

JUDGMENT OF THE COURT (Sixth Chamber)

4 May 1988 *

In Case 30/87

Reference to the Court under Article 177 of the EEC Treaty by the French Cour de Cassation, Paris, for a preliminary ruling in the proceedings pending before that court between

Corinne Bodson, residing in Charleville-Mézières (France),

and

Pompes funèbres des régions libérées SA, whose registered office is in Reims,

on the interpretation of Articles 37, 85, 86 and 90 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of: O. Due, President of Chamber, T. Koopmans, K. Bahlmann, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: J. L. Cruz Vilaça

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Mrs Bodson, the appellant in the main proceedings, by J. Rouvière, of the Paris Bar, in the written procedure, and by R. Brunois, of the Paris Bar, in the oral procedure,

Pompes funèbres des régions libérées SA, the respondent in the main proceedings, by J.-L. Devolve, of the Paris Bar,

* Language of the Case: French.

the Government of the French Republic, by G. Guillaume and C. Chavance, acting as Agents,

the Commission of the European Communities, by its Legal Adviser, L. Antunes, acting as Agent, and N. Coutrelis, of the Paris Bar,

having regard to the Report for the Hearing and further to the hearing on 9 December 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 February 1988,

gives the following

Judgment

- 1 By a judgment of 20 January 1987, which was received at the Court on 2 February 1987, the French Cour de cassation (Court of Cassation) referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 37, 85, 86 and 90 of the EEC Treaty, in order to assess the compatibility with those provisions of national rules on exclusive concessions of communal monopolies for certain funeral services.
- 2 Those questions arose in a dispute between Pompes funèbres des régions libérées SA (hereinafter referred to as 'PFRL'), a subsidiary of Pompes funèbres générales, which has since 1972 been given an exclusive concession by the town of Charleville-Mézières to provide the 'external services' for funerals, on the one hand, and Mrs Corinne Bodson, who had engaged in certain activities forming part of the 'external services' for funerals within the territory of that commune, on the other.
- 3 A French Law of 1904, whose main provisions at present form part of Article L 362-1 *et seq.* of the Code des communes (Code relating to the Communes), entrusted the 'external services' for funerals to the communes. Those services cover exclusively the carriage of the body after it has been placed in the coffin, the provision of hearses, coffins and external hangings of the house of the deceased,

conveyances for mourners, the equipment and staff needed for burial and exhumation and cremation. In particular, the 'external services' do not include either the 'internal services', which relate to the religious services, or the 'non-regulated services' which cover non-essential funeral services such as the supply of flowers and marblework.

- 4 It is apparent from the documents before the Court that 5 000 French communes, out of a total of some 36 000, with 25 million inhabitants, approximately 45% of the population of France, have granted to a private undertaking a concession to provide the 'external services'. Pompes funèbres générales and its subsidiaries hold the concession in 2 800 communes. They carry out a large proportion of burials in France. According to the information provided by the Commission, the parent company, Pompes funèbres générales, is itself a subsidiary of an undertaking which forms part of the Lyonnaise des Eaux group.

- 5 Mrs Bodson operates an undertaking business under a franchise from Mr Michel Leclerc, who has set up a network of such firms in France which provide their services at prices substantially lower than those normally charged in that sector, in particular by Pompes funèbres générales and its subsidiaries. When Mrs Bodson organized funerals within the territory of the town of Charleville-Mézières, the holder of the exclusive concession instituted proceedings for an injunction against her.

- 6 Mrs Bodson appealed to the Cour de cassation against the interim judgment of the Cour d'Appel, Reims, which prohibited Mrs Bodson from engaging in any activity relating to the 'external services' for funerals and prescribed a penalty in the event of any infringement. In the proceedings before the Cour de cassation, Mrs Bodson contended that the group comprising Pompes funèbres générales and its subsidiaries had abused its dominant position on the market. She referred to a notice issued by the French Commission on Competition stating that that group enjoyed a monopoly or a dominant position. She alleged that this monopoly or dominant position had arisen as a result of the fact that the Pompes funèbres générales group had been exclusively granted a large proportion, and in some regions of France almost all, of the communal concessions for the 'external services' for funerals and the abuse consisted, in particular, of the charging of excessive prices. She claimed that the applicability of Article 37 of the EEC Treaty could not be ruled out where there were a number of communal monopolies covering the national territory.

7 The Cour de cassation considered that it was necessary to ascertain whether the Treaty had to be interpreted as applying to situations of the kind described; it therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Is Article 37 of the EEC Treaty capable of applying to a number of communal monopolies granted to a single undertaking or to a single group of undertakings covering part of the national territory whose object is the provision of the “external services” for funerals as defined by Article L 362-1 *et seq.* of the Code des Communes set out above, which include the provision of services and the supply of goods?
 2. Is Article 90 of the EEC Treaty capable of being applied to an undertaking or to a group of undertakings to which a number of such monopolies have been granted in that field?
 3. If Article 90 of the EEC Treaty is not applicable, can Article 85 or Article 86 apply to that undertaking or group of undertakings? More specifically, is Article 85 applicable to contracts for such concessions concluded with the communes?
 4. Does it make any difference to the answers to the above questions if all the monopolies or the dominant position resulting therefrom in fact also relate to the provision of services or the supply of goods in connection with funerals which are outside the scope of the “external services” as defined by Article L 362-1 of the Code des communes?’
- 8 Reference is made to the Report for the Hearing for a fuller account of the relevant French legislation, the facts of the case and the background to the dispute, and for a summary of the written observations submitted to the Court, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.
- 9 The first question relates to the interpretation of the Treaty in the context of State monopolies, whilst the other three questions, which should be considered together, are concerned with the interpretation of the competition rules applicable to undertakings.

First question

- 10 With regard to the interpretation of Article 37 of the EEC Treaty, it must be borne in mind that, as the Court has consistently held (see in particular the judgment of 28 June 1983 in Case 271/81 *Société coopérative du Béarn v Mialocq* [1983] ECR 2057), it follows both from the place occupied by Article 37 in the chapter of the EEC Treaty on the elimination of quantitative restrictions and from the wording used in that provision that it refers to trade in goods and cannot relate to a monopoly over the provision of services. However, the possibility cannot be ruled out that a monopoly over the provision of services may have an indirect influence on trade in goods between Member States, in particular where the monopoly over the provision of services established by an undertaking or by a group of undertakings leads to discrimination against imported goods as opposed to products of domestic origin.
- 11 It must also be pointed out that Article 37 applies to State monopolies of a commercial character, an expression which covers, according to the second subparagraph of Article 37 (1), any body through which a Member State either directly or indirectly supervises, determines or appreciably influences trade between Member States, and which also applies to monopolies delegated by the State to others.
- 12 It is on the basis of those two considerations that Article 37 has to be interpreted in relation to the situation envisaged by the national court, namely where a number of communal monopolies are granted to undertakings belonging to the same group, covering a certain part of the national territory, and relating to the provision of services and also the supply of goods.
- 13 In that regard, it must be pointed out that Article 37 applies in particular to situations in which the national authorities are in a position to supervise, determine or even appreciably influence trade between Member States through a body established for that purpose or a monopoly delegated to others. That provision therefore covers a situation in which the monopoly in question is operated by an undertaking or group of undertakings, or by the territorial units of a State such as communes.
- 14 However, the situation described by the national court is not covered by either of those alternatives. The national rules entrust the provision of the 'external services'

for funerals to the communes, which are at liberty to grant private undertakings the concession to provide the service, to leave it entirely unregulated or to operate it themselves. The fact that the holders of concessions in a number of communes covering a large part of the national territory belong to a single group of undertakings and can thus influence patterns of trade is the result of the conduct of the undertakings in question and not of the national or municipal authorities.

- 15 It is apparent from those considerations that the situation envisaged by the national court must be dealt with in the light of the Treaty provisions applicable to undertakings, and in particular Articles 85, 86 and 90, rather than in the light of the rules relating to State monopolies in Article 37.

Second, third and fourth questions

- 16 It must be pointed out, in the first place, that the aim of Article 90 is to specify in particular the conditions for the application of the competition rules laid down by Articles 85 and 86 to public undertakings, to undertakings granted special or exclusive rights by the Member States and to undertakings entrusted with the operation of services in the general economic interest. Accordingly, it is necessary to start by examining the problems relating to the applicability of Articles 85 and 86.
- 17 With regard to Article 85, the national court asks, more specifically, in the second limb of its third question, whether that provision is applicable to contracts for concessions concluded in the field of funeral services between certain undertakings or a group of undertakings and communes.
- 18 As the Commission has rightly pointed out, Article 85 of the Treaty applies, according to its actual wording, to agreements 'between undertakings'. It does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service.

- 19 With regard to the applicability of Article 85 to relations between holders of concessions belonging to the same group of undertakings, it must be borne in mind that, as the Court has held (judgment of 31 October 1974 in Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147), that provision is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.
- 20 It is for the national court to ascertain whether such a situation exists in this case. The mere fact that holders of concessions belong to the same group of undertakings is not decisive in that regard. Account must be taken of the nature of the relationship between the undertakings belonging to that group. In this case, the nature of that relationship is not apparent either from the questions submitted for a preliminary ruling or from other information in the documents before the Court. In particular, it is not apparent that the undertakings pursue the same market strategy, which is determined by the parent company.
- 21 Any anti-competitive behaviour on the part of a group of undertakings holding concessions which constitute an economic unit as defined in the case-law of the Court must be considered in the light of Article 86 of the Treaty. The questions submitted for a preliminary ruling would appear to be based on that premise since the fourth question refers to 'all the monopolies or the dominant position resulting therefrom'. It is necessary, therefore, to examine the conditions in which Article 86 can be applied to a situation of that kind.
- 22 Article 86 prohibits abusive practices resulting from the exploitation by one or more undertakings of a dominant position within the common market or in a substantial part of it. However, that prohibition applies only in so far as those practices may affect trade between Member States.
- 23 According to the French Government, the latter condition is not fulfilled in a case such as this. The Commission shares that view, pointing out that it had received complaints concerning the prices charged by concession holders belonging to the Pompes funèbres générales group and that, after considering those complaints, it

came to the conclusion that the activities of the group could have only an imperceptible influence on transactions with other Member States. In that regard, the Commission took the view that the monopoly in the 'external services' for funerals does not involve the supply of any goods other than coffins and that a monopoly exists in only some 14% of communes in France, the Pompes Funèbres Générales group holding the concession in only two-thirds of those communes. However, the Commission points out that the same group also provides funeral services in other Member States, in particular the Netherlands, where it handles 14% of all burials, and in the United Kingdom and the Federal Republic of Germany.

- 24 In that regard, it must be borne in mind that, in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position, within the meaning of Article 86, account must be taken of the consequences for the effective competitive structure in the common market. In the case of services, those consequences may, in particular, as the Court pointed out in its judgment of 2 March 1983 in Case 7/82 *GVL v Commission* [1983] ECR 483, consist in the activities of an undertaking or group of undertakings being conducted in such a way that their effect is to partition the common market and thereby to restrict the freedom to provide services which constitutes one of the objectives of the Treaty.
- 25 Accordingly, it is for the national court to consider whether, in the case before it, the activities of the group of undertakings holding concessions, and the monopoly they enjoy over a large part of the territory of a Member State, affect the importation of goods from other Member States or the possibility for competing undertakings established in other Member States to provide services in the first-mentioned Member State.
- 26 The second condition laid down by Article 86 is that an undertaking must have a dominant position within the common market or in a substantial part of it. A dominant position of that kind is characterized, according to the case-law of the Court (see the judgment of 9 November 1983 in Case 322/81 *Michelin v Commission* [1983] ECR 3461), by a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the market by allowing it to behave to an appreciable extent independently of its competitors and its customers. It also follows from the case-law of the Court that the application of Article 86 is not precluded by the fact that the absence or restriction of competition is facilitated by laws or regulations.

27 In order to examine whether a dominant position of that kind exists in a case such as this, it is appropriate to determine the economic strength of the group of undertakings holding concessions on the relevant market, that is to say the market in funerals. As the concept of a dominant position relates to a factual situation, it is also necessary to take into consideration the position of the group of undertakings in question in the communes in which it does not hold the exclusive concession, in addition to the services provided and the goods supplied by the group apart from the 'external services', such as, for instance, the supply of flowers or marblework forming part of the 'non-regulated service'.

28 According to the information in the documents before the Court, the group of undertakings of which Pompes funèbres générales is the parent company holds the exclusive concession in less than 10% of communes in France. However, the population of those communes accounts for more than one-third of the total population of France. It is the size of the population, rather than the number of communes covered by the exclusive concessions granted to the group in question, which determines the number of burials and which must therefore be taken into consideration in order to ascertain whether a dominant position exists.

29 While the existence of such a dominant position is a question of factual assessment for the national court, it is appropriate for it to base its appraisal on the following criteria:

the size of the market share held by the group which is shielded from any competition at all as a result of the exclusive concession;

the influence of that monopolistic situation on the position of the group with regard to supplies of goods and services not covered by the exclusive concession;

the position of the group in communes which have not granted a concession to an undertaking for the 'external services' for funerals and the market share held by the group in other Member States;

the financial resources of the group as apparent, for instance, from the fact that the group belongs to a powerful conglomerate of undertakings or groups of undertakings.

- 30 The third condition laid down by Article 86 is the abuse of a dominant position. By way of illustration, indent (a) of the second paragraph of Article 86 refers to the imposition, whether directly or indirectly, of unfair prices. In this case, the complaints addressed to the Commission were concerned precisely with the imposition of unfair prices by the concession holders. In these proceedings, Mrs Bodson contended that Pompes funèbres générales and its subsidiaries charge excessive prices.
- 31 The French Government and PFRL have denied that the prices charged by the subsidiaries of Pompes funèbres générales are unfair. The documents before the Court do not contain any information enabling that problem to be resolved. Since over 30 000 communes in France have not granted to an undertaking the concession to provide 'external services' for funerals, but have left that service unregulated or operate it themselves, it must be possible to make a comparison between the prices charged by the group of undertakings which hold concessions and prices charged elsewhere. Such a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair.
- 32 The French Government and PFRL have also pointed out that concession holders are not in a position to 'impose' any price, since the prices to be charged are fixed by the contract specifications which form part of the conditions for the concession. That argument cannot be accepted. It is clear from the documents before the Court that the grant of the concession for the 'external services' for funerals is regarded in France as a contract concluded between the commune and the concession holder, which, moreover, corresponds to the view taken by the national court. It follows from that finding that the level of prices is indeed attributable to the undertaking, since the latter assumes full responsibility for the contracts which it has concluded.
- 33 In so far as the communes imposed a given level of prices on the concession holders, in the sense that they refrained from granting concessions for the 'external services' to undertakings if the latter did not agree to charge particularly high prices, the communes are covered by the situation referred to in Article 90 (1) of the Treaty. That provision governs the obligations of the Member States — which includes, in this context, the public authorities at the regional, provincial or communal level — towards undertakings 'to which [they] grant special or exclusive rights'. That situation covers precisely the grant of an exclusive concession for the 'external services' for funerals.

34 It follows from that finding that public authorities may not, in circumstances such as those of this case, either enact or maintain in force any 'measure' contrary to the rules of the Treaty, in particular the rules laid down by Articles 85 and 86. They may not therefore assist undertakings holding concessions to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession.

35 It follows from all the foregoing considerations that:

- (a) Article 85 of the Treaty does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service;
- (b) Article 86 of the Treaty applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company, in a situation in which those monopolies cover a certain part of the national territory and relate to the 'external services' for funerals,

where the activities of the group, and the monopoly enjoyed by the undertakings in question over a part of the territory of a Member State, affect the importation of goods from other Member States or the possibility for competing undertakings established in other Member States to provide services in the first-mentioned Member State,

where the group of undertakings occupies a dominant position characterized by a position of economic strength which enables it to hinder effective competition on the market in funerals, and

where that group of undertakings charges unfair prices, even though the level of those prices is fixed by the contract specifications which form part of the conditions of the contract for the concession;

- (c) Article 90 (1) of the Treaty must be interpreted as precluding public authorities from imposing on undertakings to which they have granted exclusive rights,

such as a monopoly in the provision of the 'external services' for funerals, any conditions as to price that are contrary to Articles 85 and 86.

Costs

- ³⁶ The costs incurred by the Government of the French Republic 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 proceedings 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 questions referred to it by the French Cour de cassation by judgment of 20 January 1987, hereby rules:

- (1) Article 85 of the EEC Treaty does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service.**

- (2) Article 86 of the EEC Treaty applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company, in a situation in which those monopolies cover a certain part of the national territory and relate to the 'external services' for funerals,**

where the activities of the group, and the monopoly enjoyed by the undertakings in question over a part of the territory of a Member State, affect the importation of goods from other Member States or the possibility for competing undertakings established in other Member States to provide services in the first-mentioned Member State,

where the group of undertakings occupies a dominant position characterized by a position of economic strength which enables it to hinder effective competition on the market in funerals, and

where that group of undertakings charges unfair prices, even though the level of those prices is fixed by the contract specifications which form part of the conditions of the contract for the concession.

- (3) Article 90 (1) of the EEC Treaty must be interpreted as precluding public authorities from imposing on undertakings to which they have granted exclusive rights, such as a monopoly in the provision of the 'external services' for funerals, any conditions as to price that are contrary to Articles 85 and 86.

Due

Koopmans

Bahlmann

Kakouris

O'Higgins

Delivered in open court in Luxembourg on 4 May 1988.

J.-G. Giraud

O. Due

Registrar

President of the Sixth Chamber