

JUDGMENT OF THE COURT
17 November 1993 *

In Case C-2/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kammergericht Berlin for a preliminary ruling in the criminal proceedings pending before that court against

Wolf W. Meng,

on the interpretation of Article 3(f), the second paragraph of Article 5 and Article 85(1) of the Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauero,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Wolf Meng, by Bernd Grüber, Rechtsanwalt, Heidelberg,
- the German Government, by Ernst Röder, Ministerialrat, Federal Ministry of Economic Affairs, and Joachim Karl, Regierungsdirektor in the same Ministry, acting as Agents,

* Language of the case: German.

— the Commission of the European Communities, by Bernhard Jansen, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Meng, the German Government and the Commission at the hearing on 11 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1992,

having regard to the order of 9 December 1992 re-opening the procedure,

having regard to the replies given to the written questions put by the Court:

— for Mr Meng, by Bernd Grüber,

— for the Belgian Government, by Robert Hoebaer, Directeur d'Administration, Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— for the Danish Government, by Jorgen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— for the German Government, by Ernst Röder and Claus-Dieter Quassowski, acting as Agents,

— for the Greek Government, by Vassileios Kondolainos, Assistant Legal Adviser, State Legal Council, and Maria Bosdeki, representative of the State Legal Council, acting as Agents,

— for the Spanish Government, by Alberto Navarro González, Miguel Bravo-Ferrer Delgado and Gloria Calvo Díaz, State Attorneys in the Department for Community Matters, acting as Agents,

- for the French Government, by Edwige Belliard, Sous-Directeur du Droit Economique, Ministry of Foreign Affairs, and Catherine de Salins, Adviser in that Ministry, acting as Agents,
- for the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent, assisted by John Cook SC, and Jennifer Payne, B. L., acting as Agent,
- for the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs, Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,
- for the Netherlands Government, by A. Bos, Legal Adviser, Ministry of Foreign Affairs, acting as Agent,
- for the Portuguese Government, by Luis Inez Fernandes, Director of the Legal Department, Directorate General for the European Communities, Ministry of Foreign Affairs, and João Alvaro Sousa Fialho Lopes, Deputy-Director General, Directorate General for Competition and Prices, Ministry of Commerce, acting as Agents,
- for the United Kingdom, by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, and Stephen Richards and Nicholas Paines, Barristers,
- for the Commission of the European Communities, by Bernhard Jansen, acting as Agent,

after hearing the oral observations of Mr Meng, the German, Greek, Spanish, French, Irish and Italian Governments, the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the United Kingdom and the Commission at the hearing on 27 April 1993,

after hearing the Opinion of the Advocate General at the hearing on 14 July 1993,

gives the following

Judgment

1 By order of 26 November 1990, received at the Court on 3 January 1991, the Kammergericht (Higher Regional Court) Berlin referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 3(f), the second paragraph of Article 5 and Article 85(1) of the Treaty in order to determine whether State rules which had the effect of restricting competition between economic agents were compatible with those provisions.

2 That question was raised in proceedings brought by Mr Meng against a judgment of the Amtsgericht (Local Court) Tiergarten, Federal Republic of Germany, imposing on him a fine for infringement of the insurance regulations which prohibit the transfer of commission to clients.

3 It is apparent from the order for reference that Mr Meng is a professional financial adviser, providing advice in particular in relation to insurance policies. Between March 1987 and July 1988, in pursuit of that activity, when concluding contracts of insurance he transferred to his clients on six occasions the commission paid to him by the insurance company. Three of the policies were for health insurance and three for legal expenses insurance.

4 The transfer of commission is prohibited in the Federal Republic of Germany, as regards health insurance, by the Anordnung über das Verbot der Gewährung von Sondervergütungen und des Abschlusses von Begünstigungsverträgen in der Krankenversicherung (Order prohibiting the granting of special bonuses and the conclusion of preferential agreements in health insurance, hereinafter the 'Anordnung', published in *Deutscher Reichsanzeiger und Preussischer Staatsanzeiger* No 129 of 6 June 1934, p. 3) which was issued on 5 June 1934 by the Reichsaufsichtsamt für Privatversicherung (Private Insurance Supervision Office of the German Reich, hereinafter 'the Supervision Office'). Paragraph I of the Anordnung provides:

'Insurance companies and intermediaries acting in connection with the conclusion of insurance contracts shall not grant special advantages of any kind whatsoever to the policyholders.'

- 5 The same prohibition applies to indemnity insurance and to legal expenses insurance by virtue of the Verordnung über das Verbot von Sondervergütungen und Begünstigungsverträgen in der Schadenversicherung (Regulation prohibiting special bonuses and preferential agreements in indemnity insurance, published in *Bundesgesetzblatt I*, p. 1243, hereinafter the 'Verordnung'), adopted by the Bundesaufsichtsamt für das Versicherungswesen, the German insurance supervision office which took over the functions of the Reichsaufsichtsamt für Privatversicherung, also hereinafter 'the Supervision Office'. Paragraph 2 of the Verordnung provides:
- '(1) Insurance companies subject to federal control and persons acting as intermediaries for insurance contracts concluded with them providing indemnity insurance, accident insurance, credit insurance, suretyship insurance and legal expenses insurance shall not grant special advantages of any kind whatsoever to policyholders.
- (2) Any direct or indirect advantage granted in addition to the benefits resulting from the contract of insurance, in particular any transfer of commission, shall constitute a special advantage.'
- 6 The Anordnung and the Verordnung were adopted by the Supervision Office on the basis of the Gesetz über die Beaufsichtigung der Versicherungsunternehmen of 12 May 1901 (Law on the supervision of insurance companies, RGBl. p. 139). The third sentence of Paragraph 81(2) of that Law, in the codified version of 13 October 1983 (BGBl. I, p. 1261) provides that the Supervision Office
- 'may in general or for certain branches of insurance prohibit insurance companies and insurance intermediaries from granting special advantages in any form whatsoever'.
- 7 Considering that by transferring his commission to his clients Mr Meng had infringed the abovementioned provisions, the Amtsgericht Tiergarten fined him DM 1850. Mr Meng appealed against that judgment to the Kammergericht Berlin, contending that the regulations were contrary to Article 3(f), the second paragraph of Article 5 and Article 85(1) of the Treaty.

- 8 In those circumstances, the Kammergericht Berlin, taking the view that the outcome of the dispute depended on the interpretation of Community law, referred the following question to the Court of Justice for a preliminary ruling:

‘Are the rules in Part I of the Order of the Deutsches Reichsaufsichtsamt für Privatversicherung of 5 June 1934 prohibiting the granting of special bonuses and the conclusion of preferential agreements in health insurance (*Deutscher Reichsanzeiger und Preussischer Staatsanzeiger* No 129 of 6 June 1934) and Paragraph 1 of the Order of the *Bundesaufsichtsamt für das Versicherungswesen* of 17 August 1982 prohibiting special bonuses and preferential agreements in indemnity insurance (*Bundesgesetzblatt* I, p. 1243; *Veröffentlichungen des Bundesaufsichtsamtes für das Versicherungs-und Bausparwesen* — VerBAV — 1982, 456), under which self-employed insurance brokers are also prohibited from granting special bonuses by paying over commission fees, incompatible with Articles 3 (f), 5 and 85 (1) of the EEC Treaty and therefore unenforceable?’

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

- 10 It must be noted at the outset that it is not for the Court, in proceedings under Article 177 of the Treaty, to rule as to the compatibility of provisions of national law with those of Community law; however, the Court is competent to provide the national court with all information as to the interpretation of Community law to enable the national court to decide whether the provisions at issue are compatible with the Community provisions.

- 11 Accordingly, the question submitted by the Kammergericht Berlin must be construed as essentially seeking to determine whether Article 3(f), the second paragraph of Article 5 and Article 85(1) of the Treaty preclude State rules which prohibit insurance intermediaries from transferring to their clients all or part of the commission paid by insurance companies.

The question whether the rules are State rules

- 12 It must first be noted that the Supervision Office is an administrative authority, under the auspices of a Ministry (at present the Federal Ministry of Finance) and that, by law, it is responsible for supervising the activity of insurance companies. To that end, the Supervision Office is empowered in particular to adopt regulatory measures to prohibit conduct liable to prejudice the interests of consumers. It was on that basis that the Supervision Office adopted the contested measures in 1934 and 1982.
- 13 It can be inferred from the instruments governing the Supervision Office and the powers vested in it that those measures constitute State rules. It is therefore necessary to consider whether, as contended by Mr Meng, Article 85 in conjunction with Article 3(f) and the second paragraph of Article 5 of the Treaty preclude rules of that kind.

The interpretation of Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty

- 14 In interpreting Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty it should be noted that Article 85, read in isolation, relates only to the conduct of undertakings and does not cover measures adopted by Member States by legislation or regulations. However, the Court has consistently held that Article 85, read in conjunction with Article 5 of the Treaty, requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. By virtue of the same case-law, such is the case where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere (see Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769, paragraph 16).
- 15 It must first be observed in that regard that the German rules on insurance neither require nor favour the conclusion of any unlawful agreement, decision or concerted practice by insurance intermediaries, since the prohibition which they lay down is a self-contained one.

- 16 It must then be determined whether the rules have the effect of reinforcing an anti-competitive agreement.
- 17 It is common ground that the rules at issue were not preceded by any agreement in the sectors to which they relate, namely those of health insurance, indemnity insurance and legal expenses insurance.
- 18 However, the Commission has stated that certain undertakings had concluded an agreement intended to prohibit transfers of commission in the life assurance sector and that, by rendering that agreement applicable to other sectors, the rules reinforced its scope.
- 19 That view cannot be upheld. Rules applicable to a particular branch of insurance cannot be regarded as reinforcing the effects of a pre-existing agreement, decision or concerted practice unless they simply reproduce the elements of an agreement, decision or concerted practice between economic agents in that sector.
- 20 Finally, it must be observed that the rules themselves prohibit the grant of special advantages to policyholders and do not delegate to private traders responsibility for taking decisions affecting the economic sphere.
- 21 It follows that rules like those at issue in the main proceedings do not fall within the categories of State rules which, according to the case-law of the Court of Justice, undermine the effectiveness of Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty.
- 22 Accordingly, it must be stated in reply to the question submitted by the national court that Article 3(f), the second paragraph of Article 5 and Article 85 of the EEC Treaty do not, in the absence of any link with conduct on the part of undertakings of the kind referred to in Article 85(1) of the Treaty, preclude State rules which prohibit insurance intermediaries from transferring to their clients all or part of the commission paid by insurance companies.

Costs

23 The costs incurred by the Belgian, Danish, German, Greek, Spanish, French, Irish, Italian, Netherlands, Portuguese and United Kingdom Governments, and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since, for the parties to the main proceedings, these proceedings are a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Kammergericht Berlin by order of 26 November 1990, hereby rules:

Article 3(f), the second paragraph of Article 5 and Article 85 of the EEC Treaty do not, in the absence of any link with conduct on the part of undertakings of the kind referred to in Article 85(1) of the Treaty, preclude State rules which prohibit insurance intermediaries from transferring to their clients all or part of the commission paid by insurance companies.

Duc	Mancini	Moitinho de Almeida	Diez de Velasco
Kakouris	Joliet	Schockweiler	
Rodríguez Iglesias	Grévisse	Zuleeg	Kapteyn

Delivered in open court in Luxembourg on 17 November 1993.

J.-G. Giraud

O. Due

Registrar

President