JUDGMENT OF THE COURT
1 October 1987 *

In Case 311/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vice-President of the Rechtbank van Koophandel (Commercial Court), Brussels, for a preliminary ruling in the case pending before that court between

VZW Vereniging van Vlaamse Reisbureaus

and

VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten

on the interpretation of Articles 30, 34 and 85 (1) of the EEC Treaty,

THE COURT,

composed of: Lord Mackenzie Stuart, President, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, O. Due, U. Everling, K. Bahlmann, R. Joliet and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

the VZW Vereniging van Vlaamse Reisbureaus, the plaintiff in the main proceedings, by F. Van Bellinghen, of the Antwerp Bar,

the VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, the defendant in the main proceedings, by H. Ketsman, of the Brussels Bar,

* Language of the Case: Dutch.

the Belgian Government, by the Minister for Transport, acting as Agent, assisted by E. Marissens, of the Brussels Bar,

the French Government, by G. Guillaume, acting as Agent, and R. Abraham, acting as Deputy Agent,

the Irish Government, represented by L. J. Dockery, Chief State Solicitor, acting as Agent, assisted by J. Cooke, SC,

the Commission of the European Communities, by its Principal Legal Adviser B. Van der Esch and L. Gyselen, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 5 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 December 1986,

gives the following

Judgment

1 By an order of 12 July 1984 which was received at the Court on 15 October 1985, the Vice-President of the Rechtbank van Koophandel, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 30, 34 and 85 (1) of the Treaty.

2 Those questions were raised in the course of proceedings brought by the Vereniging van Vlaamse Reisbureaus (Association of Flemish Travel Agencies, hereinafter referred to as 'the Vereniging') against the Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten (Social Service of the local and regional public services, hereinafter referred to as the 'Sociale Dienst') pursuant to Article 55 of the Law of 14 July 1971 on trade practices for an order prohibiting the Sociale Dienst from continuing to grant rebates to its clients, contrary to the rules

on commercial practices for travel agents laid down in Article 22 of the Royal Decree of 30 June 1966 (*Belgisch Staatsblad* (Official Gazette) of 27. 7. 1966).

3 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure and the observations submitted to the Court pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

4 The Sociale Dienst, the defendant in the main proceedings, was established by the Bijzonder Kinderbijslagfonds (Special Family Allowance Fund), and has *inter alia* the task of acting as a travel agent for local and regional public service employees. In that capacity the Sociale Dienst grants these persons rebates on the price of tours organized by tour operators, passing on to them all or part of the commission normally paid to travel agents.

5 Article 22 of the Royal Decree of 30 June 1966, which the Vereniging, in the main proceedings, contends has been infringed, provides as follows:

'The holder of a licence (to act as a travel agent) must:

(1) *With regard to his clients:*

...

(b) Observe the prices and fares agreed upon or required by law;

...

(2) *With regard to suppliers:*

(a) Observe the prices and fares agreed upon or required by law;

...

(d) Observe the agreed prohibition on the sharing of commissions with clients;

(3) *With regard to his fellow travel agents:*

Refrain from any act contrary to fair commercial practice diverting or attempting to divert their clients or the clients of one of them, harming or attempting to harm their reputation or, more generally, interfering or attempting to interfere with their ability to compete.

The following are deemed to be acts contrary to fair commercial practice:

...

(e) Failure to observe prices and fares agreed upon or imposed by law;

(f) The sharing of commissions, the granting of rebates and the offer of benefits of any kind contrary to commercial practices;

...'.

6 The Royal Decree of 1966 in which Article 22 appears was adopted pursuant to Article 5 (2) of the Law of 21 April 1965 on the activities of travel agents (*Belgisch Staatsblad* of 1. 6. 1965), under which the King may lay down rules on commercial practices. That law provides *inter alia* that a licence is required for the exercise of activities as a travel agent (Article 1 (1)). The licence may be withdrawn if the rules on commercial practices laid down pursuant to Article 5 (2) are not or are no longer observed (Article 6 (1)). The rules governing the withdrawal of licences are laid down in Article 18 (1) of the Royal Decree of 1966.

7 Moreover, since failure to observe the rules on commercial practices contained in Article 22 of the Royal Decree of 1966 is declared by the second subparagraph of Article 22 (3) to be 'an act contrary to fair commercial practice' it falls under the prohibition contained in Article 54 of the Law of 14 July 1971 on commercial practices, and may thus be the subject-matter of an action for a restraining order under Article 55 of that law. Such an action may be brought not only by the persons concerned but also 'on the application of a trade association concerned by the matter which has legal personality' (Article 57, first paragraph).

8 It was in the course of an action for a restraining order pursuant to Article 55 that the Vice-President of the Rechtbank van Koophandel, Brussels, in interlocutory proceedings, considered that the dispute before him raised questions of the interpretation of certain provisions of Community law and therefore decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(A) Are the provisions of Article 22 (3) (e) and (f) of the Belgian Royal Decree of 30 June 1966, which provide that it is contrary to fair commercial practice for an approved travel agency (that is to say, a travel agency holding the authorization provided for in the Law of 21 April 1965):

(1) to offer prices and tariffs other than those agreed or imposed by law,

(2) to share commissions, give rebates or offer advantages, in any form whatsoever, on conditions which are contrary to customary practice,

compatible with Article 85 (1) of the EEC Treaty, in particular where it appears that acts which are contrary to fair commercial practice are prohibited by virtue of Article 54 of the Belgian Law of 14 July 1971 on Trade Practices?

(B) Are agreements adopted by travel agents on the basis of those provisions compatible with Article 85 (1) of the EEC Treaty?

(C) Are the abovementioned provisions of Belgian domestic law and any agreements adopted in implementation thereof compatible with Articles 30 and 34 of the EEC Treaty?'

Question A

9 Although the first question refers expressly only to Article 85 (1) of the Treaty, it must be understood, as the Belgian and French Governments and the Commission have suggested, as seeking to ascertain whether legislative provisions or regulations of a Member State requiring travel agents to observe the prices and tariffs for travel set by tour operators, prohibiting them from sharing commissions paid in respect of the sale of such travel with their customers or granting rebates to their customers and regarding such acts as contrary to fair commercial practice are incompatible with the obligations of the Member States pursuant to Article 5, in conjunction with Articles 3 (f) and 85, of the EEC Treaty.

10 As the Court has consistently held (see, most recently, the judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes* [1986] ECR 1425), while it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not laws or regulations of the Member States, the Treaty nevertheless imposes a duty on Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness. The Court has held that that would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects.

11 In order to reply in a useful manner to the national court it is necessary first of all to determine whether the documents before the Court disclose the existence of agreements, decisions or concerted practices of that kind in the area of activities concerned by the question referred, and then to determine whether provisions such as the Belgian provisions at issue are intended to reinforce the effects of such agreements, decisions or concerted practices, or have that effect.

12 The documents before the Court show that the Belgian provisions form part of a structure involving agreements at various levels intended to oblige travel agents to observe the prices of tours fixed by tour operators.

13 First of all, according to information provided by the Commission, which was not disputed, in 1963 the Belgische Beroepsvereniging voor Reisbureaus (Union of Belgian Travel Agents, hereinafter referred to as the 'BBR') adopted a code of

conduct binding on its members. Article 22 of that code, the content of which was incorporated in Article 22 of the Royal Decree of 30 June 1966, at issue in the main proceedings, treated the sharing of commissions with customers and the granting to them of prohibited rebates or rebates contrary to commercial usage as unfair competition.

14 Secondly, again according to the information provided by the Commission, in 1975 a framework agreement was concluded within the BBR regarding cooperation between the council of travel agents and the group of charter flight operators belonging to the BBR. Article 8 (b) of that agreement provides that an agent may not transfer part of his commission to a third party in any form and must observe the price and conditions of sale laid down by the organizer.

15 With regard to contractual relations between tour operators and travel agents, the standard-form contract attached to the observations of the Belgian Government provides under point 1 of the general conditions of cooperation that a tour operator 'may refuse to sell [tours] to agents who refuse to comply with the rules of commercial practice and act contrary to the spirit of the legislation'. That wording allows tour operators to rescind their contracts with travel agents who do not observe the rules of commercial practice applicable to them, including those prohibiting the sharing of commissions and the granting of rebates.

16 The existence of a system of agreements intended to prevent such practices is confirmed, moreover, by the very wording of Article 22 of the Royal Decree of 30 June 1966, at issue in the main proceedings. Article 22 (2) (d), concerning the obligations of a travel agent 'with regard to suppliers', states that the agent must 'observe the agreed prohibition on the sharing of commissions with clients'.

17 It must therefore be concluded, on the basis of the documents before the Court, that with regard to the activities of travel agents there is a system of agreements both between travel agents themselves and between agents and tour operators intended to oblige agents to observe the prices for travel set by tour operators, and

having that effect. Such agreements have the object and effect of restricting competition between travel agents. That is to say, they prevent travel agents from competing on prices by deciding, on their own initiative, to pass on to their customers some portion of the commission which they receive.

18 Furthermore, such agreements may affect trade between Member States in several respects. First of all, travel agents operating in one Member State may sell travel organized by tour operators established in other Member States. Secondly, these agents may sell travel to customers residing in other Member States. Thirdly, the travel in question is often to other Member States.

19 The Belgian Government denied that Article 85 (1) can apply to the relationship between a tour operator and a travel agent, arguing that the relationship is one of principal and agent. A travel agent must therefore be regarded as an auxiliary organ of the tour operator. In support of its argument the Belgian Government emphasized that a travel agent does not enter into contracts with clients in his own name but in the name and on behalf of the tour operator organizing the travel in question.

20 However, a travel agent of the kind referred to by the national court must be regarded as an independent agent who provides services on an entirely independent basis. He sells travel organized by a large number of different tour operators and a tour operator sells travel through a very large number of agents. Contrary to the Belgian Government's submissions, a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking.

21 It follows from those considerations that agreements such as those at issue in the main proceedings are incompatible with Article 85 (1) of the Treaty.

22 It remains to be determined whether provisions such as those at issue before the national court, viewed in this context, are of such a nature as to reinforce the effects of the agreements between travel agents and tour operators.

23 First of all, by transforming an originally contractual prohibition into a legislative provision a provision such as Article 22 of the Royal Decree of 1966 reinforces the effect of the agreements in question between the parties, inasmuch as the rule acquires a permanent character and can no longer be rescinded by the parties. Secondly, by treating the failure to observe agreed prices and tariffs or the prohibition on the sharing of commissions with clients as contrary to fair commercial practice it allows travel agents who comply with the agreed rules of commercial practice to bring proceedings for a restraining order against travel agents who are not party to the agreement and do not comply with those rules. Thirdly, with regard both to parties to the agreements and to third parties the possible withdrawal of the licence to operate as a travel agent in the event of failure to observe the agreed rules of commercial practice constitutes a highly effective sanction.

24 The answer to Question A referred by the national court must therefore be that legislative provisions or regulations of a Member State requiring travel agents to observe the prices and tariffs for travel set by tour operators, prohibiting them from sharing the commission paid in respect of the sale of such travel with their clients or granting rebates to their clients and regarding such acts as contrary to fair commercial practice are incompatible with the obligations of the Member States pursuant to Article 5, in conjunction with Articles 3 (f) and 85, of the EEC Treaty, where the object or effect of such national provisions is to reinforce the effects of agreements, decisions or concerted practices which are contrary to Article 85.

Question B

25 In this question the national court seeks to ascertain whether agreements such as those entered into by travel agents are compatible with Article 85 (1) of the Treaty.

26 Although the national court does not specify which agreements entered into by travel agents it is referring to, it may be inferred from the context of the main proceedings that it has in mind the agreements discussed in the proceedings and mentioned above in connection with the reply to the first question.

27 Since it has already been determined that agreements of that kind are incompatible with Article 85 (1), it is not necessary to reply separately to Question B.

Question C

28 In this question the national court asks whether provisions such as the Belgian provisions at issue and agreements of the kind entered into between travel agents and between travel agents and tour operators are compatible with Articles 30 and 34 of the Treaty.

29 Articles 30 and 34 fall under Title I of the Treaty, on the free movement of goods. They provide that quantitative restrictions on imports and exports, and all measures having an equivalent effect, are prohibited between Member States.

30 Since Articles 30 and 34 of the Treaty concern only public measures and not the conduct of undertakings, it is only the compatibility with those articles of national provisions of the kind at issue in the main proceedings that need be examined.

31 National provisions of that kind have neither the object nor the effect of restricting the movement of goods between Member States.

32 The sale of travel constitutes the provision of services and not the sale of goods, regardless of the terminology used in the course of business. It follows that provisions such as the Belgian provisions at issue cannot be considered contrary to Article 30 or Article 34.

33 The answer to Question C referred by the national court must therefore be that legislative provisions or regulations of a Member State of the kind referred to in the reply to the first question are not incompatible with Articles 30 and 34 of the Treaty.

Costs

34 The costs incurred by the Belgian, French and Irish Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action 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 Vice-President of the Rechtbank van Koophandel, Brussels, by order of 12 July 1984, hereby rules:

(1) Legislative provisions or regulations of a Member State requiring travel agents to observe the prices and tariffs for travel set by tour operators, prohibiting them from sharing the commission paid in respect of the sale of such travel with their clients or granting rebates to their clients and regarding such acts as contrary to fair commercial practice are incompatible with the obligations of the Member States pursuant to Article 5, in conjunction with Articles 3 (f) and 85, of the EEC Treaty, where the object or effect of such national provisions is to reinforce the effects of agreements, decisions or concerted practices which are contrary to Article 85.

(2) Legislative provisions or regulations of a Member State of the kind referred to in the reply to the first question are not incompatible with Articles 30 and 34 of the Treaty.

Mackenzie Stuart O'Higgins Schockweiler Bosco

Due Everling Bahlmann Joliet Moitinho de Almeida

Delivered in open court in Luxembourg on 1 October 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President