European Court of Justice, 14 February 2008, Dynamic Medien v Avides Media

FREE MOVEMENT

Age-limit label

- **Free movement of goods does not preclude national rules, which prohibit the sale and transfer by mail order of image storage media which do not bear a label from that authority or that body indicating the age from which they may be viewed.**

Article 28 EC does not preclude national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purposes of protecting young persons and which do not bear a label from that authority or that body indicating the age from which they may be viewed, unless it appears that the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts.

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European Court of Justice, 2 November 2008
(A. Rosas, U. Lõhmus, J. Klučka, A. Ó Caoimh and P. Lindh)
JUDGMENT OF THE COURT (Third Chamber)
14 February 2008 (*)
(Free movement of goods – Article 28 EC – Measures having equivalent effect – Directive 2000/31/EC – National rules prohibiting the sale by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting children and which do not bear a label from that authority indicating the age from which they may be viewed – Image storage media imported from another Member State which have been examined and classified by the competent authority of that State and bear an age-limit label – Justification – Child protection – Principle of proportionality)
In Case C-244/06,
REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Koblenz (Germany), made by decision of 25 April 2006, received at the Court on 31 May 2006, in the proceedings
Dynamic Medien Vertriebs GmbH
v
Avides Media AG,
THE COURT (Third Chamber),
composed of A. Rosas (Rapporteur), President of the Chamber, U. Lõhmus, J. Klučka, A. Ó Caoimh and P. Lindh, Judges,
Advocate General: P. Mengozzi,
Registrar: J. Swedenborg, Administrator,
having regard to the written procedure and further to the hearing on 2 May 2007,
after considering the observations submitted on behalf of:
– Dynamic Medien Vertriebs GmbH, by W. Konrad and F. Weber, Rechtsanwälte,
– Avides Media AG, by C. Grau, Rechtsanwalt,
– the German Government, by M. Lumma, C. Blaschke and C. Schulze-Bahr, acting as Agents,
– Ireland, by D. O'Hagan, acting as Agent, and P. McGarry, BL,
– the United Kingdom Government, by V. Jackson, acting as Agent, and M. Hoskins, Barrister,
– the Commission of the European Communities, by B. Schima, acting as Agent,
after hearing the **Opinion of the Advocate General at the sitting on 13 September 2007**,
gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC and 30 EC and of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('the Directive on electronic commerce') (OJ 2000 L 178, p. 1).
2 The reference has been made in the course of proceedings between two companies incorporated under German law, Dynamic Medien Vertriebs GmbH ('Dynamic Medien') and Avides Media AG ('Avides Media'), with respect to mail order sales by Avides Media in Germany, via the internet, of image storage media from the United Kingdom which have not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purpose of protecting young persons and which do not bear any label from such an authority or body as to the age from which such image storage media may be viewed.
Legal framework
Community law
3 According to Article 1(1) thereof, Directive 2000/31 seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.
4 Article 2(h) of Directive 2000/31 defines the concept of 'coordinated field' as 'requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.'
5 Article 2(h)(ii) states that the coordinated field does not cover requirements such as those applicable to

goods as such or requirements applicable to the delivery of goods. As regards the requirements relating to goods, recital (21) in the preamble to Directive 2000/31 mentions safety standards, labelling obligations, and liability for goods.

6 Article 3(2) of Directive 2000/31 provides that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. Article 3(4), however, states that under certain conditions Member States may, in respect of a given information society service, take measures necessary for reasons such as public policy, in particular the protection of young persons and the protection of public health and consumers.

7 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) seeks, according to Article 1 thereof, to harmonise the provisions applicable in the Member States concerning distance contracts between consumers and suppliers.

National law

8 Paragraph 1(4) of the Law on the protection of young persons (Jugendschutzgesetz) of 23 July 2002 (BGBl. 2002 I, p. 2730) defines sale by mail order as 'any transaction for consideration carried out by means of the ordering and dispatch of a product by postal or electronic means without personal contact between the supplier and the purchaser or without technical or other safeguards to ensure that the product is not dispatched to children or adolescents'.

9 Paragraph 12(1) of the Law on the protection of young persons provides that pre-recorded video cassettes and other image storage media programmed with films or games to be reproduced or played on a screen (picture carriers) may be made publicly accessible to a child or adolescent only if the programmes have been authorised for that person's age range and labelled by the highest authority of the Land or by a voluntary self-regulation body under the procedure described in Paragraph 14(6) of that Law, or if they are information, educational or training programmes labelled by the supplier as 'information programmes' or 'educational programmes'.

10 Paragraph 12(3) of the Law provides that 'image storage media which have not been labelled or have been labelled "Not suitable for young persons" under Paragraph 14(2) by the highest authority of the Land or by a voluntary self-regulation body under the procedure described in Paragraph 14(6), or which have not been labelled by the supplier in accordance with Paragraph 14(7), may not:

1. be offered, transferred or otherwise made accessible to a child or adolescent;
2. be offered or transferred in retail trade outside of commercial premises, in kiosks or in other sales outlets which customers do not usually enter, or by mail order.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Avides Media sells video and audio media by mail order via its internet site and an electronic trading platform.

12 The dispute in the main proceedings concerns the importation by that company of Japanese cartoons called 'Animes' in DVD or video cassette format from the United Kingdom to Germany. The cartoons were examined before importation by the British Board of Film Classification ('the BBFC'). The latter checked the audience targeted by the image storage media by applying the provisions relating to the protection of young persons in force in the United Kingdom and classified them in the category 'suitable only for 15 years and over'. The image storage media bear a BBFC label stating that they may be viewed only by adolescents aged 15 years or older.

13 Dynamic Medien, a competitor of Avides Media, brought proceedings for interim relief before the Landgericht (Regional Court) Koblenz (Germany) with a view to prohibiting Avides Media from selling such image storage media by mail order. Dynamic Medien submits that the Law on the protection of young persons prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance with that Law, and which do not bear an age-limit label corresponding to a classification decision from a higher regional authority or a national self-regulation body ('competent authority').

14 By decision of 8 June 2004, the Landgericht Koblenz held that mail order sales of image storage media bearing only an age-limit label from the BBFC is contrary to the provisions of the Law on the protection of young persons and constitutes anti-competitive conduct. On 21 December 2004, the Oberlandesgericht (Higher Regional Court) Koblenz, ruling in an application for interim relief, confirmed that decision.

15 The Landgericht Koblenz, called to rule on the merits of the dispute and unsure whether the prohibition provided for by the Law on the protection of young persons complied with the provisions of Article 28 EC and Directive 2000/31, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'[1] Does the principle of the free movement of goods within the meaning of Article 28 EC preclude a provision of German law prohibiting the sale by mail order of image storage media (DVDs, videos) that are not labelled as having been examined in Germany as to their suitability for young persons?

[2] In particular: Does the prohibition of mail order sales of such image storage media constitute a measure having equivalent effect within the meaning of Article 28 EC?

[3] If so: Is such a prohibition justified under Article 30 EC, having regard to Directive [2000/31] even if the image storage medium has been examined as to its suitability for young persons by another Member State … and is labelled accordingly, or does such a check by another Member State … constitute a less severe means for the purposes of that provision?'

The questions referred for a preliminary ruling

Preliminary observations

16 By its questions, which it is appropriate to examine together, the referring court asks whether the principle of free movement of goods within the meaning of Articles 28 EC to 30 EC, the latter being read, where appropriate, in conjunction with the provisions of Directive 2000/31, precludes national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined or classified by the competent authority for the purpose of protecting young persons and which does not bear a label from that authority indicating the age from which they may be viewed.

17 As far as concerns the national legal context giving rise to the request for a preliminary ruling, the German Government submits that the prohibition of mail order sales of unexamined image storage media is not absolute. In fact, that type of sale is in accordance with national law when it is ensured that the order was made by an adult and that delivery of the goods concerned to children or adolescents is prevented by effective means.

18 In that context, the question arises as to the definition in national law of the concept of mail order sales. It is clear from the case-file that that concept is defined by Paragraph 1(4) of the Law on the protection of young persons as 'any transaction for consideration carried out by means of the ordering and dispatch of a product by postal or electronic means without personal contact between the supplier and the purchaser or without technical or other safeguards to ensure that the product is not dispatched to children or adolescents'.

19 However, it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct (see, to that effect, Case C-58/98 Corsten [2000] ECR I-7919, paragraph 24). The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 10; Case C-136/03 Dörr and Ünal [2005] ECR I-4759, paragraph 46; and Case C-419/04 Conseil général de la Vienne [2006] ECR I-5645, paragraph 24).

20 In such circumstances, it is appropriate to reply to the request for a preliminary ruling by starting from the premiss, which is that of the referring court, that the rules at issue in the main proceedings prohibit any sale by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed.

21 Furthermore, it is apparent, in the light of the evidence in the case-file, that the rules at issue in the main proceedings apply not only to suppliers established on the territory of the Federal Republic of Germany but also to suppliers whose registered offices are in other Member States.

22 As regards the provisions of Community law applicable in circumstances such as those in the main proceedings, certain aspects relating to the sale of image storage media by mail order may come within the scope of Directive 2000/31. However, as is clear from Article 2(h)(ii) thereof, that directive does not govern the requirements applicable to goods as such. The same is true of Directive 97/7.

23 Since the national rules relating to the protection of young persons at the time of the sale of goods by mail order have not been harmonised at Community level, the rules at issue in the main proceedings must be assessed by reference to Articles 28 EC and 30 EC.

The existence of a restriction on the free movement of goods

24 Avides Media, the United Kingdom Government and the Commission of the European Communities take the view that the rules at issue in the main proceedings constitute a measure having equivalent effect to a quantitative restriction prohibited, in principle, by Article 28 EC. According to the United Kingdom Government and the Commission that regime is, however, justified on grounds relating to the protection of young persons.

25 Dynamic Medien, the German Government and Ireland submit that the rules at issue in the main proceedings concern selling arrangements within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097. Since they are applicable to both national and imported products alike, and affect the marketing of those two types of products in the same way in law and in fact, they do not fall within the prohibition laid down in Article 28 EC.

26 According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 28 EC (see, inter alia, **Case 8/74 Dassonville [1974] ECR 837, paragraph 5**, Case C-420/01 Commission v Italy [2003] ECR I-6445, paragraph 25, and **Case C-143/06 Ludwigs-Apotheke [2007] ECR I-0000**, paragraph 26).

27 Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-Community trade. By virtue of that factor, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect (such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply to all products alike, unless their application can be justified by a public-

interest objective taking precedence over the requirements of the free movement of goods (see, to that effect, **Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649**, paragraphs 6, 14 and 15; Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 8; and Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 67).

28 In its case-law, the Court has also treated as measures having equivalent effect, prohibited by Article 28 EC, national provisions making a product lawfully manufactured and marketed in another Member State subject to additional controls, save in the case of exceptions provided for or allowed by Community law (see, inter alia, Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraphs 36 and 37, and Case C-14/02 ATRAL [2003] ECR I-4431, paragraph 65).

29 By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the line of case-law beginning with Dassonville, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see, inter alia, Keck and Mithouard, paragraph 16; Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraph 21; and Case C-434/04 Ahokainen and Leppik [2006] ECR I-9171, paragraph 19). Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (see Keck and Mithouard, paragraph 17).

30 Subsequently, the Court treated as provisions governing sales arrangements within the meaning of the judgment in Keck and Mithouard provisions concerning, in particular, a number of marketing methods (see, inter alia, Hünermund and Others, paragraphs 21 and 22; Case C-254/98 TK-Heimdienst [2000] ECR I-151, paragraph 24; and Case C-441/04 A-Punkt Schmuckhandel [2006] ECR I-2093, paragraph 16).

31 It is clear from paragraph 15 of the judgment in Case C-391/92 Commission v Greece [1995] ECR I-1621 that rules which restrict the marketing of products to certain points of sale, and which have the effect of limiting the commercial freedom of economic operators, without affecting the actual characteristics of the products referred to, constitute a selling arrangement for the purposes of the case-law cited in paragraph 29 of this judgment. Therefore, the need to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the above-mentioned requirements from being treated as selling arrangements (see Canal Satélite Digital, paragraph 30). That is the case, inter alia, with regard to the need to alter the labelling of imported products (see, inter alia, Case C-33/97 Colim [1999] ECR I-3175, paragraph 37, and Case C-416/00 Morellato [2003] ECR I-9343, paragraphs 29 and 30).

32 In the present case, the rules at issue in the main proceedings do not constitute a selling arrangement within the meaning of the case-law resulting from Keck and Mithouard.

33 Those rules do not prohibit sale by mail order of image storage media. They provide that, in order to be marketed in that way, image storage media must be subject to a national examination and classification procedure for the purpose of protecting young persons, regardless of whether a similar procedure has already been followed in the Member State from which those image storage media were exported. Furthermore, those rules lay down a condition with which image storage media must comply, namely that with regard to their labelling.

34 Such rules are liable to make the importation of image storage media from a Member State other than the Federal Republic of Germany more difficult and more expensive, with the result that they may dissuade some interested parties from marketing such image storage media in the latter Member State.

35 It follows that the rules at issue in the main proceedings constitute a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC, which in principle is incompatible with the obligations arising from that article unless it can be objectively justified.

Possible justification for the rules at issue in the main proceedings

36 The United Kingdom Government and the Commission take the view that the rules at issue in the main proceedings are justified in so far as they are designed to protect young people. That objective is linked in particular to public morality and public policy, which are grounds of justification recognised in Article 30 EC. Furthermore, Directives 97/7 and 2000/31 expressly authorise the imposition of restrictions on grounds of public interest.

37 Dynamic Medien, the German Government and Ireland concur with that position if it is established that those rules do not fall outside the prohibition laid down by Article 28 EC. The German Government submits that they pursue public-policy objectives and ensure that young people are able to develop their sense of personal responsibility and their sociability. Furthermore, the protection of young people is an objective which is closely related to ensuring respect for human dignity. Ireland also invokes the imperative requirement of consumer protection recognised by the judgment in Cassis de Dijon.

38 Avides Media takes the view that the rules at issue in the main proceedings are disproportionate in so far as they have the effect of systematically prohibiting the sale by mail order of image storage media not bearing the labelling which they require, regardless of whether or not the image storage media concerned were examined in another Member State for the purpose of protecting young people. In addition, it is argued, German law fails to provide for a simplified procedure in

cases where such an examination has in fact been made.

39 In that connection, it must be recalled that the protection of the rights of the child is recognised by various international instruments which the Member States have cooperated on or acceded to, such as the International Covenant on Civil and Political Rights, which was adopted by the General Assembly of the United Nations on 19 December 1966 and entered into force on 23 March 1976, and the Convention on the Rights of the Child, which was adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. The Court has already had occasion to point out that those international instruments are among those concerning the protection of human rights of which it takes account in applying the general principles of Community law (see, inter alia, Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 37).

40 In this context, it must be observed that, under Article 17 of the Convention on the Rights of the Child, the States Parties recognise the important function performed by the mass media and are required to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. Article 17(e) provides that those States are to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.

41 The protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24(1) of which provides that children have the right to such protection and care as is necessary for their well-being (see, to that effect, Parliament v Council, paragraph 58). Furthermore, the Member States' right to take the measures necessary for reasons relating to the protection of young persons is recognised by a number of Community-law instruments, such as Directive 2000/31.

42 Although the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods (see, by analogy, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 74), the fact remains that such restrictions may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it (see, to that effect, Case C-36/02 Omega [2004] ECR I-9609, paragraph 36, and Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union [2007] ECR I-0000, paragraph 75).

43 It is clear from the decision making the reference that the national rules at issue in the main proceedings are designed to protect children against information and materials injurious to their well-being.

44 In that connection, it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, referred to in paragraphs 39 to 42 of this judgment, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, Omega, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.

45 While it is true that it is for the Member States, in the absence of Community harmonisation, to determine the level at which they intend to protect the interest concerned, the fact remains that that discretion must be exercised in conformity with the obligations arising under Community law.

46 Although the rules at issue in the main proceedings correspond to the level of child protection that the German legislature has sought to ensure on the territory of the Federal Republic of Germany, it is also necessary that the measures implemented by those rules be suitable for securing that objective and do not go beyond what is necessary in order to attain it.

47 There is no doubt that prohibiting the sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority for the purpose of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed constitutes a measure suitable for protecting children against information and materials injurious to their well-being.

48 As far as concerns the substantive scope of the prohibition concerned, the Law on the protection of young persons does not preclude all forms of marketing of unchecked image storage media. It is clear from the decision making the reference that it is permissible to import and sell such image storage media to adults by way of distribution channels involving personal contact between the supplier and the purchaser, which thus ensures that children do not have access to the image storage media concerned. In the light of those factors, it appears that the rules at issue in the main proceedings do not go beyond what is necessary to attain the objective pursued by the Member State concerned.

49 As regards the examination procedure established by the national legislature in order to protect children against information and materials injurious to their well-being, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the national provisions enacted to that end. Those provisions must be assessed solely by reference to the objective pursued and the level of protection which the Member State in question intends to provide (see, by analogy, Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 36, and Omega, paragraph 38).

50 However, such an examination procedure must be one which is readily accessible, can be completed

within a reasonable period, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts (see, to that effect, Case C-344/90 Commission v France [1992] ECR I-4719, paragraph 9, and Case C-95/01 Greenham and Abel [2004] ECR I-1333, paragraph 35).

51 In the present case, it appears from the observations submitted by the German Government before the Court that the procedure for examining, classifying, and labelling image storage media, established by the rules at issue in the main proceedings, fulfils the conditions set out in the preceding paragraph. However, it is for the national court, before which the main action has been brought and which must assume responsibility for the subsequent judicial decision, to ascertain whether that is the case.

52 Having regard to all the foregoing considerations, the answer to the questions referred must be that Article 28 EC does not preclude national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority for the purposes of protecting young persons and which do not bear a label from that authority indicating the age from which they may be viewed, unless it appears that the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 28 EC does not preclude national rules, such as those at issue in the main proceedings, which prohibit the sale and transfer by mail order of image storage media which have not been examined and classified by a higher regional authority or a national voluntary self-regulation body for the purposes of protecting young persons and which do not bear a label from that authority or that body indicating the age from which they may be viewed, unless it appears that the procedure for examination, classification and labelling of image storage media established by those rules is not readily accessible or cannot be completed within a reasonable period, or that a decision of refusal is not open to challenge before the courts.

OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 13 September 2007 (1)
Case C-244/06

Dynamic Medien Vertriebs GmbH
v
Avides Media AG
(Reference for a preliminary ruling from the Landgericht Koblenz (Germany))

(Free movement of goods – Articles 28 EC and 30 EC – National rules prohibiting the sale by mail order of image storage media that have not been examined and classified by the competent national authority for the purpose of protecting young persons – Image storage media imported from another Member State which have been examined and classified by the competent authority of that State and bear an age-limit label)

I – Introduction

1. The reference for a preliminary ruling turns on the interpretation of Articles 28 EC and 30 EC and of the provisions of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('the directive on electronic commerce'). (2)

2. The reference has been made in the context of a dispute between Dynamic Medien Vertriebs GmbH ('Dynamic Medien') and Avides Media AG ('Avides'), two companies incorporated under German law, relating to the sale in Germany by the latter company, by mail order via the internet, of image storage media that have not been examined and classified by the competent German authority for the purpose of protecting young persons.

II – National law

3. Paragraph 1(4) of the Jugendschutzgesetz (Law on the protection of young persons; the 'JuSchG') of 23 July 2002 (3) defines 'sale by mail order' for the purposes of that Law as 'any transaction for consideration carried out by means of the ordering and dispatch of a product by postal or electronic means without personal contact between the supplier and the purchaser or without technical or other safeguards to ensure that the product is not dispatched to children or adolescents'. (4)

4. Paragraph 12(1) of the JuSchG provides that pre-recorded video cassettes and other image storage media may be made publicly accessible to a child or adolescent only if the programmes have been authorised for that person's age range and labelled by the highest authority of the Land or a voluntary self-regulation body under the procedure described in Paragraph 14(6) of the JuSchG or if they are information, educational or training programmes labelled by the supplier as 'information programmes' or 'educational programmes'.

5. Paragraph 12(3) of the JuSchG provides that 'image storage media which have not been labelled or have been labelled "Not suitable for young persons" under Paragraph 14(2) by the highest authority of the Land or by a voluntary self-regulation body under the procedure described in Paragraph 14(6), or which have not been labelled by the supplier in accordance with Paragraph 14(7), may not:

1. be offered, transferred or otherwise made accessible to a child or adolescent;
2. be offered or transferred in retail trade outside of commercial premises, in kiosks or in other sales outlets which customers do not usually enter, or by mail order.' (5)

III – Facts, the questions referred and course of the proceedings

6. Avides, a business established in Germany, sells audio and video media by mail order via its internet site and an electronic trading platform.

7. The case in the main proceedings relates to that company's sale by mail order in Germany of image storage media (DVDs or video cassettes) imported from the United Kingdom and containing Japanese animated cartoons known as 'Anime'. Before being imported, these programmes were examined by the British Board of Film Classification ('BBFC'). Under the rules on the protection of young persons in force in the United Kingdom, that authority checked the audience which they target and classified them in the category 'Suitable only for 15 years and over'. The image storage media in question bear a BBFC label to that effect.

8. Dynamic Medien, a competitor of Avides, seeks an order from the Landgericht (Regional Court) Koblenz to prohibit Avides from selling the image storage media in question by mail order on the ground that they have not been examined and classified in Germany under the relevant domestic rules and bear no minimum age indication corresponding to a classification decision adopted by a competent German authority.

9. In proceedings for an interim order, the Oberlandesgericht (Higher Regional Court) Koblenz held that the sale of image storage media by mail order bearing only the minimum age indication set by the BBFC contravened Paragraph 12(3) of the JuSchG and constituted anti-competitive conduct.

10. By a ruling of 25 April 2006, lodged on 31 May 2006, the Landgericht Koblenz stayed proceedings in order to refer the following question to the Court for a preliminary ruling:

'Does the principle of the free movement of goods within the meaning of Article 28 EC preclude a provision of German law prohibiting the sale by mail order of image storage media (DVDs, videos) that are not labelled as having been examined in Germany as to their suitability for young persons?

In particular:

Does the prohibition of mail order sales of such image storage media constitute a measure having equivalent effect within the meaning of Article 28 EC?

If so:

Is such a prohibition justified under Article 30 EC, having regard to Directive 2000/31/EC, even if the image storage medium has been examined as to its suitability for young persons by another Member State … and is labelled accordingly, or does such a check by another Member State … constitute a less severe means for the purposes of that provision?'

11. Pursuant to Article 23 of the Statute of the Court of Justice, written observations were submitted by Avides, the German Government, Ireland, the United Kingdom Government and the Commission.

12. The representatives of those parties and those of Dynamic Medien presented oral argument at the hearing on 2 May 2007.

IV – Legal analysis

A – The German legislation in question

13. The court of reference focuses on the prohibition, under Paragraph 12(3)(2) of the JuSchG, of the sale by mail order of image storage media not labelled as having been examined and classified for the purpose of protecting young persons by the highest authority of the Land or a voluntary self-regulation body (the 'competent German authority'). It is common ground that such a prohibition applies to sales effected both by post and electronically via the internet (order and/or delivery made by post and/or via the internet).

14. Nor is it disputed that it applies both to suppliers established in Germany, such as Avides, and to suppliers established in other States. This latter fact is important, primarily because, for the purposes of the present case, in replying to the question from the Landgericht Koblenz it is necessary to consider that prohibition only in so far as it applies to a business established in Germany and not in so far as it is applicable to a business established in another Member State. (6)

15. It must also be borne in mind that the prohibition forms part of a wider set of rules contained in the JuSchG aimed at protecting young persons in the media sector, especially in the context of the specific rules laid down in Paragraph 12 of the JuSchG for that purpose with reference to image storage media containing films or games.

16. It is apparent from those specific rules that, in essence, image storage media – with the exception of those containing information programmes or educational programmes and labelled as such by the supplier – may not, if labelled 'Not suitable for young persons' by the competent German authority or bearing no label from that authority because it has not examined them, be made accessible to children and adolescents nor be sold using certain methods (retail sales outside of commercial premises, in sales outlets which customers do not usually enter, or by mail order) whereby children and adolescents cannot be prevented from coming into contact with or gaining access to such image storage media.

17. The prohibition of mail order sales under Paragraph 12(3)(2) of the JuSchG is therefore part of a regulatory system designed to prevent children and adolescents from coming into contact with or gaining access to image storage media that have not been examined by the competent German authority or which that authority has classified as 'Not suitable for young persons'. This is confirmed by the fact, emphasised by the German Government, that that prohibition is not absolute, since as can be seen from Paragraph 1(4) of the JuSchG, it relates only to transactions by post or

electronic means without personal contact between the provider and the purchaser or without safeguards to ensure that the product is not delivered to children or adolescents. The German Government has stated that image storage media not examined by the competent German authority or which that authority has classified as 'Not suitable for young persons' may also be sold legally by mail order in Germany if appropriate measures are taken to ensure that it is an adult who both orders and takes delivery of the product ('protected' mail order).

18. On the basis of this clarification from the German Government, it would seem possible to deduce that the examination and classification of image storage media by the competent German authority are not a true obligation imposed on suppliers but simply a duty, compliance with which removes the marketing restrictions under Paragraph 12(3) of the JuSchG for image storage media not examined by that authority, in particular exempting a supplier who wishes to sell such goods by mail order from the need to adopt measures that will render the mail order 'protected'. (7)

19. Hence the domestic rules in question entail neither an obligation to submit imported image storage media to a domestic examination and classification procedure and to label them in accordance with that classification, nor a prohibition of the sale of imported image storage media not submitted to that procedure and labelling, nor an absolute ban on their sale by mail order.

20. However, it remains a fact that Paragraph 12(3) of the JuSchG imposes, for image storage media not submitted to the national examination and classification procedure, whether imported or not, a relative prohibition on the provision of the goods, in other words one applying to a particular category of potential purchasers (young persons), coupled with a prohibition of their sale outside of commercial premises and in sales outlets which customers do not usually enter, and makes mail order sales subject to restrictive conditions designed to prevent young persons from purchasing such goods.

B – The potential relevance of Community harmonisation measures

21. As pointed out by the Commission, it must first be remembered that a national measure in a sphere which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of the harmonising measure and not those of primary law, in particular Articles 28 EC and 30 EC. (8)

22. In the context of the present reference for a preliminary ruling, mention has been made of Directive 2000/31 and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (9) as Community harmonisation measures that may be relevant.

23. As regards Directive 2000/31, I would point out first of all that it seeks to contribute to the proper functioning of the internal market by creating, as far as electronic commerce is concerned, a legal framework to ensure the free movement of information society services between Member States. As indicated in Article 1(2) of the directive, it approximates only 'certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States'. (10)

24. Whilst it is acknowledged that the sale of goods via the internet constitutes an 'information society service' within the meaning of the directive in question (11) and that a domestic rule such as the prohibition of mail order sales under Paragraph 12(3)(2) of the JuSchG falls within the 'coordinated field' of the directive, (12) none of the parties intervening before the Court has stated, nor have I been able to ascertain, which specific provision in the directive in question may have implemented the exhaustive harmonisation of domestic legislation on the protection of young persons in connection with mail order sales of goods via the internet that would preclude verification of the compatibility of the prohibition with Articles 28 EC and Article 30 EC.

25. The court of reference and the German and United Kingdom Governments have pointed out that Directive 2000/31 expressly leaves scope for the national authorities to take steps to protect young persons. They have noted that, under the first indent of Article 3(4)(a)(i) thereof, the Member States may take measures necessary for reasons of 'public policy', in particular the 'protection of minors', with regard to a particular information society service, such as the sale of goods via the internet.

26. I observe, however, that the reference to Article 3(4) of Directive 2000/31 is irrelevant in the present case.

27. Article 3 contains the so-called 'internal market clause', which essentially permits the providers of information society services to operate throughout the territory of the Community while remaining subject to the provisions of the Member State in which they are established as far as matters within the field coordinated by the directive are concerned. Article 3(1) provides that '[e]ach Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field'. At the same time, Article 3(2) lays down that 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State'.

28. However, the directive provides that 'notwithstanding the rule on the control [of such services] at source', 'it is legitimate', under the conditions established in the directive, 'for Member States to take measures to restrict the free movement of information society services' (recital 24). Article 3(4), to which the court of reference and the German and United Kingdom Governments refer, lays down the conditions in

question, in particular circumscribing the public-interest grounds that may be invoked to justify such restrictive measures and making their adoption conditional on compliance with particular procedural formalities, such as requesting the Member State in which the service provider is established to take action and notifying the intention to adopt the measures in question to that Member State and to the Commission, which has a duty to verify that the measures are compatible with Community law.

29. The provisions designed to ensure 'the protection of minors' in accordance with Article 3(4) of Directive 2000/31 are therefore those that a Member State may adopt in derogation from the prohibition, laid down in Article 3(2), on restricting, for reasons falling within the field coordinated by the directive, 'the freedom to provide information society services from another Member State'. (13)

30. Since Avides is a provider established in Germany, (14) the prohibition of mail order sales under Paragraph 12(3)(2) of the JuSchG constitutes, in relation to the defendant, a national provision of the home State within the meaning of Article 3(1) of Directive 2000/31, and not a provision restricting the freedom to provide information society services from another Member State, within the meaning of Article 3(2) of that directive.

31. Hence, the rules under Article 3(2) and (4) of Directive 2000/31 play no part in an assessment of whether the prohibition of mail order sales is compatible with Community law, in that it is applicable to a business, such as Avides, established on the national territory.

32. The provisions of Directive 2000/31 are therefore not relevant in the present case. They could prove applicable, in place of Articles 28 EC and 30 EC, for assessing whether the prohibition in question is compatible with Community law in so far as it is applicable to businesses established in Member States other than Germany that make sales via the internet in Germany, but, as I have pointed out, that aspect falls outside the scope of the case before the court of reference.

33. As regards Directive 97/7, I note that the prohibition of mail order sales under Paragraph 12(3)(2) of the JuSchG appears to fall within the scope of that directive. (15) However, Article 14 of that directive allows the Member States to 'introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection' and goes on to state that '[s]uch provisions shall, where appropriate, include a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty'. Hence Directive 97/7 does not carry out an exhaustive harmonisation with regard to the sale of goods by mail order and does not preclude verifying whether more stringent measures than those which Article 14 of the directive permits the Member States to adopt in order to protect consumers are compatible with the EC Treaty, and in particular with Articles 28 EC and 30 EC; in fact, it expressly provides for such a check. (16)

34. I am therefore of the opinion that the directives in question do not preclude the need to examine whether the prohibition of mail order sales of image storage media not examined and classified by the competent German authority, as laid down in Paragraph 12(3)(2) of the JuSchG, is compatible with Articles 28 EC and 30 EC.

C – The applicability of Article 28 EC in the present case: measure having an effect equivalent to a quantitative restriction on imports?

35. By its question to the Court, the Landgericht Koblenz asks the Court first whether the abovementioned prohibition constitutes a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC.

36. Under Article 28 EC, '[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

37. In accordance with the Dassonville formula, (17) which has been reiterated repeatedly in the Court's case-law up to the present day, (18) all trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions.

38. Even where the purpose of a measure is not to regulate trade in goods between Member States, the determining factor is its actual or potential effect on intra-Community trade. In application of that criterion, established case-law beginning with the Cassis de Dijon judgment (19) states that, in the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging) constitute measures of equivalent effect prohibited by Article 28 EC, even if those rules apply to all products alike, unless their application can be justified by a public-interest objective taking precedence over the requirements of the free movement of goods. (20)

39. Hence, in accordance with the case-law beginning with the judgment in Keck and Mithouard, (21) the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the line of case-law beginning with Dassonville, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. (22)

40. Avides, the United Kingdom Government and the Commission maintain that the prohibition of mail order sales imposed by Paragraph 12(3)(2) of the

JuSchG constitutes a measure of equivalent effect prohibited by Article 28 EC.

41. According to Avides, what is at issue is not simply the regulation of a selling arrangement. The need for imported image storage media that have already been examined and classified in the exporting Member State for the purpose of protecting young persons to be submitted for examination and classification for the same purpose by the competent German authority as well would lead to significant additional costs and delays in the marketing of such products in Germany. In any case, even if the measure regulated a selling arrangement, it would not meet the first of the two conditions laid down in the Keck and Mithouard judgment, since the fact that it is applicable only on national territory means that it would fall only on electronic trading undertakings established in Germany and not also on those established in the other Member States.

42. The Commission considers that the answer lies crucially in an analysis of the real or potential effect of the national measures in question. It points out that Paragraph 12 of the JuSchG essentially obliges the traders concerned to label image storage media. The prohibition of mail order sales under Paragraph 12(3)(2) is, in the Commission's opinion, only one of the penalties laid down for non-compliance with that obligation, which, according to the Commission, falls within the category of national measures considered by the case-law mentioned in point 38 above, in that it establishes a labelling requirement with which the goods must comply. The restrictive effect of the German rules is then reinforced by the fact that the required labelling presupposes the carrying-out of a national examination procedure, even where the rules of the Member State of export already provided for a comparable procedure and labelling. Hence, according to the Commission, the rules in question impose additional costs for the sale of imported image storage media in Germany, and this is sufficient for them to be characterised as constituting a measure having an effect equivalent to a quantitative restriction.

43. According to the United Kingdom Government, any obstacle to the free movement of goods which is the consequence of applying a national measure relating to the characteristics of goods lawfully manufactured and marketed in another Member State constitutes a measure having equivalent effect, even if the measure takes the form of a restriction on a particular selling arrangement. The United Kingdom Government points out that the marketing restrictions laid down in Paragraph 12(3)(2) of the JuSchG, which include the prohibition of mail order sales in question, do not apply to image storage media in general but only to particular ones, that is to say, those that do not meet the requirements for authorisation and classification of their content by the competent German authority. Those restrictions, which apply only where the content of the image storage media has been judged unsuitable for young persons or has not been checked by that authority, therefore relate to the actual characteristics of the goods in question and not only to a selling arrangement. In any case, even if it were considered that the case in point related only to the regulation of a selling arrangement, the second of the conditions laid down in the Keck and Mithouard judgment will not be met, since according to the United Kingdom Government image storage media produced in Germany can meet the requirements of German law as to the suitability of the content for young persons more easily than those produced elsewhere.

44. By contrast, Dynamic Medien, the German Government and Ireland maintain that the prohibition of mail order sales in question relates to a selling arrangement and meets the two conditions laid down in the Keck and Mithouard judgment, with the result that it falls outside the scope of Article 28 EC.

45. Dynamic Medien observes that the restrictions imposed by Paragraph 12(3) of the JuSchG relate to selling arrangements and apply to all image storage media, whether produced in Germany or not, and sold by businesses established in Germany or in other Member States. In its view, there is therefore no protection of national production.

46. The German Government acknowledges that the prohibition of mail order sales at issue has to do with particular labelling, or rather with the absence thereof. It argues, however, that that is no reason to treat the prohibition as an obligation to label the product and to deny that it relates to a selling arrangement. The marketing of image storage media that have not been examined by the competent German authority and hence are not labelled is not prohibited, nor as a general rule would their sale by mail order. Only 'unprotected' mail order sales are prohibited, that is to say, sales where there is no guarantee that the product is ordered and received only by adults. Since other distribution channels for the sale of such products continue to be authorised, including sale by 'protected' mail order, the German Government maintains that imported image storage media are guaranteed access to the German market and importers are not forced to change the presentation of their products for sale in Germany. According to the German Government, the legislation lays down rules for a selling arrangement that apply to both imported and domestically produced merchandise and lead to no inequality of treatment between those products, either in law or in fact.

47. Ireland, for its part, points out that Paragraph 12 of the JuSchG does not relate to the characteristics of the products but to the means by which they may be offered and sold, and more specifically to the persons to whom they may be offered and sold. It notes that the rules apply in the same way to all traders concerned, irrespective of origin, and to all merchandise of the same type, whether produced in Germany or imported.

48. In my opinion, the prohibition on 'unprotected' mail order sales of image storage media not examined by the competent German authority, like the same prohibition on the making available of such products to young persons, is not a measure relating to the characteristics of the products. As I have noted above, the JuSchG does not appear to impose an obligation for

image storage media, whether imported or not, to be examined and classified by the competent German authority, and to be labelled accordingly. There is not even an absolute prohibition on the marketing of image storage media that have not been examined and classified by that authority, and hence not labelled accordingly. Such media may be sold, but only to adults, within commercial premises which the public enters in the normal way or by means of 'protected' mail order.

49. We are dealing rather with regulations that relate to commercial activity and impose restrictions on selling arrangements, on the one hand, in terms of 'how' and 'where' the products may be sold (Paragraph 12(3)(2) of the JuSchG) and, on the other, in terms of the personality of the purchaser, that is to say, 'to whom' the products may be sold (Paragraph 12(1) and (3)(1) of the JuSchG), thereby extending the list of categories set out in the formula used earlier by Advocate General Tesauro of 'how, where, when and by whom the goods may be sold'. (23)

50. It is true that the restrictions in question do not apply to all image storage media but only to certain categories (media not submitted for national examination and classification, media classified as 'Not suitable for young persons'). However, the fact that those categories are identified in terms of certain product characteristics does not of itself mean that the rules regulate the characteristics of the products, at least to the extent that there is no formal obligation to adapt the products for sale on German territory. (24) In that sense, the present case appears to be different from those that were the subject of the Mars (25) and Familiapress (26) judgments, which highlighted legislation that appeared to relate to selling arrangements but ultimately laid down requirements which products had to meet in order to be marketed in the Member State concerned.

51. The German rules in question, which can be considered to relate to selling arrangements, must meet the two conditions laid down in the Keck and Mithouard judgment referred to in point 39 above in order to be excluded from the scope of Article 28 EC.

52. As regards the first of those conditions, namely application without distinction to all traders operating within the national territory, I note that, according to the information provided by the German Government, the rules at issue apply to sales to be carried out on the national territory both by traders established in Germany and by traders established in other Member States. The first condition is therefore met.

53. As regards the second condition, namely equal impact on the marketing of domestic products and of those from other Member States, the scope of that condition must be assessed in the light of the Court's pronouncements in paragraph 17 of the Keck and Mithouard judgment, from which it can be deduced in essence that the application of provisions on the arrangements for selling products from another Member State meeting the requirements laid down by that State must not 'prevent their access to the market or … impede access any more than it impedes the access of domestic products'. (27)

54. In its decision making the reference, the Landgericht Koblenz expresses uncertainty as to whether the reasoning that led the Court to take the view, in Deutscher Apothekerverband, (28) that a prohibition on mail order sales of medicines via the internet such as that under consideration in that case did not meet the second of the conditions set in the Keck and Mithouard judgment is relevant in the present case. The Landgericht Koblenz points out that the difference between the present case and the situation in Deutscher Apothekerverband lies in the fact that Avides 'first imports the goods from Great Britain into Germany and then sells them by mail order, whereas in [that] decision the importation took place by mail order, in other words, the undertaking concerned was established in another EU State'.

55. In Deutscher Apothekerverband (29) the Court drew attention to the special importance of mail order sales for marketing products from other Member States on the national territory after the emergence of the internet as a method of cross-border sales. It made the following observation:

'A prohibition such as that at issue in the main proceedings is more of an obstacle to pharmacies outside Germany than to those within it. Although there is little doubt that as a result of the prohibition, pharmacies in Germany cannot use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they are still able to sell the products in their dispensaries. However, for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products.'

56. At a general level, such an approach could also be valid with regard to rules such as the prohibition on mail order sales under Paragraph 12(3)(2) of the JuSchG and could lead to the prohibition being classified as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 28 EC.

57. It is true that, as pointed out by the German Government, the prohibition in question is not absolute but relates only to 'unprotected' mail order sales. However, as that government explains, recourse to 'protected' mail order sales means that suppliers have to use systems for verifying the identity and majority of the person placing the order via the internet or by post and arrangements to ensure that the goods are delivered to the adult customer. In its written reply to a question put by the Court, the German Government described the nature of such verification systems used in electronic trading (30) and has mentioned, with regard to the delivery stage, registered delivery into the hands of the adult customer. The German Government also indicated that, for mail order to be considered 'protected'

where orders are placed via the internet, the supplier must use a verification system that the Kommission für Jugendmedienschutz (Commission for the Protection of Young Persons in the Media Sector) has previously deemed to be appropriate. At the hearing, the German Government acknowledged that the use of such forms of 'protected' mail order by suppliers of image storage media entailed additional costs that would not be incurred in the case of 'unprotected' mail order sales.

58. It is therefore clear that a ban on mail order sales such as that imposed by Paragraph 12(3)(2) of the JuSchG ultimately limits (to 'protected' mail order) and imposes additional costs on the permitted forms of a channel for distributing image storage media – namely mail order sales via the internet – which, as stated in point 55 above, is generally more important for marketing products from other Member States than for marketing merchandise that is already available on the national territory.

59. Nevertheless, although such considerations may lead one to conclude that the prohibition in question does not meet the second of the conditions laid down in the Keck and Mithouard judgment in that it is applicable to traders established in Member States other than Germany, (31) it must be borne in mind that in the present case the trader involved, Avides, is established in Germany and that the mail order sales are not effected from another Member State to Germany but entirely within German territory, into which the goods have previously been imported. Hence it cannot be held, on the basis of the approach followed by the Court in Deutscher Apothekerverband referred to in point 55 above, that the prohibition in question impedes access to the German market for the products that Avides imports from the United Kingdom to a greater extent than for domestic products.

60. It is certainly possible to imagine other factors that would lead the Court to hold that, to the extent to which they also apply to traders established in Germany importing image storage media from other Member States, the German rules in question regarding selling arrangements constitute a measure having an equivalent effect since they do not meet the second condition laid down in Keck and Mithouard.

61. For example, it cannot be excluded that the prohibition on offering and transferring to young persons image storage media that have not been examined by the competent German authority and the prohibition on 'unprotected' mail order sales of such products – which ultimately prevents young persons from making direct purchases of such products by mail order – may in fact be such as to impede access to the market, within the meaning of paragraph 17 of Keck and Mithouard (see point 53 above), (32) at least for image storage media aimed at adolescents. The latter generally have sufficient money and ability to purchase a DVD or video cassette themselves, without the need to involve a parent or other adult. In other words, the abovementioned prohibitions could obstruct the purchase of image storage media by the very persons who represent the main and direct purchasers.

62. Even though, as I have observed above, no obligation to submit image storage media for examination and classification by the competent German authority and to label them accordingly can be deduced from the German rules in question, it cannot be excluded either that the marketing restrictions under Paragraph 12(3) are viewed by suppliers as so stringent that they are nevertheless induced to opt for examination and classification of their products, and a consequent change in labelling. (33) In those circumstances, imported products that have already undergone similar formalities in the Member State of export would be burdened with duplicate checks and costs to which domestic products would not be subject for marketing on national territory. (34)

63. The information available to the Court does not enable it to establish with certainty whether the prohibition on mail order sales under Paragraph 12(3)(2) of the JuSchG affects the marketing of products from Member States other than Germany to any greater degree than that of products from the latter State. Where there is doubt of that kind, the Court leaves it to the court of reference to determine whether the condition laid down in Keck and Mithouard has been met. (35)

64. The reply to the first part of the question from the Landgericht Koblenz should therefore be that a prohibition on mail order sales of image storage media that have not been examined and classified by the competent national authority for the purpose of protecting young persons, such as the prohibition under Paragraph 12(3)(2) of the JuSchG, regulates a selling arrangement and, since it applies to all traders operating on the territory of the State concerned, does not constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC, on condition that it affects in the same way the marketing of products originating in that State and the marketing of products from other Member States.

D – The possible justification of the prohibition on mail order sales under Paragraph 12(3)(2) of the JuSchG

65. In the second part of the question submitted to the Court for a preliminary ruling, the court of reference asks whether the prohibition on mail order sales under Paragraph 12(3)(2) of the JuSchG can be considered to be justified under Article 30 EC and Directive 2000/31, even if the image storage medium has already been examined as to its suitability for young persons in another Member State and has been labelled accordingly.

66. In points 23 to 32 above I have already dealt with the aspects relating to Directive 2000/31, which require no further consideration on my part.

67. As to the remainder, the question of the possible justification of the prohibition in question obviously arises only if it is concluded that this constitutes a measure having equivalent effect prohibited under Article 28 EC (for example, in the approach I have followed above, if it is found not to impinge in the same way on the marketing of domestic products and

that of products from Member States other than Germany).

68. According to settled case-law, an impediment to intra-Community trade contrary to Article 28 EC may be justified only by the public-interest grounds listed in Article 30 EC – which include public morality, public policy, public security and the protection of health and life of humans – or, if the legislation creating such an impediment is applicable without distinction, by one of the overriding public-interest requirements within the meaning of the case-law flowing from the abovementioned Cassis de Dijon judgment relating, inter alia, to consumer protection. In either case, the national provision must be appropriate for securing attainment of the objective which it pursues and must not go beyond what is necessary for attaining it. (36)

69. The court of reference considers that the need to protect young persons constitutes a relevant justification, within the meaning of Article 30 EC, of the prohibition on mail order sales in question. In its view, the prohibition is 'in principle both generally appropriate and necessary to ensure the protection of young persons from image storage media that are not suitable for them'. It notes, however, that in the present case the image storage media imported by Avides and sold by that undertaking in Germany via the internet had been examined in the United Kingdom by the BBFC as to their suitability for young persons. As it considered that such an examination did not constitute a lower level of protection for young persons than that provided by the examination by the competent German authority, the court of reference asks 'whether the purpose of the protection of young persons can and must be achieved by less severe means, namely by the recognition of the examination as to suitability for young persons by [an authority in] another Member State'.

70. In its written observations, the German Government maintained that if the prohibition on mail order sales were regarded as a measure having equivalent effect prohibited by Article 28 EC, it would nevertheless be justified by the need to protect young persons, which in its opinion constitutes a ground of public policy within the meaning of Article 30 EC. It adds that the protection of young persons is closely linked to the safeguards to ensure respect for human dignity – which is a general principle of Community law (37) – and therefore represents a legitimate interest such as to justify a restriction on fundamental freedoms.

71. None of the other intervening parties in these proceedings for a preliminary ruling disputes in substance that the purpose of the German rules in question is to protect young persons and that such protection constitutes a legitimate interest that may be relied upon to justify a restriction on the free movement of goods.

72. However, Avides maintains that those rules are contrary to the principle of proportionality, since they also apply to image storage media which have already been subject to examination and classification for the purpose of protecting young persons by the competent authority in the Member State of export and are labelled accordingly, as is the case of those imported into Germany from the United Kingdom.

73. Avides points out in this regard that the examination criteria for the protection of young persons used by the competent British and German authorities are equivalent, since both the United Kingdom and Germany have signed and ratified the Convention on the Rights of the Child adopted in New York on 20 November 1989, in the preamble to which the States Parties recognise 'that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'.

74. Moreover, Avides points out that there is no provision either for image storage media that have already been examined and classified for the protection of young persons in the Member State of export and are labelled accordingly to undergo a simplified procedure of examination and classification by the competent German authority, such as that to which certain types of image storage media are subject (such as music, documentaries and animated cartoons).

75. The German Government notes that the proportionality of restrictive national measures must be assessed in the light of the objectives pursued by the national authorities of the Member State concerned and the level of protection which they seek to provide. The level of protection of young persons as regards the content of image storage media is, in the view of the German Government, necessarily dependent, in particular, on the moral and cultural concepts of each country and on its history. Hence, what is considered acceptable in one Member State for a given group of young persons may be deemed unacceptable for the same group in another Member State. (38) The German Government therefore submits that mutual recognition by Member States of the procedures for examining image storage media for the purpose of protecting young persons is not an adequate means of achieving the degree of protection of young persons which the German authorities seek to provide.

76. According to the German Government, the German legislature limited the scope of the prohibition on mail order sales of image storage media not examined by the competent national authority to a level compatible with the overriding need to ensure adequate protection of young persons. It points out that mail order sales of such merchandise are permitted where there is direct contact between the person delivering the goods in question and the person receiving them or where it is ensured, for example by means of appropriate technical measures, that young persons will not take delivery of the goods.

77. The Commission, Ireland, the United Kingdom Government and Dynamic Medien essentially share the views of the German Government, holding that the German rules in question comply with the principle of proportionality.

78. For my part, I consider that, provided the principle of proportionality is respected, the protection of young persons with regard to the content of image storage media that have not been examined and classified by the competent German authority undoubtedly constitutes an appropriate justification, within the meaning of Article 30 EC, for the obstacles to intra-Community trade that may result from such rules. As argued by the Commission, the protection of young persons may be one aspect of the defence of public morality or public policy, or of the protection of the health of humans. The exposure of young persons to images deemed improper for them (for example, because their content is violent, vulgar or sexual) may be considered by each Member State to be morally unacceptable, dangerous on account of the copycat effects to which it may give rise, or harmful to the psychological and physical development of the young persons concerned.

79. Both the prohibition on offering and transferring image storage media not examined by the competent German authority to young persons and the prohibition on 'unprotected' mail order sales of such media appear to be obviously appropriate to ensure attainment of the objective of protecting young persons.

80. It is nevertheless necessary to verify whether those measures go beyond what is necessary to attain that objective – the bone of contention in the present proceedings for a preliminary ruling – and in so doing to take account of the fact that they also apply to image storage media that have already been examined and classified for the purpose of protecting young persons by the competent authority in the Member State of export and are labelled accordingly.

81. As the Commission and the intervening governments point out, the Court has already stated that 'in principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory', (39) and that 'the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another', so that 'the competent national authorities must … be allowed a margin of discretion within the limits imposed by the Treaty'. (40) Moreover, it is settled case-law that the health and life of humans rank foremost among the assets or interests protected by Article 30 EC and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure. (41)

82. Given the discretion granted to the national authorities in this way, 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 in question. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide. (42)

83. It must therefore be recognised that, in the absence of harmonisation in the area under examination, the EC Treaty leaves the Member States free to set the age limits for access to image storage media according to the cultural, religious, moral and historic sensitivities of each State and to appoint a national authority to examine and classify the content of such media for different age groups.

84. As pointed out by the Commission, the assessment inherent in such classification is influenced by the scale of values of each State, so that in my opinion it cannot in any event be held that the examination and classification of an image storage medium in the Member State of export for the purpose of protecting young persons are sufficient to ensure the level of protection of young persons that the authorities of the Member State of import intend to provide.

85. I take the view that there is manifestly no substance to Avides' argument that the signature and ratification of the Convention on the Rights of the Child by both Germany and the United Kingdom mean that the criteria for the examination and classification of image storage media by the competent authorities of the two States are equivalent. As was observed at the hearing by the representatives of Dynamic Medien, the Commission and the governments of those two States, the Convention lays down no common standard for the protection of young persons with regard to the content of image storage media and other media products. Article 17(e) of the Convention provides only that the States Parties shall 'encourage the development of appropriate guidelines for the protection of the child from information and material [from the mass media] injurious to his or her well-being'.

86. As to the claimed possibility that image storage media that have already been examined and classified by the competent authority in the State of export should be subjected only to simplified examination in Germany, as is provided for in Germany for certain types of image storage media, I note that Avides has provided no information on the differences between this and the normal procedure. Hence in my opinion the Court does not have sufficient facts to assess whether recourse to the simplified procedure for image storage media that have already been examined and classified in the Member State of export would be an appropriate way of achieving the level of protection of young persons that the German authorities seek to provide in Germany. In any case, I have pointed out above that the assessment of what may be harmful to young persons, and hence indirectly to public morality, public policy and the health of humans, depends heavily on the scale of values of each Member State. Hence, the fact that a particular image storage medium has already been examined and classified in the Member State of export is not, in my opinion, necessarily a factor likely to mitigate the risk that the enjoyment of such a medium vitiates the abovementioned requirements of public policy in Germany and therefore to require an easing of the formalities for examination and classification by the competent German authority.

87. For that reason, I do not think that, by prohibiting the offering and transfer to young persons of image

storage media that have not been submitted for examination and classification for the protection of young persons by the competent German authority or are not labelled accordingly but have previously been examined and classified for that purpose by the competent authority in the State of export or by prohibiting 'unprotected' mail order sales of such media, the German rules on the protection of young persons with regard to image storage media are disproportionate in relation to the objectives pursued.

88. Nor can the need to interpret and apply the provisions of the EC Treaty on the freedom of movement of goods in the light of Article 13 of the Convention on the Rights of the Child, which enshrines the right of the child to freedom of expression, be relied upon to infer that the German rules in question are incompatible with those provisions, as Avides argued at the hearing. Under Article 13(1), that right 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'.

89. It is true that the Court has stated that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights. (43)

90. Furthermore, the Court has already recognised that the Convention on the Rights of the Child is binding on each of the Member States and is one of the international instruments for the protection of fundamental rights of which it takes account in applying the general principles of Community law. (44)

91. In addition, as the Commission has stated, it must be remembered that freedom of expression, including inter alia the 'freedom to … receive … information and ideas without interference by public authority and regardless of frontiers' is also enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'), on which the Court, as is widely known, draws in guaranteeing respect for fundamental rights.

92. In this regard, I observe first, as did the German Government and the Commission at the hearing, that Article 13(2) of the Convention on the Rights of the Child concedes that exercise of the right to freedom of expression may be made subject by law to such limitations as are necessary, in particular, 'for the protection of national security or of public order (ordre public), or of public health or morals', while Article 17(e) of the Convention, as I have already noted, obliges the States Parties to encourage 'the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being'.

93. Secondly, it is clear from the very wording of Article 10(2) of the ECHR that freedom of expression is subject to certain limitations justified by objectives in the public interest, in so far as those derogations are prescribed by law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. (45) These objectives in the public interest specifically mentioned in Article 10(2) of the ECHR include, in particular, 'prevention of disorder or crime' and 'the protection of health or morals'. The German rules in question are laid down by law, objectively serve the attainment of those objectives, since they address the pressing social need of protecting young persons from media content inappropriate for them, and are proportionate to the legitimate objective pursued.

94. I accordingly take the view that the reply to the second part of the question submitted for a preliminary ruling by the Landgericht Koblenz may be that where a prohibition on mail order sales of image storage media that have not been examined and classified by the competent national authority for the purpose of protecting young persons – such as that laid down in Paragraph 12(3)(2) of the JuSchG – is considered to be a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC, that prohibition is justified, within the meaning of Article 30 EC, on grounds of public morality, public policy and protection of the health of humans, even in the case where the image storage media have been examined in another Member State as to their suitability for young persons and have been labelled accordingly.

V – Conclusion

95. In the light of the foregoing considerations, I propose that the Court reply as follows to the question from the Landgericht Koblenz:

A prohibition on mail order sales of image storage media that have not been examined and classified by the competent national authority for the purpose of protecting young persons, such as the prohibition under Paragraph 12(3)(2) of the Jugendschutzgesetz, regulates a selling arrangement and, since it applies to all traders operating on the territory of the State concerned, does not constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC, on condition that it affects in the same way the marketing of products originating in that State and the marketing of products from other Member States.

Should the national court, in making that determination, conclude that such a prohibition does constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC, that prohibition is justified, within the meaning of Article 30 EC, on grounds of public morality, public policy and protection of the health of humans, even in the case where the image storage media have been examined in another Member State as to their suitability for young persons and have been labelled accordingly.

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1 – Original language: Italian.

2 – OJ 2000 L 178 , p. 1.

3 – BGBl. 2002 I, p. 2730.

4 – Unofficial translation of the original text of the JuSchG.
5 – Unofficial translation of the original text of the JuSchG.
6 – The present case nevertheless undoubtedly falls within the scope of Community law, in so far as it relates to the sale in Germany of products from the United Kingdom.
7 – Moreover, I cannot deduce from the text of the JuSchG available on the website of the Bundesministerium für Familie, Senioren, Frauen und Jugend (Federal Ministry of the Family, Senior Citizens, Women and Young Persons), in particular from Paragraph 14 on 'Labelling of films and film and game programmes', that there is an obligation to submit image storage media for sale in Germany to examination and classification by the competent German authority. In addition, Paragraphs 27 and 28 of the JuSchG, which lay down penalties for infringements of the provisions of the JuSchG, impose no penalty for the failure to submit an image storage medium to examination by the competent German authority.
8 – See, among many others, Case C-324/99 Daimler-Chrysler [2001] ECR I-9897, paragraph 32; Case C-99/01 Linhart and Biffl [2002] ECR I-9375, paragraph 18; and Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, paragraph 64.
9 – OJ 1997 L 144, p. 19.
10 – Emphasis added.
11 – This appears to be the thrust of recital 18 in the preamble to the directive, according to which '[i]nformation society services span a wide range of economic activities which take place online', which 'can, in particular, consist of selling goods online'.
12 – Under Article 2(h) of the directive, the coordinated field covers 'requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them', 'requirements with which the service provider has to comply in respect of' both the taking-up and pursuit of the activity of an information society service (in particular the 'requirements concerning the behaviour of the service provider, … the quality or content of the service including those applicable to advertising and contracts').
13 – Emphasis added.
14 – Article 2(c) of Directive 2000/31 states that for the purposes of the directive 'established service provider' means 'a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period', '[t]he presence and use of the technical means and technologies required to provide the service … not, in themselves, constitut[ing] an establishment of the provider'.
15 – In Deutscher Apothekerverband, paragraph 63, the Court reached a similar conclusion with reference to a ban on mail order sales of medicinal products, the sale of which was restricted to pharmacies, as laid down in the German legislation examined in that judgment.
16 – Deutscher Apothekerverband, paragraphs 64 and 65.
17 – Case 8/74 Dassonville [1974] ECR 837, paragraph 5.
18 – Most recently in Case C-254/05 Commission v Belgium [2007] ECR I-4269, paragraph 27.
19 – Case 120/78 Rewe-Zentral [1979] ECR 649.
20 – Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15, and Deutscher Apothekerverband, paragraph 67.
21 – Paragraph 16.
22 – Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraph 21; Case C-412/93 Leclerc-Siplec [1995] ECR I-179, paragraph 21; and Case C-441/04 A-Punkt Schmuckhandels [2006] ECR I-2093, paragraph 15.
23 – Opinion in Hünermund and Others, point 11.
24 – In Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 30, the Court observed that 'the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the abovementioned requirements from being treated as selling arrangements within the meaning of … Keck and Mithouard …'.
25 – Case C-470/93 [1995] ECR I-1923, relating to a prohibition on marketing products, the packaging of which bears certain advertising markings deemed to be misleading.
26 – Case C-368/95 [1997] ECR I-3689, relating to a prohibition on the sale of periodicals containing games for prizes.
27 – See, in particular, Case C-405/98 Gourmet International Products [2001] ECR I-1795, paragraph 18, and Case C-239/02 Douwe Egberts [2004] ECR I-7007, paragraph 51.
28 – Paragraphs 73 to 75.
29 – Ibid.
30 – In essence, these are systems for protecting closed groups of users, which are already used for the direct enjoyment of media content reserved for adults, for example by means of remote downloading.
31 – Albeit, of course, for the purpose of verifying that the prohibition on mail order sales under Paragraph 12(3)(2) of the JuSchG is compatible with Community law in that it is applicable to traders established in Member States other than Germany, regard must be had to Articles 28 EC and 30 EC, and not to the rules under Article 3 of Directive 2000/31, referred to in points 27 to 32 above.
32 – I concur with Advocate General Kokott where, in the Opinion delivered on 14 December 2006 in Case C-142/05 Mickelsson and Roos (not yet published in the ECR), footnote 31, she interprets the concept of an obstacle to market access broadly to include not only measures that 'prevent' but also those that 'significantly impede' access to the market.
33 – No information on this point has been provided to the Court in connection with the present proceedings for a preliminary ruling.
34 – From another perspective, the economic need to subject imported products to the national examination

and classification procedure and to provide for labelling to be modified accordingly could, instead of being assessed in relation to the second condition laid down in Keck and Mithouard, be treated as a genuine legal obligation, leading to the German rules in question being classified as regulations on the characteristics of the product entailing an adaptation of the product for marketing on German territory. In that case, the analysis would be different from the one I have set out in point 50 above, but the outcome would be the same, in that if it were found that the rules in question induced traders to submit the products they imported to the national examination and classification procedure and to change its labelling, but without formally requiring them to do so, the legislation would have to be classified as a measure having equivalent effect within the meaning of Article 28 EC.

35 – See Joined Cases C-34/95 to C-36/95 De Agostini and TV-Shop [1997] ECR I-3843, paragraph 44; Case C-20/03 Burmanjer and Others [2005] ECR I-4133, paragraphs 31 and 32; and A-Punkt Schmuckhandels, paragraph 25.

36 – See, from among numerous examples, Case C-14/02 ATRAL [2003] ECR I-4431, paragraph 64; Case C-270/02 Commission v Italy [2004] ECR I-1559, paragraphs 21 and 22; Douwe Egberts, paragraph 55; and Case C-366/04 Schwarz [2005] ECR I-10139, paragraph 30.

37 – The German Government refers in this regard to Case C-36/02 Omega [2004] ECR I-9609, paragraph 34.

38 – The German Government points out that the level of tolerance of violent or pornographic images differs between Member States, with the result that some films are prohibited for young persons in some Member States and not in others. It also refers to the particular sensitivity of portrayals of national socialism for the German public, and hence the examining authorities' greater severity in assessing them.

39 – Case 34/79 Henn and Darby [1979] ECR 3795, paragraph 15.

40 – Omega, paragraph 31 and the case-law cited.

41 – Deutscher Apothekerverband, paragraph 103 and the case-law cited.

42 – Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 36, and Case C-6/01 Anomar and Others [2003] ECR I-8621, paragraph 80.

43 – Familiapress, paragraph 24.

44 – Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 37.

45 – Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 79 and the case-law cited.