JUDGMENT OF THE COURT
21 September 1988 *

In Case 267/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vredegerecht (Local Court) for the Canton of Beveren (Belgium) for a preliminary ruling in the proceedings pending before that court between

Pascal Van Eycke, residing in Beveren,

and

ASPA NV, whose registered office is in Antwerp,

on the interpretation of Articles 59 to 66, 85, 86 and 95 of the EEC Treaty,

THE COURT

composed of: G. Bosco, President of Chamber, acting as President, J. C. Moitinho de Almeida (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. N. Kakouris, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Mr Van Eycke, by J. Cerfontaine, of the Antwerp Bar,

the Kingdom of Belgium, by G. Van Hecke and K. Lenaerts, lawyers, and by R. Hoebaer and R. Devyver, acting as Agents,

* Language of the Case: Dutch.

the Commission of the European Communities, by T. van Rijn, acting as Agent, assisted by R. Overhoff,

having regard to the Report for the Hearing and further to the hearing on 25 November 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 April 1988,

gives the following

Judgment

1 By a judgment of 28 October 1986, which was received at the Court on 30 October 1986, the Vredegerecht for the Canton of Beveren (Belgium) referred three questions to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 59 to 66, 85, 86 and 95 of the Treaty in order to enable it to assess the compatibility with Community law of national legislation restricting the benefit of a tax exemption on interest income to a certain category of savings deposits.

2 Those questions arose in a dispute between Mr Van Eycke, the plaintiff, and ASPA NV, a Belgian financial institution, concerning the rate of interest payable on a savings deposit which the plaintiff intended to make with ASPA. It is apparent from the documents before the Court that, after learning of the interest rates on savings deposits advertised by ASPA, the plaintiff went there in order to make a deposit on the terms advertised. When ASPA subsequently informed him that it was required, by virtue of a Royal Decree of 13 March 1986, to apply terms that were less favourable than those offered in its advertisement, the plaintiff brought an action before the national court for a declaration that ASPA could not rely on that royal decree in order to justify a change in its terms regarding savings deposits, on the ground that the decree was contrary to Article 85 *et seq.* of the EEC Treaty.

3 In order better to understand that royal decree, it should be viewed in its legal and economic context. In Belgium there has for many years been a tax exemption in respect of part of the income from savings deposits; that exemption was introduced for social reasons and in order to encourage saving, and is governed by the basic rules set out in Article 19 (7) of the Income Tax Code.

4 When, at the beginning of the 1980s, a growing number of savings establishments introduced a policy of high interest rates, the Belgian Government sought to limit the scope of the tax exemption and, by the Law of 28 December 1983, made it subject to a number of conditions to be laid down by royal decree.

5 The Royal Decree of 29 December 1983, adopted in implementation of that law, in substance made the grant of tax exemption subject to two conditions: the yield on savings accounts was to comprise, first, interest at a basic rate not exceeding the lowest average rate applicable on the market in question and, secondly, a fidelity or growth premium which could be fixed freely by each financial institution.

6 The Belgian monetary authorities subsequently came to the view that competition on fidelity or growth premiums was too vigorous and ran counter to the general trend towards lower interest rates which characterized other forms of saving. Since the maintenance of a high level of interest on savings deposits led, according to the authorities, to the maintenance of an equally high level of interest on lending, which adversely affected the country's economic performance and the public debt, the Belgian Banking Committee issued a recommendation in September 1985 to financial institutions designed to limit the yield on savings deposits. That led to the conclusion on 30 December 1985 of a self-regulatory agreement between the banks, private savings banks and public credit institutions setting the rate of interest and premiums at a maximum of 7%.

7 Since not all the financial institutions adhered to that agreement, the Minister for Finance decided to introduce a system in which the public authorities would themselves determine the conditions for the tax exemption.

8 That system was established by the abovementioned Royal Decree of 13 March 1986, which fixed the maximum level of both the basic rate of interest and the rate of the fidelity or growth premium.

9 It was in those circumstances that the national court referred to the Court for a preliminary ruling, on the basis of a joint submission by the two parties to the main proceedings, the following questions:

'(1) Is the legislative scheme established by the Royal Decree of 29 December 1983 and confirmed with slight amendments by the Royal Decree of 13 March 1986, governing the interest which may be paid by financial institutions on savings deposits, a scheme which continues in legislative form the previously existing agreements or concerted practices among banks restricting the interest payable on savings deposits and makes such interest rates compulsory:

(a) as a uniform percentage for all market participants, or

(b) as a limit to be observed by market participants in setting interest rates,

under penalty of complete loss of the fiscal benefits available to holders of ordinary savings accounts, compatible with the Community rules on competition as laid down in Article 85 *et seq.* of the EEC Treaty?

(2) In the event that the answer to Question 1 (a) is in the affirmative, is the imposition, along with a uniform basic interest rate payable by financial institutions, of a compulsory maximum limit for fidelity or growth premiums, and the exclusion of any other form of competition for obtaining deposits, under penalty of loss of the fiscal benefits referred to in Question 1 (Royal Decree of 13 March 1986, Article 1), compatible with the Community rules on competition laid down in Article 85 *et seq.* of the EEC Treaty?

(3) Does the granting of fiscal advantages, including complete exemption from withholding tax, for certain savings deposits denominated in Belgian francs held at certain financial institutions established in Belgium constitute discrimination against similar deposits taken by financial institutions not established in Belgium or denominated in other currencies or baskets of currencies, and is the granting of such fiscal advantages compatible with Articles 59 to 66 and Article 95 of the EEC Treaty?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant national legislation and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Jurisdiction

11 The Belgian Government contends in the first place that the reference for a preliminary ruling submitted by the national court is not admissible since it is apparent from a number of factors that the main dispute is purely fictitious. Secondly, it maintains that the interpretation of Community law sought in this case cannot in any way be relevant to the solution of the main dispute. In its view, the Royal Decree of 13 March 1986 in no way precludes ASPA from applying to the plaintiff its previous, more favourable terms regarding savings deposits and is therefore in no way at issue in the main proceedings.

12 It is not manifestly apparent from the facts set out in the order for reference that the dispute is in fact fictitious.

13 As for the Belgian Government's second argument, it need merely be pointed out that according to the consistent case-law of the Court, as confirmed by its judgment of 12 June 1986 in Joined Cases 98, 162 and 258/85 (*Bertini* v *Regione Lazio* [1986] ECR 1885, at p. 1893), it is for the national court to assess, having regard to the facts of the case, the need to obtain a preliminary ruling.

14 It is therefore necessary to consider the questions raised by the national court.

First and second questions

15 Those questions must be understood as seeking in substance to ascertain whether or not national legislation which restricts the benefit of an exemption from income tax in respect of interest on a certain category of savings deposits solely to deposits on which the interest rates and premiums paid do not exceed the maximum levels fixed by legislation is compatible with the obligations imposed on the Member States by Article 5 of the EEC Treaty in conjunction with Articles 3 (f) and 85.

16 It must be pointed out in that regard that Articles 85 and 86 of the Treaty *per se* are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that Articles 85 and 86 of the Treaty, in conjunction with Article 5, require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

17 According to the findings made in the order for reference, before the adoption of the legislation in question there were agreements between banks or concerted practices designed to restrict the yield on savings deposits. However, it is not apparent either from those findings or from the observations submitted to the Court that the legislation in question was intended to require or favour the adoption of new restrictive agreements or the implementation of new practices. In order to assess the true scope of that legislation in the light of the criteria laid down by the Court in its case-law it is therefore necessary merely to ascertain,

first, whether it may be regarded as intended to reinforce the effects of pre-existing agreements and, secondly, whether there are circumstances capable of depriving the legislation of its official character.

18 With regard to the first point it is sufficient to note that, as the Court has consistently held, legislation may be regarded as intended to reinforce the effects of pre-existing agreements, decisions or concerted practices only if it incorporates either wholly or in part the terms of agreements concluded between undertakings and requires or encourages compliance on the part of those undertakings. Although the prospect of losing the entire benefit of the preferential tax treatment for savings deposits constitutes a significant inducement to comply with the legislation in question, it is not apparent from any of the findings made by the national court in its judgment that such legislation merely confirmed both the method of restricting the yield on deposits and the level of maximum rates adopted under pre-existing agreements, decisions or practices. However, it is for the national court to enquire further into that point if it considers that there may be doubts in that regard.

19 With regard to the second point, it is apparent from the legislation in question that the authorities reserved to themselves the power to fix the maximum rates of interest on savings deposits and did not delegate that responsibility to any private trader. That legislation thus has an official character which cannot be called in question by the mere fact, emphasized by the plaintiff in the main proceedings, that according to the preamble to the Royal Decree of 13 March 1986 the decree was adopted following consultations with the representatives of associations of credit establishments.

20 The answer to the first and second questions must therefore be that national legislation which restricts the benefit of an exemption from income tax in respect of interest on a certain category of savings deposits solely to deposits on which the interest rates and premiums paid do not exceed the maximum levels fixed by legislation is not incompatible with the obligations imposed on the Member States by Article 5 of the EEC Treaty in conjunction with Articles 3 (f) and 85, subject to review by the national court in order to ascertain whether the legislation in question did not merely confirm both the method of restricting the yield on

deposits and the level of maximum interest rates adopted under pre-existing agreements, decisions or concerted practices.

Third question

21 In its third question the national court seeks in substance to ascertain whether or not national legislation which restricts the tax exemption described above solely to savings deposits denominated in national currency and held at financial institutions whose registered office is in the Member State concerned is incompatible with Articles 59 to 66 and 95 of the EEC Treaty.

22 With regard to the question whether such tax legislation which concerns the yield on a certain category of savings deposits held at banks is compatible with Article 59 *et seq.* of the EEC Treaty on the free movement of services, it must be pointed out that according to Article 61 (2) of the Treaty the liberalization of banking services connected with movements of capital is to be effected in step with the progressive liberalization of movement of capital.

23 The making of savings deposits forms part of the category of capital movements entitled 'opening and placing of funds on current or deposit accounts, repatriation or use of balances on current or deposit accounts with credit institutions' in List D of Annex I to the First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty (Official Journal, English Special Edition, 1959-62, p. 49) and List C of Annex I as replaced by Council Directive 86/566/EEC of 17 November 1986 amending the first directive (Official Journal 1986, L 332, p. 22). Those capital movements have not yet been liberalized.

24 In this case, therefore, the provisions of the EEC Treaty on the free movement of banking services with regard to capital movements cannot have been infringed.

25 Finally, on the question whether Article 95 of the EEC Treaty is applicable to the tax legislation in question it is sufficient to point out that the prohibition of discriminatory or protective internal taxation provided for by that article covers only the 'products' of other Member States. Savings deposits denominated in one currency or another fall, as stated earlier, within the scope of Articles 61 (2) and 67 of the EEC Treaty. They do not therefore constitute products within the meaning of Article 95 of the Treaty.

26 The answer to the third question must therefore be that national legislation which restricts the tax exemption described above solely to savings deposits denominated in national currency and held at financial institutions whose registered office is in the Member State concerned is not incompatible with Articles 59 to 66 and 95 of the EEC Treaty.

Costs

27 The costs incurred by the Kingdom of Belgium and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Vredegerecht for the Canton of Beveren, by judgment of 28 October 1986, hereby rules:

(1) National legislation which restricts the benefit of an exemption from income tax in respect of interest on a certain category of savings deposits solely to deposits on which the basic interest rates and premiums paid do not exceed the maximum levels fixed by legislation is not incompatible with the obligations imposed on the Member States by Article 5 of the EEC Treaty in conjunction with Articles 3 (f) and 85, subject to review by the national court in order to

ascertain whether the legislation in question did not merely confirm both the method of restricting the yield on deposits and the level of maximum interest rates adopted under pre-existing agreements, decisions or concerted practices.

(2) National legislation which restricts the tax exemption described above solely to savings deposits denominated in national currency and held at financial institutions whose registered office is in the Member State concerned is not incompatible with Articles 59 to 66 and 95 of the EEC Treaty.

Bosco Moitinho de Almeida Koopmans Everling

Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 21 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President