

JUDGMENT OF THE COURT (Fifth Chamber)

24 April 1997 \*

In Case C-39/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arrondissementsrechtbank te Amsterdam for a preliminary ruling in the proceedings pending before that court between

**Koninklijke Vereniging ter Bevordering van de Belangen des Boekhandels**

and

**Free Record Shop BV,**

**Free Record Shop Holding NV**

on the interpretation of Article 85 of the EC Treaty and of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as amended by Council Regulation No 59 of 3 July 1962 (OJ, English Special Edition 1959-1962, p. 249),

\* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida (President of the Chamber), L. Sevón, C. Gulmann, D. A. O. Edward (Rapporteur) and M. Wathelet, Judges,

Advocate General: C. O. Lenz,  
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Koninklijke Vereeniging ter Bevordering van de Belangen des Boekhandels, by Th. R. Bremer and M. van Empel, of the Amsterdam Bar,
  
- Free Record Shop BV and Free Record Shop Holding NV, by Th. J. Bousie, of the Amsterdam Bar,
  
- the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
  
- the French Government, by C. de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Special Adviser to the same directorate, acting as Agents,

— the Commission of the European Communities, by W. Wils, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Koninklijke Vereeniging ter Bevordering van de Belangen des Boekhandels, represented by Th. R. Bremer and M. van Empel; of Free Record Shop BV and Free Record Shop Holding NV, represented by Th. J. Bousie; of the Netherlands Government, represented by M. A. Fierstra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by W. Wils, at the hearing on 12 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

### **Judgment**

- 1 By judgment of 1 February 1996, received at the Court on 13 February 1996, the President of the Arrondissementsrechtbank (District Court) Amsterdam referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 85 of that Treaty and of Council

Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), as amended by Council Regulation No 59 of 3 July 1962 (OJ, English Special Edition 1959-1962, p. 249, hereinafter 'Regulation No 17').

- 2 The questions were raised in proceedings between Koninklijke Vereeniging ter Bevordering van de Belangen des Boekhandels (hereinafter 'KVB') and the companies Free Record Shop and Free Record Shop Holding (hereinafter 'Free Record Shop') concerning observance by Free Record Shop of the rules established by KVB for commercial trade in books in the Netherlands (Reglement voor het Handelsverkeer van Boeken in Nederland, hereinafter 'the KVB Rules').
- 3 Under the KVB Rules, KVB members are required to maintain, by means of a stipulation to be contained in the terms of supply which those members must apply, the system of imposed retail prices established by the KVB Rules, even with regard to non-members such as Free Record Shop.
- 4 It appears from the evidence before the national court that Free Record Shop put on sale at a discount, not authorized under the KVB Rules, of 25% about a dozen books which ought to have been sold at the prices imposed under those rules.
- 5 Free Record Shop contends that the imposition of retail prices for books, as provided for by the KVB Rules, is incompatible with Article 85 of the Treaty. KVB maintains that its rules enjoy provisional validity pursuant to notification of the previous version of its rules which KVB, then called VBBB, had notified to the

Commission on 30 October 1962. According to KVB, the amendments made to its rules after their notification merely relaxed the rules concerning sale prices imposed on retailers.

6 Since notification took place in 1962 and the Commission had not taken any decision since that time, the President of the Arrondissementsrechtbank te Amsterdam was uncertain as to the provisional validity of the KVB Rules as in force since 1 January 1993 and as to whether it was still possible for that provisional validity to be relied upon and, if so, until when. He therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. If an agreement between undertakings or a decision by an association of undertakings to regulate competition came into existence prior to the entry into force of Regulation No 17/62 and was notified to the Commission in good time pursuant to the provisions of that regulation, does that agreement or decision continue to benefit from the “provisional validity” which notified restrictive agreements enjoy according to the case-law of the Court of Justice if the Commission has not reacted to that notification in any way at all?
  
2. If so, does that “provisional validity” continue to exist for an unlimited period? If not, on what circumstances does the expiry of the “provisional validity” then depend?
  
3. Does the “provisional validity” apply solely to the agreement or decision, as referred to in Question 1, in the form in which it was notified, or does it also apply to agreements or decisions which have since come into existence, and which prolong the same restrictive agreements in an amended form, in so far

as they do not involve any extension or reinforcement of the restrictive agreements having regard to the functioning and realization of the Community market?’

### The first and second questions

- 7 By its first and second questions, which should be examined together, the Arrondissementsrechtbank asks in substance whether the provisional validity of a restrictive agreement concluded before entry into force of Regulation No 17 (hereinafter ‘an old agreement’), duly notified to the Commission before 1 November 1962, expires only when the Commission takes a positive or a negative decision regarding that agreement or whether, in the absence of such a decision, the provisional validity is limited in time.
- 8 The first sentence of Article 5(1) of Regulation No 17 provides that agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty in existence at the date of entry into force of the regulation and in respect of which the parties seek application of Article 85(3) were to be notified to the Commission before 1 November 1962.
- 9 According to the case-law of the Court, old agreements duly notified to the Commission before 1 November 1962 enjoy provisional validity as long as the Commission has not given a decision on them (see, to this effect, the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 48).

- 10 Such provisional validity is justified by the assurance of legal certainty in contractual matters and by the interests of the parties to the duly notified old agreement. As the Advocate General points out in paragraph 16 of his Opinion, the fact that a fairly lengthy period of time has elapsed since notification of the old agreement without the Commission having taken any position cannot have the effect of bringing the provisional validity of that agreement to an end.
  
- 11 It follows that the provisional validity of an old agreement duly notified to the Commission expires only when the Commission has taken a decision on that agreement.
  
- 12 The answer to be given to the first two questions must therefore be that the provisional validity of an old agreement notified to the Commission before 1 November 1962 expires only when the Commission has taken either a positive or a negative decision on that agreement.

### **The third question**

- 13 By its third question the national court asks in substance whether an old agreement duly notified to the Commission remains provisionally valid even when its terms were subsequently altered, if the amendments made do not extend or reinforce its effects.
  
- 14 It is settled case-law that agreements concluded after entry into force of Regulation No 17 that are merely a replica of a standard contract concluded previously and duly notified benefit from the same system of provisional validity as the latter contract (judgment in Case 1/70 *Rochas* [1970] ECR 515). The Court has also held

that, where the restrictive effect of agreements is mitigated by amendments, refusal to recognize provisional validity would be tantamount to penalizing the parties to the agreement when they have voluntarily limited its scope, which would be contrary to the spirit of competition law and would discourage parties to agreements from rendering them less restrictive (see, to this effect, the judgment in Case 106/79 *Eldi Records* [1980] ECR 1137, paragraph 16).

- 15 However, those considerations are valid only when the amendments made to old agreements entail a mitigation of their restrictive effects. Any reinforcement or extension, no matter how minimal, of the restrictions and, *a fortiori*, any introduction of new restrictions must, in principle, be regarded as having brought to an end the old agreement upon which provisional validity was conferred and as introducing a new agreement which does not enjoy provisional validity. No consideration of legal certainty justifies the parties to an old agreement being at liberty to reinforce its restrictive effects.
  
- 16 However, if the amendment of an old agreement were to have the effect of introducing a new restriction severable from the agreement (see, in this regard, the judgment in Case 56/65 *Société Technique Minière* [1966] ECR 235) and not affecting its essential structure and content, the provisional validity of the old agreement, as it stood prior to amendment, would not be affected; only the new restriction would not be covered by the provisional validity.
  
- 17 It is for the national court, in the light of the foregoing considerations, to determine the nature and consequences of the amendments made to the old agreement.



- 18 The reply to the third question must therefore be that a duly notified old agreement enjoys provisional validity only if its terms remain unchanged or, in the event of amendments, if these do not have the effect of reinforcing or extending its restrictive effects.

### Costs

- 19 The costs incurred by the Netherlands Government, the French Government and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the Arrondissementsrechtbank te Amsterdam by judgment of 1 February 1996, hereby rules:

1. The provisional validity of a restrictive agreement which was concluded before the entry into force of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, as amended

by Council Regulation No 59 of 3 July 1962 and which was notified to the Commission before 1 November 1962 expires only when the Commission has taken either a positive or a negative decision on that agreement.

2. A duly notified restrictive agreement concluded before the entry into force of Regulation No 17, as amended by Regulation No 59, enjoys provisional validity only if its terms remain unchanged or, in the event of amendments, if these do not have the effect of reinforcing or extending its restrictive effects.

Moitinho de Almeida

Sevón

Gulmann

Edward

Wathelet

Delivered in open court in Luxembourg on 24 April 1997.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber