

JUDGMENT OF THE COURT
3 July 1985 *

In Case 243/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de commerce [Commercial Court], Brussels, for a preliminary ruling in the action before that court between

SA Binon & Cie, Charleroi,

and

SA Agence et messageries de la presse, Anderlecht,

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

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

the plaintiff in the main proceedings by T. Delahaye, of the Brussels Bar,

the defendant in the main proceedings by M. Waelbroeck and M. van der Haegen, both of the Brussels Bar,

* Language of the Case: French.

the Government of the Federal Republic of Germany by M. Seidel, acting as Agent,

the Commission of the European Communities by B. van der Esch, acting as Agent, assisted by N. Coutrelis,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 February 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By judgment of 21 October 1983, which was received at the Court on 25 October 1983, the President of the Tribunal de commerce [Commercial Court], Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 85 and 86 of that Treaty.

2 The questions were raised in the course of proceedings between SA Binon & Cie [hereinafter referred to as 'Binon'], an undertaking which carries on a business in Charleroi selling books, stationery and educational toys, and SA Agence et messageries de la presse [hereinafter referred to as 'AMP']. The purpose of the action is to obtain an order directing AMP to cease refusing to sell or deliver to Binon the newspapers and periodicals, both Belgian and foreign, which it distributes in Belgium.

3 Originally Binon held a franchise from Club SA, which runs a chain of shops under that name. Since 29 January 1982 Binon has carried on its business under its own name without a franchise. From 8 March 1983 Binon requested AMP to supply it with the newspapers, magazines and publications for whose distribution it is responsible. Since AMP refused to supply it, Binon applied directly to various publishers but without success.

- 4 The judgment of the Tribunal de commerce states that, with the exception of newspapers and periodicals distributed on the basis of subscriptions, AMP is responsible, either itself or through its subsidiaries, for the distribution to retailers of a large proportion — close to 70% — of Belgian newspapers and periodicals and virtually all newspapers and periodicals published abroad. The full significance of this may be seen from the fact that, in the first place, AMP and the newspaper and periodical publishers established a selective distribution system in 1976 whereby every retail outlet was subject to the approval of a regional consultative committee and, in the second place, AMP was a member of a group of undertakings some of which occupied an important position in the field of the distribution of newspapers and periodicals.
- 5 With regard to the selective distribution system the national court states that originally, pursuant to the agreement concluded in 1976, any person wishing to commence business selling newspapers and periodicals had to submit an application for approval to the regional consultative committee, whose opinion was followed by the majority of publishers; anyone failing to submit such an application was refused all supplies by the publishers. Nevertheless, two judgments delivered in 1982 declared that agreement to be incompatible with Belgian legislation and Articles 85 and 86 of the EEC Treaty. In addition, on 10 May 1983 the Conseil du contentieux économique [Council for Economic Disputes] issued, pursuant to the Belgian Law on protection against abuse of economic power, an opinion in which it stated that AMP and the deliberating members of the consultative committees wielded economic power over the retail market in newspapers and periodicals and their distribution and had abused that power. Since that time the distribution system has been amended by an agreement concluded in 1983 by AMP and the publishers so as to abolish the system of collective approval, AMP having drawn up a set of rules which the publishers decided individually whether to accept or reject. According to Article VI (3) (2) of those rules AMP delivers an opinion on every application for the opening of a new retail outlet, which is notified to Belgian publishers; those publishers are regarded as following that opinion unless they inform AMP within eight days of a decision to the contrary by means of a special form.
- 6 In addition, the national court found that AMP had a majority holding in AMP Transports SA and a 9.35% holding in Lecture générale SA, a retailer of newspapers and periodicals. Those holdings must, according to the national court, be considered in the light of the fact that a company incorporated under French law, Hachette, which is a major publishing house in Paris, has a holding of 48.84% in AMP and one of 24.55% in Lecture générale SA.

7 The national court concludes from the aforementioned findings that AMP controls the approval of distribution outlets and has, at the same time, together with Hachette, a very substantial interest in the business of Lecture générale SA. For that reason the very strict rules on the opening of outlets, involving minimum geographical criteria, as provided for by AMP's rules for the distribution of newspapers and periodicals, were not applied in the centre of Charleroi to the business of various outlets belonging to Lecture générale SA, but those rules and criteria were relied upon as justification for the refusal to supply Binon.

8 The national court considered it necessary in those circumstances to refer the following questions to the Court for a preliminary ruling:

(1) Is it compatible with Articles 85 and 86 of the Treaty establishing the EEC for a group of undertakings or a number of undertakings whose conduct is identical and which constitute an important part of the relevant market (in this case, the market in daily and weekly newspapers and periodicals in Belgium) to maintain a practice whereby, in the absence of express intervention or action on their part, a specialized undertaking is entrusted either impliedly or expressly with the task of selectively regulating the distribution of their products by requiring retailers wishing to sell those products to submit an application for approval and by deciding whether to grant that application by reference to both qualitative and quantitative criteria, namely a criterion based on the distance from one sales outlet to another and a criterion requiring a minimum number of inhabitants per sales outlet, thus limiting competition within the relevant market?

(2) Is it compatible with Articles 85 and 86 of the Treaty establishing the EEC that in Belgium the distribution of foreign newspapers and periodicals is entrusted to a single undertaking which is in such a position as to be responsible for the distribution of more than 50% of foreign publications in Belgium and that the contracts which that undertaking requires both newspaper publishers and retailers to sign are drawn up so as to enable it to demand rescission of the contract or to refuse distribution of the publications in question if the publisher under contract supplies certain non-approved retailers directly, or to withdraw approval from retailers who re-assign or resell or effect any sale other than a retail sale or any hire or loan?

- (3) Is it compatible with Articles 85 and 86 of the Treaty establishing the EEC that the distributor in question reserves the right to fix prices and compels retailers to respect the prices laid down?
- (4) Is it compatible with Articles 85 and 86 of the Treaty establishing the EEC that the newspaper distributor in question is a Belgian company in which an important share is held by a finance group governed by foreign law which itself controls various undertakings publishing daily newspapers and periodicals in France, while that finance group and the Belgian distributor jointly hold shares in a Belgian company having as its purpose the retail distribution of newspapers and periodicals in Belgium, it being established that the distributor applies less strict criteria for approval to that retailer than to others?
- 9 It follows from the second question that the distribution system referred to by the judgment requesting a preliminary ruling from the Court applies to the distribution of foreign newspapers and periodicals in Belgium. According to the grounds of the judgment virtually the whole of the distribution of foreign newspapers in Belgium is covered by that system. Those facts are sufficient for the system to be regarded as capable of affecting trade between Member States. It is therefore not necessary to examine that particular question when replying to the questions which relate in general terms to the application of Articles 85 and 86 of the EEC Treaty.
- 10 The first and second questions relate, with regard to newspapers and periodicals published in Belgium and with regard to those published abroad, to the system governing their distribution in Belgium as organized by a specialized distribution agency. The national court wishes to know how the compatibility of such a system with Articles 85 and 86 is to be assessed with regard to three different factors:
- (a) The practice of the publishers;
- (b) The operations of the distribution agency;
- (c) The selective distribution system established by that agency in the retail trade.

The third question singles out one specific aspect of that system, namely compliance with fixed prices, whilst the fourth question relates more particularly to the possible abuse by the distribution agency of its dominant position in the market or of the selective distribution system.

(a) *The practice of the publishers*

- 11 The judgment of the Tribunal de commerce describes the practice of the publishers, especially those established in Belgium, as consisting of the distribution of their products in Belgium through a distribution agency and as involving a refusal to sell them direct to retailers. Moreover, according to that judgment, the publishers dealt in the same way with every application for approval by a retail trader.
- 12 AMP contends that the mere fact that the publishers, or some of them, entrust the distribution of their products to a specialized agency in order to organize such distribution according to certain common criteria does not constitute a concerted practice within the meaning of Article 85. According to the case-law of the Court, parallel conduct resulting from intelligent adaptation by each trader to the conduct of his competitors does not amount to an unlawful concerted practice. In this case the parallel conduct arises from a legitimate common desire to reduce distribution costs and in particular the costs incurred in taking back unsold copies.
- 13 In Binon's opinion Belgian publishers are forced to act in concert in view of the monopoly held by AMP, together with Hachette and the other undertakings associated with them, on the market in the distribution of newspapers and periodicals.
- 14 The Commission takes the view that parallel conduct by undertakings, consisting of the use of the same intermediary to supply retail traders is capable of constituting a concerted practice within the meaning of Article 85. In this case the procedure for approving new outlets as provided for by AMP's rules constitutes the framework for coordinating the conduct of publishers by means of that agency.
- 15 It should be observed that the first problem which arises in this respect is whether parallel conduct on the part of different publishers *vis-à-vis* the approval of retail

outlets is to be regarded as a 'concerted practice' within the meaning of Article 85 of the EEC Treaty where, as in this case, the parallel conduct occurs within a contractual framework. It is clear from the documents before the Court that at the present time the publishers' conduct forms part of the implementation of a set of contacts, namely the individual exclusive agreements made between the publishers and the distribution agency and those made between the latter and retail sellers.

16 This case of parallel conduct within a contractual framework arises in particular where, as in this instance, the publishers' identical response to retailers' applications for approval was made initially, pursuant to an agreement, on the basis of the opinion of the consultative committees, a practice which the Belgian courts have held to be contrary to Article 85, and where, after the termination of that agreement and its replacement by a new one, publishers contrived to engage in the same parallel conduct by following the opinion of a distribution agency instead of that of a consultative committee. In such case the new agreement, like the former agreement, has the effect of restricting competition.

17 Moreover, Article 85 would also be applicable if parallel conduct on the part of publishers were continued after the termination of the former agreement and in the absence of its replacement by a new agreement. As the Court emphasized in its judgments of 15 June 1976 in Cases 51, 86 and 96/75 (*EMI Records Limited v CBS United Kingdom Limited*, *CBS Grammafón A/S* and *CBS Schallplatten GmbH* respectively, [1976] ECR 811, 871 and 913), with regard to agreements which are no longer in force, it is sufficient, for Article 85 to be applicable, that they continue to produce their effects after they have formally ceased to be in force. The system of competition rules established by Article 85 *et seq.* of the EEC Treaty is concerned with the economic effects of agreements or of any comparable form of concerted practice or coordination rather than with their legal form.

18 The answer to the first part of the first two questions must therefore be that Article 85 (1) of the EEC Treaty must be interpreted as applying to a set of agreements between an agency which specializes in the distribution of newspapers and periodicals in one Member State, the majority of the publishers of newspapers and periodicals who are established in that State and a number of publishers established in other Member States, if the effect of that set of agreements is that in practice the approval of retail sales outlets is a matter for that agency or a body set up by it within the framework of the said agreements.

(b) *The operations of the distribution agency*

- 19 The second part of the first two questions concerns the position of the distribution agency in organizing retail sales in the interests of the publishers and in a selective manner whilst itself forming part of a group of undertakings involved in the retail trade. The national court wishes to know in particular the circumstances in which such an agency is to be regarded as occupying a dominant position on the market within the meaning of Article 86 of the EEC Treaty.
- 20 A preliminary point was raised by the AMP. It considers that the activities pursued by it in organizing the retail sale of newspapers and periodicals in the interests of the publishers cannot be subject to the prohibitions contained in Articles 85 and 86. It says that in its capacity as distributor of those products it is acting as the publishers' agent in undertaking the sale of newspapers and periodicals on their behalf. The Court's case-law and the Commission's practice have, according to AMP, recognized that an agent must be regarded as an auxiliary organ of the principal undertaking; its activities are therefore outside the scope of the prohibitions laid down in Articles 85 and 86.
- 21 In the context of the preliminary ruling procedure it is not for the Court of Justice but for the national court to judge the nature of the contractual relation between the publishers and the distribution agency. In this case the questions referred to the Court seem to relate to a situation where the relationship between the publishers and the agency appears to be closer to a relationship binding the publishers to an independent distributor. It is on that basis that the Court will deal with this case.
- 22 It is apparent from the grounds of the judgment of the national court that the question of the application of Article 86 of the distribution agency has two distinct elements: first, the dominant position occupied by AMP as the sole intermediary between publishers and retailers for the distribution of the majority of Belgian publications and all foreign publications; secondly, the fact that AMP itself operates on the market in the retail sale of those products through its holding, in conjunction with those of other members of the Hachette group, in Lecture générale SA.
- 23 On the latter point it should be noted that 190 out of a total of approximately 5 500 retail outlets in Belgium belong to Lecture générale SA. An undertaking in such a position cannot be regarded as occupying a dominant position on the retail market.

- 24 With regard to the first point, which concerns AMP's dominant position in its capacity as intermediary, AMP disputed the information given in the judgment making the reference for a preliminary ruling and maintained that its share of the market in the delivery of newspapers and periodicals to retailers did not comprise a very large part and certainly not virtually the whole of that market. In that connection, it quoted figures which differed considerably from those referred to by the national court. However, it is not for the Court of Justice to verify the accuracy of findings of fact contained in a judgment making a reference to it for a preliminary ruling.
- 25 It should next be noted that for the national court the question whether the distribution agency has a dominant position is a matter of importance for the purposes of determining whether that agency has abused such a position by controlling access to the distribution network for periodicals in an arbitrary manner. Any such abuse or arbitrary conduct relates to access to the selective distribution system established by AMP. In those circumstances it is preferable to consider the question of any abuse in the context of an examination of the compatibility of the selective distribution system with the provisions of Article 85. Accordingly, it is not necessary to examine the same conduct from the point of view of an infringement of Article 86.
- 26 It follows from the foregoing that it is not necessary to reply to the second part of the first and second questions.

(c) *The selective distribution system*

- 27 According to AMP the specific character of the market in the distribution of newspapers and periodicals requires a stable and balanced distribution network with an adequate geographical spread. In support of its contention it relies, in particular, on three facts. First, the period during which it is possible to sell newspapers and periodicals varies from one day — or even a few hours in the case of daily newspapers of which several editions are produced each day — to one month at the most; for that reason publishers find themselves obliged to take back unsold copies, which gives rise to considerable expense. Secondly, there is very little elasticity in the demand for newspapers and periodicals sold in shops, especially in the case of foreign newspapers. Finally, the social and cultural role of the press justifies the maintenance of a specialized distribution network which allows a representative selection of all publications to be made available to the reader.

28 Binon contends that the establishment of the selective distribution system in Belgium led to a complete absence of competition since retailers became part of a system — AMP's system — which operated on the basis of an organizational plan of the administrative type, without competition between distributors.

29 The Commission refers to the Court's decisions concerning the permissibility of selective distribution systems from the point of view of Article 85. In order to avoid the prohibition laid down in Article 85 (1) such a system must be based on legitimate needs such as the maintenance of a specialized trade capable of providing specific services connected with the delivery of certain products. In addition, access to such a system should be based on objective criteria of a qualitative nature because the use of quantitative criteria is, by definition, to be regarded as a restriction on competition within the meaning of Article 85; the permissibility of quantitative criteria may only be taken into account in the context of a request for exemption under Article 85 (3) in respect of which the Commission alone is competent.

30 In that connection it should be emphasized in the first place that, in this case, the agreement concluded between the distribution agency and retailers has not been notified to the Commission, as is clear from the information produced by the Commission and by AMP. In such circumstances it is not necessary to consider whether Article 85 (3) may possibly apply to an agreement of this type.

31 It must be noted that according to the Court's decisions and in particular its judgment of 25 October 1977 in Case 26/76 (*Metro SB-Grossmärkte GmbH and Co. KG v Commission*, [1977] ECR 1875) selective distribution systems constitute an aspect of competition which accords with Article 85 (1), provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises in connection with the requirements for the distribution of the product and that such criteria are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion.

32 Such a system may be established for the distribution of newspapers and periodicals, without infringing the prohibition contained in Article 85 (1), given the special nature of those products as regards their distribution. As AMP rightly pointed out, newspapers and periodicals can, as a general rule, only be sold by retailers during an extremely limited period of time whereas the public expects each distributor to be able to offer a representative selection of press publications,

in particular those of the national press. For their part, publishers undertake to take back unsold copies and this gives rise to a continuous exchange of those products between publishers and distributors.

33 Consequently, the permissibility of a selective distribution system in this field from the point of view of Article 85 (1) depends in particular on the criteria governing the choice of distributors. Those criteria must be objective and of a qualitative nature. The limitation of the number of retail outlets, for example by reference to a minimum number of inhabitants in the vicinity of an outlet, does not qualify as such a criterion.

34 It must be remembered that the application of a criterion of a quantitative nature causes a selective distribution system to infringe the prohibition contained in Article 85 (1). Only the Commission has the power to examine, in the context of an application for exemption under Article 85 (3), whether such a criterion may be justified with regard to the requirements laid down by that provision.

35 The answer to the third part of the first two questions must therefore be that a selective distribution system for newspapers and periodicals which affects trade between Member States is prohibited by Article 85 (1) of the Treaty if re-sellers are chosen on the basis of quantitative criteria. However, the Commission may, within the framework of an application for exemption under Article 85 (3), examine whether, in a particular case, criteria of that kind may be justified.

(d) *The application of the distribution system in practice*

36 The fourth question, which it is convenient to consider next, raises the problem whether the application by a distribution agency, which forms part of a group of undertakings, of criteria of approval which are less strict with regard to distributors belonging to the same group in comparison with other retailers, within the framework of a selective distribution system which is, in principle, compatible with Article 85, constitutes conduct which renders the system incompatible with that provision.

37 It is clear from the foregoing considerations and, moreover, from a consistent line of decisions of the Court, that a selective distribution system cannot be regarded as compatible with Article 85 (1) unless the criteria governing the choice of re-sellers are objective and uniform and unless they are applied in a non-discriminatory manner. To apply criteria in a less strict manner to undertakings belonging to the same group of undertakings as the distribution agency cannot be regarded as non-discriminatory.

38 Consequently, the answer to the fourth question must be that a selective distribution system for newspapers and periodicals which affects trade between Member States is prohibited by Article 85 (1) if the criteria determining the choice of resellers are applied less strictly in relation to undertakings than in relation to other retailers.

(e) *The fixed prices*

39 Finally, the third question is concerned with the problem whether the fact that, within the framework of a selective distribution system of newspapers and periodicals, fixed prices must be observed renders the system incompatible with the prohibition laid down in Article 85 of the EEC Treaty.

40 AMP contends in that regard that the prices of newspapers and periodicals are fixed by the publishers and not, as the national court seems to think, by the distribution agency. Observance by retailers of the prices fixed by publishers arises from the aforementioned special characteristics of the distribution of newspapers and periodicals.

41 The Government of the Federal Republic of Germany, which took part in the proceedings solely in order to submit observations with regard to the third question, considers that the freedom of the press, as a fundamental right protected by the constitutional law of the Member States and by the Court's case-law, entails the freedom to contribute to the formation of public opinion. For that reason newspapers and periodicals as well as their distribution have special characteristics. The nature of newspapers and periodicals requires an extremely rapid system for their distribution in view of the very limited period during which they can be sold before they are out of date; at the end of that period, the length of which varies according to the specific publication in question, newspapers and periodicals have practically no value. To those factors must be added the heterogeneity of newspapers and periodicals and the lack of elasticity in demand since each newspaper or periodical has more or less its own body of customers.

42 The German Government concludes that, from the point of view of competition, the position of the market in newspapers and periodicals is so special that it is not possible to apply to it without modification principles which have been developed in completely different contexts. If the possibility of fixing prices for newspapers and periodicals is not accepted any effective distribution system for such products would be incompatible with the rules on competition and the effect on the

diversity and freedom of the press would be disastrous. From that point of view it is not unimportant to note that systems of fixed prices in relation to the distribution of newspapers and periodicals are accepted under the legislation of most Member States or are operated without encountering any difficulties.

- 43 In the Commission's opinion any price-fixing agreement constitutes, of itself, a restriction on competition and is, as such, prohibited by Article 85 (1). The Commission does not deny that newspapers and periodicals and the way they are distributed have special characteristics but considers that these cannot lead to an exclusion of such products and their distribution from the scope of Article 85 (1). On the contrary, those characteristics should be put forward by the undertakings relying upon them in the context of an application for exemption under Article 85 (3).
- 44 It should be observed in the first place that provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article 85 (1) which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.
- 45 In those circumstances, where an agreement which establishes a selective distribution system and which affects trade between Member States includes such a provision, an exemption from the prohibition contained in Article 85 (1) of the EEC Treaty may only be granted by means of a decision adopted by the Commission in the conditions laid down by Article 85 (3).
- 46 If, in so far as the distribution of newspapers and periodicals is concerned, the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission must take account of those factors when examining an agreement for the purposes of Article 85 (3).
- 47 Consequently, the answer to the third question must be that the requirement, in the framework of a selective distribution system for newspapers and periodicals which affects trade between Member States, that fixed prices must be respected renders that system incompatible with Article 85 (1) of the Treaty. However, the Commission may, in considering an application for exemption under Article 85 (3), examine whether, in a particular case, such an element of a distribution system may be justified.

Costs

48 The costs incurred by the Government of the Federal Republic of Germany and the Commission, which have submitted observations to the Court are not recoverable. As the 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,

in answer to the questions referred to it by the President of the Tribunal de commerce, Brussels, by judgment of 21 October 1983, hereby rules:

- (1) Article 85 (1) of the EEC Treaty must be interpreted as applying to a set of agreements between an agency which specializes in the distribution of newspapers and periodicals in one Member State, the majority of the publishers of newspapers and periodicals who are established in that State and a number of publishers established in other Member States whose products are distributed in the aforesaid Member State, if the effect of that set of agreements is that in practice the approval of retail sales outlets is a matter for that agency or a body set up by it within the framework of the said agreements.
- (2) A selective distribution system for newspapers and periodicals which affects trade between Member States is prohibited by Article 85 (1) of the Treaty if re-sellers are chosen on the basis of quantitative criteria. However, the Commission may, within the framework of an application for exemption under Article 85 (3), examine whether, in a particular case, criteria of that kind may be justified.
- (3) A system of that kind is prohibited by Article 85 (1) if the criteria determining the choice of re-sellers are applied less strictly in relation to undertakings which are part of a particular group of undertakings than in relation to other retailers.

- (4) The requirement, in the framework of a selective distribution system for newspapers and periodicals which affects trade between Member States, that fixed prices must be respected renders that system incompatible with Article 85 (1) of the Treaty. However, the Commission may, in considering an application for exemption under Article 85 (3), examine whether, in a particular case, such an element of a distribution system may be justified.

Mackenzie Stuart

Bosco

Due

Kakouris

Pescatore

Koopmans

Everling

Bahlmann

Galmot

Delivered in open court in Luxembourg on 3 July 1985.

P. Heim

A. J. Mackenzie Stuart

Registrar

President