

67. The Belgian Government takes the view that the purpose of the requirement of prior administrative authorisation to exercise the contested itinerant activity is essentially to protect consumers.

68. It is true that, in accordance with settled case-law, protecting consumers constitutes an overriding reason in the public interest capable of justifying a restriction on the fundamental freedoms guaranteed by the Treaty.³²

31 — See, inter alia, *Commission v Luxembourg*, cited above, paragraph 21 and the case-law cited there. See also, to this effect, Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraphs 23 and 24, and the case-law cited there.

32 — See, inter alia, *Buet and EBS*, cited above, paragraph 10, *Schindler*, cited above, paragraph 58, and *Canal Satellite Digital*, cited above, paragraph 34.

69. Clearly, the requirement of prior administrative authorisation to exercise the contested itinerant activity is intended to protect consumers as the recipients of the services in question.

70. However, I take the view that such a requirement is disproportionate; it goes beyond what is necessary in order to attain the objective pursued.

71. As the Court held in *Buet and EBS*, cited above, paragraph 12, with respect to canvassing at private dwellings and the associated risk which the potential customer runs of making an ill-considered purchase, it is usually sufficient, in order to guard against such a risk, to ensure that purchasers have the right to cancel a contract concluded in their home. From that point of view, what holds good for the signature of a contract for the sale of goods in the context of a door-to-door selling arrangement also holds good for the conclusion of a contract for a subscription to periodicals on the public highway.

72. It is common ground that, in this case, those who concluded the subscription contracts in question had the right to cancel them, in accordance with Directive 85/577. Moreover, it is clear from the file that that right to cancel was clearly stated on the order form, a copy of which was given to the customer.

73. I therefore take the view that such a right to cancel the subscription contracts was sufficient to guard against the risk to which potential customers would be exposed of entering into ill-considered commitments of that kind. It follows, in my view, that the requirement of prior administrative authorisation to exercise the contested itinerant activity goes beyond what is necessary in order to protect consumers against such a risk.

74. That conclusion is not rebutted by the fact that, in the judgment in *Buet and EBS*, cited above, paragraph 15, the Court accepted that it is permissible for the national legislature of the Member State to consider that giving consumers a right of cancellation is not sufficient protection and that it is necessary to ban canvassing at private dwellings.

75. That assessment was based on factual considerations which are not comparable to those of the main proceedings in this case, and it cannot therefore be extended to the latter.

76. I would point out that, in that judgment, the Court held that there is greater risk of an ill-considered purchase when the canvassing at private dwellings is for enrolment for a course of instruction or the sale of educational material, since the potential purchaser often belongs to a category of people who are behind with their education and are seeking

to catch up, which makes them particularly vulnerable when faced with offers to purchase such products.³³ The Court also held that, since teaching is not a consumer product in daily use, an ill-considered purchase could cause the purchaser harm in terms of professional training and recruitment, in other words, effects other than mere financial loss and which could be longer lasting.³⁴

77. Such risks are not comparable to those which may arise from an itinerant activity involving the offer and signature of contracts for subscriptions to periodicals such as those offered by the defendants in the main proceedings. As the Commission rightly pointed out, the periodicals concerned are for everyday reading or reading for pleasure and are not therefore aimed at a category of people who are particularly vulnerable. Moreover, as the Commission also pointed out, the signature of such subscription contracts, even if ill-considered (which is not manifestly so, given that there is a right to cancel), will at most cause the customer a financial loss, and a relatively modest one at that.

78. I would add that, although it is true (as the Court held in paragraph 16 of that judgment) that the last recital in the preamble to Directive 85/577 states that

³³ — See *Buet and EBS*, cited above, paragraph 13.

³⁴ — *Ibid.*, paragraph 14.

Member States are free to maintain or introduce a total or partial prohibition on the conclusion of contracts away from business premises, the fact remains, as has already been seen,³⁵ that those Member States are still required to comply with the rules of the Treaty. It cannot therefore be concluded from this that Member States are authorised to impose such a prohibition on any form of canvassing or merchandise.

79. Consequently, I concur with the Commission's view that, in the main proceedings in this case, the right to cancel the subscription contracts which was available to potential customers was sufficient to guard against the risk to which the latter were exposed of entering into ill-considered undertakings. It follows, in my view, that the requirement of prior administrative authorisation to exercise the contested itinerant activity goes beyond what is necessary in order to guarantee the protection of consumers against such a risk.

80. Although the risk to which consumers might be exposed of being the victims of fraudulent practices or abuses of trust cannot be completely excluded, it cannot justify a measure as strict as the requirement, on pain of criminal penalties, of prior administrative authorisation for any itinerant activity involving the offer and conclusion of any contract for a subscription to periodicals.

81. In that regard, I find it difficult to understand why an itinerant activity of this kind, concerned with the conclusion of contracts for subscriptions to *periodicals*, is subject to the requirement of prior administrative authorisation even where it forms part of a regular service provided to an established local clientele, whereas the itinerant activity concerned with the conclusion of contracts for subscriptions to *newspapers* is exempt from such a requirement in such circumstances (where it is a regular service provided to an established local clientele). I take the view that this difference in the rules applicable shows that the national legislation concerning the conclusion of subscriptions to periodicals is disproportionate.

82. I conclude from this that the contested national legislation goes beyond what is necessary in order to protect consumers, and must therefore be regarded as incompatible with Article 49 EC.

83. I would point out that it is highly likely that the same conclusion would be reached if the national legislation at issue were assessed in the light of the rules of the Treaty relating to the free movement of goods, rather than those relating to the freedom to provide services.

³⁵ — See points 31 and 32 of this Opinion.

84. It should be recalled that, according to the rule in *Keck and Mithouard*, cited above,³⁶ national provisions restricting or prohibiting certain selling arrangements which, on the one hand, apply to all relevant traders operating within the national territory and, on the other hand, 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 *Dassonville*³⁷ line of case-law.

85. In the present case, assuming that the national legislation at issue is regarded as governing arrangements for the sale of goods, since that legislation does not relate to the content or composition of those goods but to the way in which they are marketed, it is reasonable to take the view that the other conditions laid down by the rule in *Keck and Mithouard* are not satisfied.

86. Although that legislation is indeed applicable to everyone wishing to exercise itinerant activity of the kind at issue in the main proceedings on Belgian territory, it is not inconceivable that it may affect the

marketing of periodicals from other Member States more than the marketing of national periodicals.

87. As the Commission pointed out, the use of salesmen is an effective means of bringing to the attention of potential customers, with a view to encouraging them to subscribe to, periodicals from other Member States with which they are naturally less familiar than with national periodicals. The use of such salesmen to act as intermediaries in the conclusion of subscription contracts is also a very useful means of marketing certain foreign periodicals which may be difficult to get hold of on the market of the Member State on the territory of which the itinerant activity is exercised. In such circumstances, the conclusion of a subscription (made easier by the intervention of salesmen) saves those interested in such periodicals having to look for them, in particular in a Member State other than that in which they are resident.

88. It is therefore reasonable to take the view that making the exercise of the contested itinerant activity subject to the acquisition of prior administrative authorisation is such as undoubtedly to impede access to the market of periodicals from other Member States more than access to the market of national periodicals.

³⁶ — See paragraph 16.

³⁷ — Case 8/74 [1974] ECR 837.

89. If the national legislation at issue were to be assessed in the light of the rules of the Treaty relating to the free movement of goods, it would be for the national court to determine whether that legislation does indeed have such an effect.

conclude that the national legislation at issue is incompatible with Article 49 EC.

90. If that were the case, the national legislation at issue would have to be regarded as constituting a restriction on the free movement of goods (not falling outside the prohibition laid down in Article 28 EC), and it would therefore be necessary to take into account the examination carried out in points 67 to 82 of this Opinion and to

91. Consequently, the answer to the questions referred in this case should be that Community law is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the exercise of an itinerant activity involving the offer or conclusion of contracts for subscriptions to periodicals subject to the acquisition of prior administrative authorisation, and which at the same time prohibits, on pain of criminal penalties, the exercise of such an activity by a person not having the required authorisation.

V — Conclusion

92. In the light of the foregoing, I propose that the Court should answer the question referred by the *Rechtbank van eerste aanleg te Brugge* as follows:

‘Community law is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the exercise of an itinerant activity involving the offer or conclusion of contracts for subscriptions to periodicals subject to the acquisition of prior administrative authorisation, and which at the same time prohibits, on pain of criminal penalties, the exercise of such an activity by a person not having the required authorisation.’