

JUDGMENT OF THE COURT (Fifth Chamber)
13 July 1993 *

In Case C-42/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State (Belgium) for a preliminary ruling in the proceedings pending before that court between

Adrianus Thijssen

and

Controledienst voor de Verzekeringen,

on the interpretation of the first paragraph of Article 55 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, R. Joliet, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Adrianus Thijssen, by Georges van Hecke, of the Brussels Bar,

* Language of the case: Dutch.

- the Belgian Government, by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, External Trade and Cooperation, acting as Agent, assisted by J. Putzeys, S. Gehlen and X. Leurquin, of the Brussels Bar,
- the United Kingdom, by S. Cochrane, of the Treasury Solicitor's Department, acting as Agent, assisted by Nicholas Paines, of the Bar of England and Wales,
- the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Ben Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicant in the main proceedings, the United Kingdom and the Commission, at the hearing on 18 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1993,

gives the following

Judgment

- 1 By order of 21 January 1992, received at the Court on 17 February 1992, the Raad van State (Belgium) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the first paragraph of Article 55 of the Treaty.
- 2 This question was raised in the course of proceedings between Adrianus Thijssen and the Controledienst voor de Verzekeringen (hereinafter 'the Insurance Inspectorate') on the matter of refused admission to the office of approved commissioner, as introduced by Articles 38 to 40 of the Belgian Law of 9 July 1975 on the regulation of insurance undertakings (*Belgisch Staatsblad*, 29 July 1975, hereinafter 'the Law of 1975').

- 3 According to the case-file, by letter dated 24 September 1986 Mr Thijssen applied for the office of approved commissioner in response to an invitation for applications from the Insurance Inspectorate. The documents attached to Mr Thijssen's letter showed that he was of Netherlands nationality. By letter of 6 November 1986, the President of the Insurance Inspectorate replied to Mr Thijssen that his application had been turned down because he did not fulfil the nationality requirement laid down by Article 2(1)(1) of Regulation No 6 of the Insurance Inspectorate (*Belgisch Staatsblad*, 26 March 1986, hereinafter 'Regulation No 6').
- 4 Mr Thijssen brought an action before the Raad van State for annulment of this decision, his sole submission being that the rejection of his application on the ground that he was not of Belgian nationality violated Articles 52 and 55 of the Treaty. He emphasizes in this regard that according to the judgment of the Court of Justice of 21 June 1974 in Case 2/74 *Reyners v Belgium* [1974] ECR 631), Article 52 of the Treaty has direct effect.
- 5 The defendant in the main proceedings argues that by virtue of the first paragraph of Article 55 of the Treaty the right of establishment does not apply to the office of approved commissioner.
- 6 The Raad van State considered that the outcome of the proceedings turned on the interpretation of Community law, and decided to ask the Court for a preliminary ruling on the following question:

'Does the derogation from the principle of freedom of establishment provided for in the first paragraph of Article 55 of the EEC Treaty apply to the office of approved commissioner introduced by Articles 38 to 40 of the Law of 9 July 1975 on the regulation of insurance undertakings?'

- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of 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.
- 8 As a preliminary matter, it should be recalled that the first paragraph of Article 55 of the Treaty excludes from the application of the provisions on freedom of establishment activities which in a Member State are connected, even occasionally, with the exercise of official authority. Nevertheless, as the Court ruled in *Reyners* (cited above, at paragraph 45), the derogation provided for in Article 55 must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.
- 9 Accordingly, the object of the question referred by the court requesting the preliminary ruling is to ascertain whether activities of the kind exercised by an approved commissioner pursuant to the Law of 1975 entail direct and specific participation in the exercise of official authority. To reply to this question, it is necessary to consider the nature of the duties carried out by approved commissioners under that Law, as they have been described by the national court.
- 10 Article 29(1) of the Law of 1975 establishes the Insurance Inspectorate as a body governed by public law, with legal personality and subject to the authority of the Ministry of Economic Affairs. According to the second paragraph thereof, the Insurance Inspectorate has the task of supervising the application of the Law and its implementing regulations. By Article 29(4), the Insurance Inspectorate has the power to make regulations. It thus determines the obligations which must be imposed on insurance undertakings in order 'to ensure that their activities are conducted in accordance with the principles of insurance practice, the precepts of equity and the general interests of insured parties and beneficiaries under contracts of insurance'.

- 11 It is not disputed that the Insurance Inspectorate exercises official authority. Its supervisory function serves to protect insured parties and the public interest. It can intervene directly in the management of insurance undertakings by imposing preventive and positive measures.
- 12 Under its regulatory powers, the Insurance Inspectorate adopted Regulation No 2 of 20 November 1978 concerning the admission of approved commissioners (*Belgisch Staatsblad*, 15 December 1978), which it subsequently repealed by Regulation No 6.
- 13 In contrast to Regulation No 2, which entitled nationals of other Member States, *inter alia*, to perform the duties of approved commissioner, Article 2(1) of Regulation No 6 provides as follows:

‘In order to be approved by the Inspectorate for the performance of the duties of approved commissioner in regulated undertakings, a candidate must

1. be of Belgian nationality,

...’

- 14 It is therefore established that the nationality requirement, which is not mentioned in the Law of 1975, was introduced only in 1986, by means of a regulation adopted by the Insurance Inspectorate.
- 15 Furthermore, Regulation No 6 gives no explanation why such a requirement should be necessary. In response to a question put by the Court, the Belgian Government observed merely that in 1986 it had been deemed necessary to add the condition of Belgian nationality. According to Article 20 of Regulation No 6,

approved commissioners who are nationals of other Member States and were already admitted when the regulation entered into force retain their approved status.

- 16 Finally, Article 38 of the Law of 1975 requires Belgian insurance companies or associations to appoint at least one commissioner from among the members of the Institute of Auditors, which was established by the Law of 22 July 1953, who have been approved by the Insurance Inspectorate. The same applies to Belgian undertakings in the form of mutual insurance societies or non-profit-making associations and to foreign insurance undertakings, which are required to appoint, for the purposes of managing their operations in Belgium, an approved commissioner chosen from the same group of persons.
- 17 According to Article 39 of the Law of 1975, approved commissioners must take a special written oath. Article 40 provides that

‘Approved commissioners shall carry out their duties under the supervision of the Insurance Inspectorate.

The approved commissioners shall immediately bring to the notice of the directors, managers or general agent of the undertaking, and of the Insurance Inspectorate, any infringement of this Law or of its implementing regulations, as well as any other matter which appears to them capable of prejudicing the financial position of the undertaking.

In addition to their general duties as commissioners, as laid down in the legislation on commercial companies and in the undertaking’s own statutes, the commissioners shall, whenever the Insurance Inspectorate so requests, and in the absence of such a request at least once a year, provide the Inspectorate with a report on the financial position and management of the undertaking.

Should an approved commissioner obtain knowledge of a decision by the undertaking the implementation of which might constitute an offence, he shall veto such implementation and refer the matter to the Insurance Inspectorate forthwith. His veto shall have suspensory effect for a period of eight days.'

- 18 As the Belgian Government emphasized in its submissions, the activities of an internal auditor or 'ordinary commissioner', as the Government describes it, are not connected with the exercise of official authority. The duties of an ordinary commissioner consist in fact in auditing the finances and the annual accounts of the company and presenting to the general meeting a report on the audits so carried out on the basis of the documents and information which he is entitled to obtain from the responsible officers of the undertaking.
- 19 Approved commissioners are freely appointed by insurance undertakings from among the commissioners duly approved by the Insurance Inspectorate and are also remunerated by them. They enjoy the confidence of both the insurance undertaking and the supervisory authorities.
- 20 With regard to the duties of the commissioners mentioned in paragraph 17, above, to prepare a report for the Insurance Inspectorate, either on a regular basis or at the request of the latter, to bring to the notice of the Inspectorate any unusual occurrences, and to inform the insurance undertaking of possible offences or facts which might jeopardize its financial position, it should be noted that, as the applicant in the main proceedings pointed out during the Hearing, other public bodies have similar duties, yet are not regarded for that reason as exercising official authority. This is the case for credit and financial institutions which, under Article 6 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), are bound to inform the authorities if there is suspicion of money laundering.

- 21 As to the veto which an approved commissioner may enter against the implementation of a decision where such implementation could constitute an offence, it must be noted that a commissioner is obliged to refer the matter forthwith to the Insurance Inspectorate. While his veto has suspensory effect for a period of eight days, the final decision on the matter lies with the Insurance Inspectorate, which is thus in no way bound by the commissioner's veto and, within the limits of its powers, will take such measures as the situation requires. Finally, it must be noted that, as is clearly set out in Article 40 of the Law of 1975, the approved commissioners perform their duties under the supervision of the Insurance Inspectorate.
- 22 Consequently, the auxiliary and preparatory functions of an approved commissioner *vis-à-vis* the Insurance Inspectorate — which itself is the body which exercises official authority by taking the final decision — cannot be regarded as having a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 55 of the Treaty.
- 23 Accordingly, the reply to the question put by the Raad van State must be that the first paragraph of Article 55 of the EEC Treaty is to be interpreted as meaning that the derogation from the right of establishment contained therein does not apply to the office of approved commissioner, as described in the order referring the question to the Court.

Costs

- 24 The costs incurred by the Belgian Government, the United Kingdom 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 question referred to it by the Belgian Raad van State by order of 21 January 1992, hereby rules:

The first paragraph of Article 55 of the EEC Treaty is to be interpreted as meaning that the derogation contained therein does not apply to the office of approved commissioner, as described in the order referring the question to the Court.

Rodríguez Iglesias

Joliet

Moitinho de Almeida

Grévisse

Edward

Delivered in open court in Luxembourg on 13 July 1993.

J.-G. Giraud

G. C. Rodríguez Iglesias

Registrar

President of the Fifth Chamber