JUDGMENT OF THE COURT (Sixth Chamber)
21 September 2000 *

In Case C-222/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Kantongerecht te Groningen (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Hendrik van der Woude

and

Stichting Beatrixoord,

on the interpretation of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida (Rapporteur), President of the Chamber, R. Schintgen and V. Skouris, Judges,

* Language of the case: Dutch.

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Van der Woude, by P.E. Mazel, of the Leeuwarden Bar,

— Stichting Beatrixoord, by M. Blokzijl, of the Groningen Bar,

— the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Swedish Government, by A. Kruse, Departementsråd in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by P. Elias QC and J. Skilbeck, Barrister,

— the Commission of the European Communities, by W. Wils and H.J.M. van Vliet, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Van der Woude, represented by P.E. Mazel; of the Netherlands Government, represented by M.A. Fierstra; of the Swedish Government, represented by B. Hernquist, Deputy Director in the Legal Affairs Secretariat of the Ministry of Foreign Affairs, acting as Agent; of the United Kingdom Government, represented by R. Magrill, Treasury Solicitor's Department, acting as Agent, assisted by S. Moore, Barrister; and of the Commission, represented by W. Wils, at the hearing on 23 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

1 By order of 20 May 1998, received at the Court on 17 June 1998, the Kantongerecht te Groningen (Cantonal Court, Groningen) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).

2 The question was raised in proceedings between Mr Van der Woude, Head of Technical Services in the Stichting Beatrixoord ('Beatrixoord'), and Beatrixoord concerning the fact that Beatrixoord was not permitted to contribute to the premiums for employees' sickness insurance provided by an insurer other than the insurer managing the IZZ (Stichting Instituut Ziektekostenvoorziening Zieken-

huiswezen — Sickness Insurance Institute for the Hospital Sector) Medical Expenses Scheme established by the collective labour agreement for the hospital sector which governs Mr Van der Woude's contract.

National legislation

3 Under Article 1(1) of the Wet op de Collectieve Arbeidsovereenkomst ('the Collective Labour Agreements Law'), a collective labour agreement is defined as follows:

'"Collective labour agreement" means an agreement entered into by one or more employers, or one or more associations of employers of full legal capacity, and one or more associations of workers of full legal capacity which governs principally or exclusively the conditions of employment which must be respected in the context of employment contracts.'

4 The first paragraph of Article 12 of the Collective Labour Agreements Law provides:

'Any term entered into between an employer and an employee which contravenes a collective labour agreement binding both of them shall be void. The provisions of the collective labour agreement shall apply in place of the relevant term.'

5 Article 14 of the Collective Labour Agreements Law states:

'Apart from provisions which are not covered by the collective labour agreement, an employer bound by the agreement must, throughout the period during which the collective agreement is applicable, comply with the provisions of the agreement even in respect of employment contracts, within the meaning of the collective agreement, which he enters into with employees who are not bound by the collective labour agreement.'

6 Article 2(1) of the Wet op het Algemeen Verbindend en het Onverbindend Verklaren van Bepalingen van Collectieve Arbeidsovereenkomsten (Law on the General Binding or Non-binding Nature of Provisions of Collective Labour Agreements) provides:

'The Minister may, in respect of all or part of the national territory, declare the generally applicable binding nature of provisions of a collective labour agreement applying in all or part of the national territory to a majority — which he considers substantial — of persons working in a given sector. Except in those cases in respect of which the Minister provides for a derogation, those provisions shall be binding on all employers and all employees as regards contracts of employment which, taking into account the nature of the activity with which they deal, fall, or would fall, within the scope of the collective labour agreement, whether they were concluded before or after the entry into force of the declaration as to the binding nature of the provisions of the collective labour agreement.'

7 Article 3 of the same Law states:

'1. A term agreed between an employer and an employee which is contrary to provisions which have been declared binding shall be void: the provisions which have been declared binding shall apply in place of the relevant term.

...

3. If the employment contract does not include provisions relating to matters regulated by provisions which have been declared binding, the provisions declared binding shall apply.'

The Collective Labour Agreement for the Hospital Sector

8 Article 32 of the Collectieve Arbeidsovereenkomst voot het Ziekenhuiswezen (Collective Labour Agreement for the Hospital Sector, 'the Collective Labour Agreement'), which was last extended until 31 March 1998, provides:

'IZZ Medical Expenses Scheme:

1. Employees (or former employees) may be members of the IZZ Medical Scheme(s) covering health care.

The conditions relating to their membership and that of any associate member(s) shall be governed by the Rules on the IZZ Medical Expenses Scheme ("the Rules").

The Rules shall also govern the premium payable. Following consultation with the parties to this collective labour agreement, the Rules shall be laid down and may be amended by the board of management of the institute referred to in paragraph 2.

The amount of any contribution(s) to be paid by the employer towards the premium in respect of the medical expenses scheme(s) concerned shall be fixed by the parties to this collective labour agreement. Any employer contributions shall be applicable to part-time employees on a pro-rata basis in relation to their employment.

2. The Rules referred to in paragraph 1 shall be implemented by the Stichting Instituut Ziektekostenvoorziening Ziekenhuiswezen (IZZ — Sickness Insurance Institution for the Hospital Sector). The parties to this collective labour agreement shall be represented on the board of management of the IZZ.

The IZZ may arrange for its functions to be carried out, wholly or in part, by one or more non-profit-making medical expenses insurance organisations.

3. Following consultation with the parties to this collective labour agreement, the total premium payable per member in relation to the (former) employee's membership of the IZZ Medical Expenses Scheme shall be fixed by the IZZ and shall, save as may otherwise be provided by the Rules, be paid by the employer into the Medical Expenses Fund managed by the IZZ.'

9 Article II(G) of the Collective Labour Agreement states:

'Save in so far as may be otherwise provided, the employer may not depart from the provisions of this collective labour agreement or agree with the employee any conditions of employment which are not regulated by this collective labour agreement.'

10 Article 2(1A) of the Reglement Ziektekostenvoorziening IZZ (IZZ Rules on health care) provides:

'The following persons shall, on application, be admitted to membership of the basic indemnity scheme: an employee taking up employment with the employer shall be admitted from the date on which he takes up his post; an employee who has not been eligible to join the health care scheme until a later date, shall be admitted from that date.'

The dispute in the main proceedings

11 Mr Van der Woude is the Head of Technical Services at Beatrixoord which runs a rehabilitation centre. He is not a member of a trade union. His employment contract is governed by the Collective Labour Agreement.

12 Beatrixoord, in accordance with Article 32(1) of the Collective Labour Agreement, pays 50% of the contributions to the IZZ Medical Expenses Scheme on behalf of Mr Van der Woude.

13 The IZZ does not itself carry on insurance business but has, since 1977, been subcontracting the business to Onderlinge Waarborgmaatshappij (a mutual insurance company) Zorgverzekeraar VGZ ua ('VGZ') established in Nijmegen. A total of around 750 000 persons (260 000 employees and their families) are insured, of whom it is estimated that 40% are insured on a private basis.

14 In the main proceedings, Mr Van der Woude claims that Beatrixoord should be obliged to contribute to the premiums for his sickness insurance, irrespective of which insurer is covering his medical expenses. He wishes to become a member of another sickness insurance scheme, RZG, which offers more advantageous terms as regards both the services provided and the contributions payable. In particular, Mr Van der Woude explains that his monthly payment (including the contribution made by Beatrixoord) amounts to NLG 133 for basic insurance and NLG 33 for supplementary insurance and that the excess on the policy amounts to NLG 200 whereas, if he were insured with RZG, those payments would amount to NLG 128.50 and NLG 19.50 respectively and the excess would be NLG 150. Moreover, in the context of comprehensive dental treatment (six crowns costing NLG 800 each), RZG would cover the entire cost of the treatment, while under the current IZZ rules, Mr Van der Woude is entitled to a reimbursement of NLG 450 per crown. He adds that, in the case of the IZZ scheme, supplementary insurance may be taken out only after a medical examination.

15 It is evident from the order for reference that Beatrixoord may not depart from the terms of the Medical Expenses Scheme laid down in Article 32 of the Collective Labour Agreement by contributing to the insurance selected by Mr Van der Woude unless it is established that the provisions at issue in the main proceedings are void.

16 The answer to the question of whether the provisions of the Collective Labour Agreement at issue in the main proceedings are contrary to Articles 85 and 86 of the Treaty depends, in particular, upon whether IZZ, which does not itself carry on insurance business, can be described as an undertaking for the purposes of Articles 85 and 86.

17 In those circumstances, the Kantongerecht te Groningen decided to stay proceedings and refer to the Court for a preliminary ruling the following question:

'Are Article II(G) of the Collective Labour Agreement (which prohibits any departure from the terms of that agreement) and Article 32 thereof (which lays down the medical expenses rules), read in conjunction with each other, contrary to Articles 85 and 86 of the EC Treaty?'

The question submitted for a preliminary ruling

18 The national court is asking essentially whether the provisions of a collective labour agreement which relate to sickness insurance for employees covered by the agreement and under which employers' contributions are paid only in respect of insurance taken out with the insurer or insurers selected for the purposes of implementing that agreement are compatible with Articles 85 and 86 of the Treaty.

19 Despite being notified of the judgments in Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 and

Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121, the national court considers it necessary to maintain its reference on the grounds that, in the present case, operation of the IZZ Medical Expenses Scheme had been subcontracted to IZZ, which called upon the commercial insurer VGZ to carry on the insurance business in question.

20 Mr Van der Woude submitted at the hearing that in *Albany*, *Brentjens'* and *Drijvende Bokken* the Court had given an answer, in the main, to the question which has been referred. He nevertheless submitted that the exception to the application of Article 85 of the Treaty recognised in those cases did not apply to health care insurance. He argued that insurance premiums relating to health care, unlike pension contributions which form part of the direct remuneration for work, do not fall within the core subjects negotiated in the framework of collective labour agreements. In addition, he submits that the collective labour agreement has a direct influence on third parties, namely other providers of health care insurance, since it entails an obligation to become a member of VGZ.

21 The Netherlands Government, supported by the Swedish and United Kingdom Governments and the Commission, also referred to *Albany*, *Brentjens'* and *Drijvende Bokken* at the hearing, submitting that the agreement entered into in the present case between six associations of employers and 28 organisations representing employees evolved from dialogue between management and labour, was concluded in the form of a collective agreement and concerned employees' terms of employment. A collective labour agreement of that kind would therefore satisfy the criteria set out in the case-law mentioned above. It added that the fact that the insurance business was not carried on by management and labour and that IZZ subcontracted the business to VGZ did not affect the nature or purpose of the collective labour agreement at issue in the main proceedings.

22 It should be noted that, in *Albany*, *Brentjens'* and *Drijvende Bokken*, the Court held that agreements entered into in the framework of collective bargaining between employers and employees and intended to improve employment and

working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 85(1) of the Treaty.

23 It is therefore necessary to consider whether the nature and purpose of the agreement at issue in the main proceedings warrant its exclusion from the scope of Article 85(1) of the Treaty.

24 First, the agreement in point in the main proceedings was concluded in the form of a collective agreement and constitutes the result of collective bargaining between organisations representing employers and those representing employees.

25 Second, regarding its purpose, the agreement establishes in a given sector a health care insurance scheme which contributes to improving the working conditions of the employees, not only by ensuring that they have the necessary means to meet medical expenses but also by reducing the costs which, in the absence of a collective agreement, would have to be borne by the employees.

26 The fact that the insurance business in question was subcontracted cannot prevent the exception from the prohibition in Article 85 of the Treaty, which was established by *Albany*, *Brentjens'* and *Drijvende Bokken*, from applying in the case of a collective labour agreement such as that in point in the main proceedings. To accept such a limitation would constitute an unwarranted restriction on the freedom of both sides of industry who, when they enter into an agreement concerning a particular aspect of working conditions, must also be able to agree to the creation of a separate body for the purpose of implementing the agreement and this body must be able to have recourse to another insurer.

27 It must therefore be concluded that the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

28 As far as Article 86 of the Treaty is concerned, Mr Van der Woude has submitted that the relevant geographic market was the Netherlands and that the market for the product concerned was that of supplying and concluding private health care insurance for employees who were subject to the Collective Labour Agreement. He argues that Article 32 of the Collective Labour Agreement resulted in the creation of a sub-market since, as regards those employees subject to the agreement, ordinary health insurance could not be substituted for insurance provided by IZZ/VGZ. Those insurers therefore enjoyed a dominant position for the purposes of Article 86 of the Treaty and, since the employers paid 50% of the premium, IZZ/VGZ were able to act independently of their competitors.

29 Mr Van der Woude asserts, in addition, that IZZ/VGZ abused their dominant position by imposing unfair prices or other unfair trading conditions. He claims that, in spite of deriving advantages as regards costs from the contested body of provisions of the Collective Labour Agreement, IZZ/VGZ none the less offered less advantageous conditions than any of their potential competitors, as is apparent from the observations set out in paragraph 14 above. He also draws attention to Article 2(1A) of the IZZ's rules on health care, the consequence of which is that an employee who for personal reasons does not become a member, or ceases to be a member, of IZZ/VGZ may not join or rejoin the IZZ scheme, a provision which further strengthens the link between the assured and IZZ/VGZ.

30 In that regard, it is sufficient to note that it does not appear from either the papers provided by the national court or from the written and oral observations that the system laid down in the Collective Labour Agreement has induced the undertaking responsible for managing the insurance scheme at issue in the main

proceedings to abuse any dominant position it might have or that the services provided by the undertaking do not meet the needs of the employees concerned.

31 Questions concerning whether the term under which former members may not rejoin the IZZ scheme, or the fact that unfair pricing or trading conditions are imposed in the present case, constitute an abuse of a dominant position do not fall within the scope of the main proceedings, which concern only the compatibility with the competition rules of rules laid down in the Collective Labour Agreement as to which sickness insurance scheme employers may contribute to.

32 The answer to be given to the question referred for a ruling must therefore be that the provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty.

Costs

33 The costs incurred by the Netherlands, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Kantongerecht te Groningen by order of 20 May 1998, hereby rules:

The provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).

Moitinho de Almeida Schintgen Skouris

Delivered in open court in Luxembourg on 21 September 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber