

Nexus v. Germany
*Service Restriction whenever a
Member State pleases?*

In this case the free movement of services is violated. The excuse the German authorities use to prohibit a service with an appeal to endangerment to its public policy is unjustified when the service is not contrary to the public policy the Member State upholds.

Outline Case

Nexus, a company established under German law exploits a gaming hall in the city of Bonn which is called Laserdrome. In Laserdrome you can play all kind of games, games in which you have to hit all kind of moving objects with a laser gun. Those games can be compared with clay-pigeon shooting, or the shooting games with air rifles you find all over the world at fairs and other sociable occasions.

A game the authorities have problems with is the game Gotcha. Gotcha is exactly the same game as the popular laser game we know in The Netherlands.

The object of this game is hitting sensory tags placed on the jacket worn by players. Gotcha is the subject of a franchising agreement concluded between Nexus and the UK company, Dynamite. The technology and equipment used for the game, which includes sub-machine-gun-type laser targeting devices and sensory tags, are supplied by Dynamite. Dynamite also carries out any necessary repairs on the equipment. The playing of Gotcha is not prohibited in The United Kingdom and is, just like in The Netherlands and other European countries, very popular.

However, in Bonn things are a little different. The Police authorities of Bonn have even such problems with the Gotcha game that they prohibited the game on pain of 10.000 euro fine each time the game is played. The question is if this action by the German authority can be justified under Community law.

Freedom of services

A franchising agreement has been concluded between Nexus and the UK company, Dynamite. The supply

of equipment used for the game which are supplied by Dynamite and the repair service on this equipment are services as meant in the EC Treaty. Article 50 EC Treaty describes services as follows:

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

Although Dynamite is providing for goods namely the laser guns and other equipment the main thing in this cases is the franchising agreement and the repairing which can be seen as services, because the providing for those goods is necessary for the installation of the game. You can find the ground for this reasoning in the Schindler case.¹ So this case has to be tested in the light of the principles of the freedom to provide services.

So this agreement is a service and therefore falls under the scope of a Article 49 EC Treaty. Article 49 EC Treaty reads as follows:

.....restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a state of Community other than that of the person for whom the services are intended.

¹ C- 275/92, Customs & Excise v. Schindler, [1994] ECR I-1039

Restrictions on the freedom to provide services do not only count for natural persons but also for companies having their registered office within the Community, Article 48 EC Treaty. The cross-border element is fulfilled in this case because Dynamite is a national (company) of the Member State, The United Kingdom and provides services in Germany a Member State of the European Community.

The prohibition of Gotcha by the German government obstructs Dynamite to providing its service and is therefore in violation of European Law, although this can be justified in a limited set of situations that is not so in this particular case.

The European Union is founded on the principles of freedom, democracy, and respect of human rights and the fundamental freedoms, and the rule of law, principles which are common to the Member States, Article 6 Treaty on the European Union. According to paragraph 2 of that Article The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, as general principles of Community law.

Article 55 jo. 46 EC Treaty makes it sometimes possible for states to maintain restrictions:

The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the ap-

plicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

The German government argues that the game has to be prohibited because it thinks it is a danger to public policy. I do not challenge the fact that a Member State has the freedom to prohibit a game if a game is a danger to public policy. It is true that in the case Schmidberger a Member State successfully invoked to its fundamental rights.

In Schmidberger a motorway between Germany and Italy (crossing Austria) was blocked during four days by a protest of an environmental group against heavy traffic, which was authorized by the State of Austria. This was justified according to the European Court because the fundamental right of freedom of expression of the environmental group outweighed out the fundamental freedom of the free movement of goods.²

What I debate is not the question if Germany can prohibit a game on grounds of public policy but the question if it can determine for itself in every case if a product or a service is a threat to its public policy. For instance if the Austrian government was always used to stop marches blocking roads but made an exception in the Schmidberger case then it would be

disproportional under Austria's own policy and the appeal on freedom of expression would not be justified.

I dare to claim that if the German government in all circumstances can determine whether a service or a product is a danger to public policy the meaning of the Articles of the EC Treaty to prohibit restrictions on import an export lose their reason for existence. Why? Because when a state has a complete discretion to ban products or services from its market on this base, it can do so on a random base and then there is no strict rule or reason to hold it back from that. This goes against the grain of all the principles of freedom of movement of goods, freedom of establishment and the freedom of services. This is just quite the same as if a Member State would say: "well it is proven that coffee is bad for health, so Max Havelaar coffee is not allowed because coffee is bad for health." While the Member State still allows all other brands to sell their coffee on the national market.

So the question that has to be answered here is if the statement that Gotcha is a danger to its public policy is valid. To answer this question we have to see if the game Gotcha fits in the German policy on games. If we do that the only possible outcome would be that prohibiting this game is disproportional to other games and is contrary to Germany's own policy.

The German authorities want to ban the game Gotcha from the market because the aim of the game is to play

² C- 112/00, Schmidberger v. Austria, [2003] ECR I-5659

killing each other. Take chess for instance the aim of the game is to kill the king and the army of your chess partner. Or take little kids they used to make their own gun toys and they pretended that they were shooting at each other. Nowadays there are not many kids making their own toy-guns playing soldiers anymore. Why is that? Have our ethics changed? No our ethics have not changed. Kids nowadays play shoot-em-up games on their computer against a computer opponent, against a friend or against someone on the other side of the world. And you can find thousands and thousands of games more where the aim of the game is similar. What we see here is that in our society it has always been accepted that people played killing each other. For German society this is no different.

To avoid any misunderstanding I am not defending that the realistic shoot-em-up computer games kids play are ethical I do not even defend that playing killing each other is ethical. But what I am saying here is that the argument that a laser game must be prohibited under German law because the aim of the game is to play killing each other is invalid. In Germany all kind of games playing killing each other are allowed, from the realistic shoot-em-up computer games to paintball. It think these two come much closer to actually killing someone than laser games. The computer games because all the blood, the screaming and the realistic images and the paintball game because you can sustain some

serious bruises (and those are not ink) from the bullets.

Conclusion

In this case the German authorities are infringing Community law. Even though at first sight their reference to Article 46 EC Treaty seems plausible, this restriction cannot be justified. When interpreting the meaning of the EC Treaty on the prohibition of restrictions on freedom to provide services within the Community in its best fit and its best light there has to be concluded that a Member State ought not to have the only say in the question if a restriction is necessary to avoid violation of public policy. If the Member State is granted the final say in the question if an import restriction is necessary according its public policy, this has to be proven by the Member State. For this case counts that the German authorities have to prove that the installation of the game Gotcha in the city of Bonn is a danger to public policy. If we take a closer look at this we see that this is not the case, Gotcha is not a danger to its public policy. German public policy points out that all kind of games with the same aim as Gotcha are allowed. This also means that prohibiting Gotcha is disproportional in respect to the other games.

In my opinion Article 27 paragraph 2 of Directive of the Citizens' free

movement rights should be applied analogous to this case.³

...The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general preventions shall not be accepted.

If the German authorities can determine for themselves if the game Gotcha is against their public policy the meaning of Article 46 EC Treaty loses its effect, because a Member State can then restrict a service in its country whenever it pleases with the excuse of endangerment to public.

For these reasons the sanctions taken by the German authorities have to be declared unjustified because they are contrary to Community law and disproportionate.

³Dir. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Literature and Case Law

Literature:

- P. Craig and G. De Búrca, EU Law – Text, Cases and Materials, Oxford University Press, Third Edition, 2002.

Case Law:

- C- 112/00, Schmidberger v. Austria, [2003] ECR I-5659
- C- 275/92, Customs & Excise v. Schindler, [1994] ECR I-1039

Directives:

- Dir. 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States