JUDGMENT OF THE COURT (Fifth Chamber)

1 February 2001 *

In Case C-108/96,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Première Instance de Bruxelles (Belgium) for a preliminary ruling in the criminal proceedings before that court against

Dennis Mac Quen,

Derek Pouton,

Carla Godts,

Youssef Antoun

and

Grandvision Belgium SA, formerly Vision Express Belgium SA, being civilly liable,

* Language of the case: French.

intervener:

Union Professionnelle Belge des Médecins Spécialistes en Ophtalmologie et Chirurgie Oculaire, civil plaintiff,

on the interpretation of Article 5 of the EC Treaty (now Article 10 EC) and of Articles 30, 52 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 43 EC and 49 EC),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting as President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Ms Godts, Mr Antoun and Mr Pouton, and Grandvision Belgium SA, by M. Fyon, F. Louis, A. Vallery and H. Gilliams, avocats,

— Union Professionnelle Belge des Médecins Spécialistes en Ophtalmologie et Chirurgie Oculaire, by J.-M. Defourny, avocat, and R. Bützler, avocat à la Cour de cassation (Belgium),

— the Commission of the European Communities, by M. Patakia, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Godts, Mr Antoun, Mr Pouton and Grandvision Belgium SA, represented by M. Fyon, F. Louis, A. Vallery and H. Gilliams; of Union Professionnelle Belge des Médecins Spécialistes en Ophtalmologie et Chirurgie Oculaire, represented by J.-M. Defourny and F. Mourlon Beernaert, avocat; and of the Commission, represented by M. Patakia, at the hearing on 10 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2000,

gives the following

Judgment

1 By judgment of 27 March 1996, received at the Court on 3 April 1996, the Tribunal de Première Instance de Bruxelles (Court of First Instance, Brussels) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 5 of the EC Treaty (now Article 10 EC) and of Articles 30, 52 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 43 EC and 49 EC).

2 Those questions have arisen in criminal proceedings brought against Ms Godts, Mr Mac Quen, Mr Antoun and Mr Pouton, and Grandvision Belgium SA ('Grandvision'), in its capacity as employer of the four accused, for having unlawfully performed one or more acts relating to the practice of medicine.

The legal framework

3 The applicable provisions of national law are to be found in the Royal Decree of 30 October 1964 (*Moniteur Belge* (Belgian Official Journal) of 24 December 1964, p. 13274), establishing the conditions governing the exercise of the profession of optician and spectacle-maker in skilled-trade undertakings, small and medium-size businesses and small-scale industries, as amended by the Royal Decrees of 16 September 1966, 14 January 1975, 3 October 1978 and 2 March 1988 (*Moniteur Belge* of 17 March 1988, p. 3812), and in Royal Decree No 78 of 10 November 1967 on the exercise of medical, nursing and paramedical professions and on the medical committees dealing with the prevention of the unlawful practice of medicine (*Moniteur Belge* of 14 November 1967, p. 11881).

4 Article 2(1) of the Royal Decree of 30 October 1964 provides:

'The profession of optician shall, for the purposes of the present Decree, consist in the habitual and independent exercise of one or more of the following activities:

(a) the offering to the public, sale, maintenance and repair of optical articles designed to correct and/or compensate vision;

(a) a the trial, adaptation, sale and maintenance of artificial eyes;

(b) the making-up of prescriptions issued by ophthalmologists for the purpose of correcting vision'.

5 Article 2(1), first subparagraph, of Royal Decree No 78 provides:

'No person may operate as a medical practitioner unless he or she holds the statutory qualification of medical doctor, surgeon or obstetrician obtained in accordance with the legislation on the conferment of academic titles and the syllabus for university examinations, unless that person has been lawfully exempted from that requirement and also satisfies the conditions laid down by Article 7(1) or (2)'.

6 The second subparagraph of Article 2(1) of Royal Decree No 78 provides:

'The unlawful practice of medicine shall consist in the habitual performance, by a person who does not satisfy all of the requisite conditions under the first subparagraph of the present paragraph, of any act involving, or stated to involve, in regard to a human being, an examination of that person's state of health, detection of disease and deficiencies, establishment of a diagnosis, introduction or administration of treatment for a pathological state, whether physical or mental, real or imaginary, or vaccination'.

7 By judgment of 28 June 1989 (*Cass.*, 28 June 1989, *Pas.* 1989 I-1182), the Belgian Cour de Cassation (Court of Cassation) ruled that account had to be taken of the provisions of Royal Decree No 78 in construing Article 2(1) of the Royal Decree of 30 October 1964.

8 The Cour de Cassation ruled in that judgment that, 'while opticians who are not medical doctors are authorised to perform acts designed to correct defects of a purely optical nature, whether or not they use equipment or instruments for that purpose, they are none the less prohibited from examining the state of vision of their clients otherwise than by using a method under which the patient alone determines the sight defects from which he suffers, *inter alia* on the basis of

printed scales which may be incorporated in a control instrument and which the patient himself corrects by choosing, as the optician proposes, the lenses which satisfy him. The optician is obliged to advise his client to consult an ophthalmologist if the indications thus obtained leave any doubt as to the nature of the defect which has been established'.

The facts of the main proceedings and the questions submitted for preliminary ruling

9 According to the case-file, Grandvision is a limited-liability company with its registered office in Brussels. Grandvision belongs to a group of companies marketing products and services in the field of optics. It is controlled by Vision Express UK Ltd, a company established under English law. Mr Mac Quen was the managing director of Vision Express UK before acting, from November 1990 to July 1991, as general manager of Vision Express Belgium SA. Mr Pouton succeeded him in this capacity from July 1991 to 1993.

10 Shortly after being established, Vision Express Belgium SA distributed in Belgium advertisements for a variety of eyesight examinations conducted in its shops, including, *inter alia*, 'computer tonometry' intended to test for 'internal hypertension of the eye', general 'retinoscopy' designed to examine 'the state of the retina', as well as a 'measurement of the field of vision using state-of-the-art equipment' and 'biomicroscopy' to check 'the state of your cornea, your conjunctiva, eyelids and tear ducts ...'. It appears that these advertisements were a verbatim translation of Vision Express UK Ltd's advertisements in the United Kingdom.

11 On the basis of those advertisements, the Union Professionnelle Belge des Médecins Spécialistes en Ophtalmologie et Chirurgie Oculaire (Belgian Association of Ophthalmologists and Eye Surgeons) ('UPBMO') lodged a complaint in September 1991 against Grandvision alleging unlawful practice of medicine and use of misleading advertising, and appeared as the civil plaintiff in the criminal proceedings subsequently instituted.

12 At the conclusion of the criminal investigation, proceedings against Mr Mac - Quen and Mr Pouton, together with Mr Antoun, an optician, Ms Godts, a secretary, and Grandvision — which, as the employer of the four accused, was civilly liable — were instituted before the Tribunal de Première Instance de Bruxelles, sitting in criminal matters.

13 Since it was unsure whether the Belgian legislation referred to in paragraphs 3 to 6 of the present judgment, as construed by the Cour de Cassation, was consistent with Community law, the Tribunal de Première Instance de Bruxelles decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a prohibition, arising from the interpretation or the application of a provision of national law, restraining opticians in other Member States from offering within a Member State, for the correction of purely optical defects, services consisting of an objective eyesight examination, that is to say otherwise than by using a method by which the client himself determines the eyesight defects and sees to the correction to be made, compatible with Articles 5, 52 and 59 of the EC Treaty?

2. Are obstacles within a Member State to the marketing of equipment which enables an objective eyesight examination to be carried out with a view to correcting purely optical defects, such as, for example, an autorefractor, arising from the ban imposed by national law on opticians established in other Member States preventing them from offering, within that Member State, services consisting of an objective eyesight examination, that is to say a non-subjective examination, for the correction of purely optical defects, compatible with Article 30 of the EC Treaty?'

14 UPBMO appealed against that decision. The President of the Court of Justice therefore decided, by order of 28 June 1996, to stay proceedings. After the

Belgian Cour de Cassation, on appeal from a judgment of the Cour d'Appel de Bruxelles (Brussels Court of Appeal), confirmed, by judgment of 12 May 1999, that the appeal brought before it by UPBMO had been withdrawn, the proceedings before the Court of Justice resumed on 11 June 1999.

Preliminary observations

15 UPBMO submits that the dispute in the main proceedings concerns a purely internal situation which has no connection with Community law. It argues that the situation of Grandvision, being a company established under Belgian law and operating in Belgium, does not come within the scope of Community law.

16 In this regard, it is clear from the observations submitted to the Court and from the details provided at the hearing that Grandvision is a limited-liability company which was established under Belgian law in 1990 under the name Vision Express Belgium SA by the Netherlands company VE Holdings BV. As a subsidiary of Vision Express UK Ltd, a company governed by English law, it belongs to a group of companies established in various Member States which markets products and services in the optics sector. The legal position of such a company comes within the scope of Community law pursuant to the provisions of Article 52 of the Treaty.

17 Grandvision contends that the Belgian authorities disagree as to the interpretation of the national legislation cited in paragraph 3 of the present judgment. More particularly, it argues that the interpretation adopted by the Cour de Cassation, which would prohibit opticians who are not qualified medical doctors from conducting objective eyesight examinations and reserve this type of examination

to ophthalmologists, is not shared by other Belgian courts, so that it is not established that opticians are necessarily prohibited from conducting such examinations in Belgium.

18 As to that, where there are actual or apparent differences in analysis between the administrative or judicial authorities of a Member State regarding the proper construction of national legislation, particularly in respect of its exact scope, it is not for the Court to rule on which interpretation is in accordance, or most in accordance, with Community law. On the other hand, the Court is required to interpret Community law with regard to a factual and legal situation such as that described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it.

The questions submitted for preliminary ruling

19 By its questions, the national court is in substance asking whether Articles 5, 30, 52 and 59 of the Treaty preclude the competent authorities of a Member State from interpreting the national law governing the practice of medicine in such a way that, within the context of the correction of purely optical defects, the objective examination of a client's eyesight, that is to say, an examination which does not use a method under which the client alone determines the optical defects from which he is suffering, is reserved to ophthalmologists, to the exclusion, in particular, of opticians who are not qualified medical doctors.

20 Since the main proceedings do not involve a supply of services provided by Grandvision or its employees to recipients established in other Member States and do not relate to the obligations of Member States within the meaning of

Article 5 of the Treaty, it is unnecessary to consider whether the prohibition in issue in the main proceedings ('the prohibition under challenge') is or is not in accordance with Articles 5 and 59 of the Treaty.

21 So far as Article 30 of the Treaty is concerned, even assuming the prohibition under challenge to be restrictive of the free movement of goods, those restrictive effects would be the unavoidable consequence of that prohibition. To the extent that the prohibition might be justified, its effects would have to be accepted for the purposes of Article 30 of the Treaty.

22 With regard to Article 52 of the Treaty, it is to be observed at the outset that the question whether an objective examination of eyesight is an activity reserved to ophthalmologists is not regulated by Council Directives 75/362/EEC and 75/363/EEC of 16 June 1975 concerning, respectively, the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, and the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors (OJ 1975 L 167, p. 1 and p. 14), nor is it regulated by Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1), which repealed the two directives first mentioned. Furthermore, it is common ground that the activity of optician is not the subject of any specific Community legislation.

23 UPBMO submits that, in those circumstances, Member States are entitled to reserve certain eyesight examinations to those persons who are best qualified, that is to say, ophthalmologists. In paragraph 12 of its judgment in Case C-61/89 *Bouchoucha* [1990] ECR I-3551, the Court recognised that, in the absence of Community legislation governing the paramedical activity at issue in that case,

each Member State is free to regulate the exercise of that activity within its territory, on condition only that it does not discriminate between its own nationals and those of the other Member States. The same considerations must, UPBMO submits, obtain in the main proceedings here.

24 While it is true that, in the absence of harmonisation of the activities at issue in the main proceedings, Member States remain, in principle, competent to define the exercise of those activities, they must none the less, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty (see Joined Cases C-193/97 and C-194/97 *De Castro Freitas and Escallier* [1998] ECR I-6747, paragraph 23, and judgment of 3 October 2000 in Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31).

25 The second paragraph of Article 52 of the Treaty provides that freedom of establishment is to be exercised under the conditions which the legislation of the country of establishment lays down for its own nationals. It follows that, where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with those conditions (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 36).

26 According to the Court's case-law, however, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see, in particular, judgments in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, in *Gebhard*, cited above, paragraph 37, and,

most recently, of 4 July 2000 in Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 57).

27 In that regard, first of all, the prohibition under challenge applies irrespective of the nationality and Member State of establishment of those to whom it is addressed.

28 Next, with regard to the question whether there are overriding reasons based on the general interest which may justify the restriction on freedom of establishment resulting from the prohibition under challenge, it must be remembered that the protection of public health is one of the reasons which may, under Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC), justify restrictions resulting from special treatment for foreign nationals. Protection of public health is therefore, in principle, also capable of justifying national measures which apply indiscriminately, such as those in this case.

29 The importance of protecting public health is also emphasised by the fact that Article 3(o) of the EC Treaty (now, after amendment, Article 3(1)(p) EC) provides that the activities of the Community are to include, as provided in the Treaty and in accordance with the timetable set out therein, a contribution to the attainment of a high level of health protection.

30 The choice of a Member State to reserve to a category of professionals holding specific qualifications, such as ophthalmologists, the right to carry out objective eyesight examinations on their patients using sophisticated instruments that make it possible to assess internal eye pressure, determine the field of vision or analyse the condition of the retina, may be regarded as an appropriate means by which to ensure attainment of a high level of health protection.

31 That being so, it is necessary to consider whether the prohibition under challenge is necessary and proportionate to secure the objective of attaining a high level of health protection.

32 While it acknowledges the importance of public health, Grandvision denies that the mere fact that ophthalmologists have higher professional qualifications than opticians is such as to justify objective examinations of purely optical defects being reserved to them. It has not, Grandvision submits, been established that the use of those instruments by opticians involves a risk to public health, particularly bearing in mind the fact that the activities at issue in the main proceedings are lawful in other Member States even when carried out by opticians who are not qualified medical doctors.

33 It should be borne in mind in this regard that the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51, and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 42).

34 The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted (Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34).

35 It must, however, be pointed out that the prohibition under challenge, which is relied on in the main proceedings as the basis for criminal charges, is not expressly provided for by any legislative provision of national law but follows rather from the interpretation which the Belgian Cour de Cassation gave in 1989 to a number of relevant national provisions with a view to attaining a high level of protection of public health. It appears that that interpretation is based on an

assessment of the risks to public health which might result if opticians were authorised to carry out certain eyesight examinations.

36 An assessment of this kind is liable to change with the passage of time, particularly as a result of technical and scientific progress. It is significant in this regard that the Bundesverfassungsgericht (Federal Constitutional Court) (Germany) concluded, in its decision of 7 August 2000 (1 BvR 254/99), that the risks which might follow from authorising opticians to carry out certain examinations of their clients' eyesight, such as tonometry and computerised perimetry, are not such as to preclude them from conducting those examinations.

37 It is for the national court to assess, in the light of the Treaty requirements relating to freedom of establishment and the demands of legal certainty and the protection of public health, whether the interpretation of domestic law adopted by the competent national authorities in that regard remains a valid basis for the prosecutions brought in the case in the main proceedings.

38 The answer to the questions submitted for a preliminary ruling must therefore be that, as Community law stands at present, Article 52 of the Treaty does not preclude the competent authorities of a Member State from interpreting the national law governing the practice of medicine in such a way that, within the context of the correction of purely optical defects, the objective examination of a client's eyesight, that is to say, an examination which does not use a method under which the client alone determines the optical defects from which he is suffering, is reserved, for reasons relating to the protection of public health, to a category of professionals holding specific qualifications, such as ophthalmologists, to the exclusion, in particular, of opticians who are not qualified medical doctors. It is for the national court to assess, in the light of the Treaty requirements relating to freedom of establishment and the demands of legal certainty and the protection of public health, whether the interpretation of domestic law adopted by the competent national authorities in that regard

remains a valid basis for the prosecutions brought in the case in the main proceedings.

Costs

39 The costs incurred by the Commission, which has submitted observations 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 Tribunal de Première Instance de Bruxelles by judgment of 27 March 1996, hereby rules:

As Community law stands at present, Article 52 of the EC Treaty (now, after amendment, Article 43 EC) does not preclude the competent authorities of a Member State from interpreting the national law governing the practice of

medicine in such a way that, within the context of the correction of purely optical defects, the objective examination of a client's eyesight, that is to say, an examination which does not use a method under which the client alone determines the optical defects from which he is suffering, is reserved, for reasons relating to the protection of public health, to a category of professionals holding specific qualifications, such as ophthalmologists, to the exclusion, in particular, of opticians who are not qualified medical doctors. It is for the national court to assess, in the light of the Treaty requirements relating to freedom of establishment and the demands of legal certainty and the protection of public health, whether the interpretation of domestic law adopted by the competent national authorities in that regard remains a valid basis for the prosecutions brought in the case in the main proceedings.

Wathelet Edward Jann

Delivered in open court in Luxembourg on 1 February 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber