JUDGMENT OF THE COURT (Sixth Chamber)

3 May 2001 *

In Case C-28/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Rechtbank van Eerste Aanleg te Gent, Belgium, for a preliminary ruling in the criminal proceedings brought before that court against

Jean Verdonck,

Ronald Everaert

and

Édith de Baedts,

on the interpretation of Article 6 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Verdonck, Mr Everaert and Mrs De Baedts, by K. Geens, H. Gilliams, J.-M. Nelissen Grade and R. Verstringhe, advocaten,

— the Belgian Government, by A. Snoecx, acting as Agent,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Portuguese Government, by J.A. Texeira Santos do Rio and L. Fernandes, acting as Agents,

— the Commission of the European Communities, by C. Tufvesson and T. van Rijn, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Verdonck, Mr Everaert and Mrs De Baedts, and of the Belgian Government and the Commission at the hearing on 13 July 2000,

after hearing the Opinion of the Advocate General at the sitting on 12 October 2000,

gives the following

Judgment

1 By judgment of 27 January 1999, received at the Court on 5 February 1999, the Rechtbank van Eerste Aanleg te Gent (Court of First Instance, Ghent) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 6 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30).

2 Those questions were raised in the course of criminal proceedings brought against Mr Verdonck, Mr Everaert and Mrs De Baedts (hereinafter 'the defendants in the main proceedings' or 'the defendants'), who are charged under Articles 181, 182, 183 and 189 of the Law of 4 December 1990 on financial transactions and financial markets (*Belgisch Staatsblad* of 22 December 1990, p. 23800, hereinafter 'the 1990 Law'). Those provisions define and punish insider crime.

The relevant Community legislation

3 Article 1 of Directive 89/592 provides as follows:

'For the purposes of this Directive:

1. "inside information" shall mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question;

...'.

4 Article 2 of Directive 89/592 provides as follows:

'1. Each Member State shall prohibit any person who:

— by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

— by virtue of his holding in the capital of the issuer, or

— because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

2. Where the person referred to in paragraph 1 is a company or other type of legal person, the prohibition laid down in that paragraph shall apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

...'

5 Article 6 of Directive 89/592 provides as follows:

'Each Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are applied generally. ...'

The relevant Belgian legislation

6 Directive 89/592 was transposed into Belgian law by Articles 181 to 189 of the 1990 Law.

7 Article 181 of the 1990 Law defines 'inside information' as follows:

'Inside information, for the purposes of this Code, shall mean information which has not been made public, of a sufficiently precise nature, relating to one or several issuers of transferable securities or other financial instruments or to one or several transferable securities or other financial instruments, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities or the other financial instrument or instruments in question.

Inside information does not include information which holding companies possess because of their role in the management of companies in which they have a shareholding, unless it is information which must be made public pursuant to the statutory and regulatory provisions concerning the obligations arising from admission to the official listing of transferable securities on a stock exchange.'

8 Under Article 182(1) of the 1990 Law:

'Any person who:

(i) by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

(ii) by virtue of his holding in the capital of the issuer,

(iii) or because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses information that he knows, or ought reasonably to know, is inside information, shall be prohibited from acquiring or disposing of, for his own account or for the account or a third party, either directly or indirectly, transferable securities or other financial instruments to which that information relates.'

9 The definition of a holding company appears in Article 1 of Royal Decree No 64 of 10 November 1967 regulating the statutes of holding companies (*Belgisch Staatsblad* of 14 November 1967, p. 11815).

10 Under that provision, holding companies are defined as:

'1 Companies incorporated under Belgian law that have shareholdings in one or more Belgian or foreign subsidiaries, conferring on them, in law or in fact, power to direct the activities of those subsidiaries, in so far as:

(a) those companies or all or some of their subsidiaries, or subsidiaries of their subsidiaries, have made an offer to the public in Belgium in connection with the issue or placing of their stocks or shares;

(b) the value of their shareholdings is at least five hundred million francs in aggregate or represents at least half of their own capital;

2 Companies incorporated under Belgian law that have, or whose subsidiaries or subsidiaries of their subsidiaries have, made an offer to the public in Belgium in connection with the issue or placing of their stocks or shares and which are subsidiaries or subsidiaries of subsidiaries of foreign companies or institutions having, in companies incorporated under Belgian law, direct or indirect shareholdings the value of which is at least five hundred million francs in aggregate or represents at least half of their own capital.'

The main proceedings and the questions referred for a preliminary ruling

11 At its meetings of 22 August and 10 October 1995, the board of directors of Ter Beke NV (hereinafter 'Ter Beke') considered the possibility of taking over Chilled

Food Business, a division of Unilever Belgium NV (hereinafter 'Unilever'). On 14 September 1995, a tentative offer was made and, on 19 December 1995, the board of directors of Ter Beke approved a bid to take over Chilled Food Business.

12 On 5 March 1996, Ter Beke and Unilever signed a letter of intent, made public on the same day, in which they expressed their wish to continue their existing discussions on an exclusive basis. Between 5 March 1996 and 18 March 1996, following the publication of the letter of intent, the price of shares in Ter Beke rose from BEF 2 800 to BEF 3 230, an increase of 15.3%.

13 On 14 May 1996, Ter Beke and Unilever signed an acquisition agreement relating to Chilled Food Business.

14 It is apparent from the judgment of the national court that the defendants are directors of the board of Ter Beke and that Mr Verdonck is also a member of the company's management committee. Between 6 and 8 February 1996, the defendants placed orders on the stock exchange which resulted in the acquisition of shares in Ter Beke at a price of BEF 2 590.

15 The Openbaar Ministerie (the Public Prosecutor) brought proceedings against the defendants before the Rechtbank van Eerste Aanleg te Gent on the ground that, by purchasing shares in Ter Beke before the letter of intent between itself and Unilever was made public, they made unlawful use of inside information, contrary to Articles 181, 182, 183 and 189 of the 1990 Law.

16 In their defence, the defendants argued, *inter alia*, that the 1990 Law is inconsistent with Directive 89/592 in that, by laying down a more stringent definition of insider dealing than the directive, whilst at the same time providing that information in the possession of holding companies does not amount to inside information for the purposes of the offence of insider dealing, the 1990 Law contravenes Article 6 of Directive 89/592, which authorises the Member States to adopt more stringent provisions than those laid down in the directive only if such provisions are applied generally.

17 Taking the view that judgment in the case depended on the interpretation of Article 6 of Directive 89/592, the Rechtbank van Eerste Aanleg te Gent stayed the proceedings and referred the following three questions to the Court of Justice for a preliminary ruling:

'1 Does Article 6 of Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, which reads: "Each Member State may adopt provisions more stringent than those laid down by this directive or additional provisions, provided that such provisions are applied generally ...", allow a Member State to provide for a more stringent definition in its legislation, whilst granting a given category, namely holding companies, specific exemption from that more stringent definition?

2 Is the implementation of Directive 89/592, transposed in Belgium by Article 181 of the Law of 4 December 1990, compatible with Article 6 of the directive? Article 181 reads as follows:

"Inside information, for the purposes of this Code, shall mean information which has not been made public, of a sufficiently precise nature, relating to

one or several issuers of transferable securities or other financial instruments or to one or several transferable securities or other financial instruments, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities or the other financial instrument or instruments in question.

Inside information does not include information which holding companies possess because of their role in the management of companies in which they have a shareholding, unless it is information which must be made public pursuant to the statutory and regulatory provisions concerning the obligations arising from admission to the official listing of transferable securities on a stock exchange.

The provisions of this Code shall apply to the transferable securities and other financial instruments referred to in Article 1."

3 If the Member State has implemented Directive 89/592/EEC as the Belgian legislature has done in Article 181 of the Law of 4 December 1990, and such implementation is contrary to the directive, does this mean that the more

stringent provisions are deemed not to form part of the national legislation, or that they remain fully applicable, and to holding companies as well?'

The first two questions

18 By its first two questions, which can be considered together, the national court is asking essentially whether Article 6 of Directive 89/592 is to be interpreted as not precluding a Member State from applying legislative provisions on the prohibition of use of inside information which are more stringent than those laid down by that directive but which at the same time exclude a certain category of information in the possession of holding companies from the definition of inside information contained in that legislation.

19 The defendants in the main proceedings, the Belgian and Portuguese Governments and the Commission are agreed that, in so far as the 1990 Law does not require that an insider use inside information in his possession with full knowledge of the facts, and thus also covers unintentional use of inside information, its definition of the prohibited use of inside information is more stringent than that in Article 2(1) of Directive 89/592.

20 There are, however, differences of opinion over the question whether the 1990 Law complies with Article 6 of Directive 89/592, which permits provisions that are more stringent than those laid down in the directive only on condition that such provisions are 'applied generally'.

21 The defendants and the Portuguese Government submit that that question should be answered in the negative. They argue that the provisions of the 1990 Law at issue in the main proceedings, which they consider to be more stringent, do not apply to a specific category of companies and are not therefore applied generally, within the meaning of Article 6.

22 For its part, the Belgian Government submits, in essence, that the second paragraph of Article 181 of the 1990 Law merely makes clear, for holding companies, which confidential information in their possession, in particular information concerning their subsidiaries, constitutes inside information and which information is not inside information. By classifying as inside information any information in the possession of holding companies which must be made public pursuant to the statutory and regulatory provisions of national law concerning the obligations arising from admission of transferable securities to official listing on a stock exchange, Article 181 of the 1990 Law does no more than give a definition corresponding to the general definition of inside information set out in Article 1(1) of Directive 89/592. The information which must be made public pursuant to those provisions of national law is precisely the information which would be likely to have a significant effect on the price of the transferable securities in question, referred to in Article 1(1) of the directive.

23 In this connection, the Belgian Government argues that, in the version in force at the time of the offence with which the defendants in the main proceedings are charged, the first indent of Article 4(1) of Royal Decree No 2331 of 18 September 1990 on obligations arising from the listing of transferable securities on the primary market of a Belgian stock exchange (*Belgisch Staatsblad* of 22 September 1990, p. 18138) imposed an obligation on companies whose shares were admitted to official listing on a stock exchange to 'make public, without delay, any fact or decision within their knowledge which, if it were made public, would be likely to have a significant effect on the price of the shares on the exchange'. The Belgian Government indicates that that provision has since been incorporated into Royal Decree No 1421 of 3 July 1996 on ad hoc reporting obligations

of issuers whose financial instruments are listed on the primary market and the new market of a stock exchange (*Belgisch Staatsblad* of 6 July 1996, p. 18700).

24 The Belgian Government adds that certain specific attributes of holding companies led the legislature to define inside information more precisely where those companies are concerned, but points out that that definition merely renders explicit, in the case of a particular category of companies, the general definition.

25 Alternatively, it submits that, should the definition of inside information for holding companies be held to be different from that applicable to other companies, that would not detract from the general scope of application of Article 182 of the 1990 Law, since that provision prohibits use of any inside information for carrying out transactions relating to transferable securities or financial instruments.

26 In the further alternative, the Belgian Government submits that, if the combined provisions of the second paragraph of Article 181 and Article 182 of the 1990 Law were to be held to create an exception to a provision more stringent than those laid down by Directive 89/592, that exception is justified. Indeed, the directive itself takes account of certain specific situations and certain categories of participants in the financial markets so as to remove them from its ambit in order to avoid prohibiting perfectly routine transactions. In this connection, the Belgian Government refers to the 11th and 12th recitals in the preamble to Directive 89/592 and to Article 2(4) of that directive. It submits that, in the absence of provisions such as those contained in the second paragraph of Article 181 of the 1990 Law, holding companies would be unable to manage their shareholdings. The Netherlands Government shares that view. Both governments consider that holding companies are in a special position because, by virtue of their legal or de

facto control over their subsidiaries, they necessarily possess confidential information. Thus, if all such information were to be regarded as inside information, such companies would be unable to conduct their business.

27 The Commission submits that the exception in favour of holding companies means that that category of companies is exempted not only from the prohibition of unintentional use of inside information but also from the prohibition of use of such information with full knowledge of the facts. In other words, the exception for holding companies derogates both from the more stringent prohibition in the 1990 Law and from the prohibition laid down in Directive 89/592. The exception in the second paragraph of Article 181 of the 1990 Law is, however, legally distinct from the more stringently formulated prohibition of use of inside information in Article 182 of the 1990 Law, so that that national provision remains a provision which is applied generally, within the meaning of Article 6 of the directive, despite the derogation in favour of holding companies.

28 It must be borne in mind at the outset that, although the Court may not, under Article 177 of the Treaty, rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 12, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 36).

29 Under Article 2(1) of Directive 89/592, the Member States must prohibit any person who, by virtue of his duties, profession or holding in the capital of an

issuer, possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

30 Article 6 of Directive 89/592 permits the Member States to adopt provisions more stringent than those laid down by the directive, provided that such provisions are applied generally.

31 The Belgian Government accepts that, with regard to the prohibition contained in Article 2(1) of Directive 89/592, its national legislature availed itself of the possibility of laying down more stringent provisions by not adopting the condition of 'taking advantage' of inside information 'with full knowledge of the facts'. Article 182(1) of the 1990 Law in fact prohibits persons to whom it applies and who are in possession of information which they know, or ought reasonably to know, is inside information from acquiring or disposing of transferable securities whose market price is likely to be significantly affected by that information.

32 Furthermore, the Belgian legislature introduced into the definition of inside information, set out in Article 181 of the 1990 Law, additional elements in relation to the definition of inside information in Article 1 of Directive 89/592, which covers information not in the public domain, of a precise nature and relating to one or more issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely 'to have a significant effect on the price of the transferable security or securities in question'. However, it is clear that the additional elements in Article 181 of the 1990 Law concern only information held by a particular category of participants in the financial markets, namely holding companies, and do not concern, in general, a

specific kind of information that might have an influence on the price of transferable securities or other financial instruments, regardless of the status or position of the natural or legal person possessing that information.

33 Such a provision can therefore bring about a regime specific to a particular category of participants in the financial markets, contrary to Article 6 of Directive 89/592, unless the additional elements merely clarify the general definition of inside information for that category of participants without in any way altering the scope of that definition.

34 It is for the national court to determine whether or not the additional elements included by the national legislature in Article 181 of the 1990 Law with regard to information in the possession of holding companies, read in conjunction with all the provisions of national law determining the application of that provision, result in making the information regarded as inside information in the case of holding companies more restricted than the information regarded as inside information for the purposes of the general definition contained in Article 181. In so doing, the national court will thus be able to determine whether or not holding companies and persons having access to information possessed by them are more favourably treated than other participants in the financial market in so far as concerns the prohibition on using inside information as defined by Directive 89/592 and, in particular, in so far as concerns the provisions of the 1990 Law that are more stringent than those set out in the directive.

35 The answer to be given to the first two questions must therefore be that Article 6 of Directive 89/592 does not preclude the application of legislative provisions of a Member State which, as regards the prohibition of use of inside information, are more stringent than those laid down by the directive, provided that the scope of

the definition of inside information used for applying that legislation is the same for all natural or legal persons subject to the legislation.

The third question

36 In the event that the existence of provisions of national law more stringent than those laid down by Directive 89/592 is incompatible with Article 6 of that directive, by reason of the fact that they are not of general application, the national court asks essentially whether those more stringent provisions are to be regarded as not forming part of the national legislation or whether they must be applied to all participants in the financial markets, including those otherwise exempt from them under that national legislation.

37 Suffice it to observe in this connection that, if the provisions of the legislation of a Member State that are more stringent than those laid down by Directive 89/592 are incompatible with Article 6 of that directive, they are contrary to Community law and cannot therefore be applied to any participant in the financial markets.

38 The answer to the third question must therefore be that, if provisions of national law run counter to Article 6 of Directive 89/592, by reason of the fact that certain natural or legal persons are specifically exempted from a more stringent prohibition of use of inside information than that laid down by the directive, the national court must disapply those more stringent provisions with regard to all persons to whom they might otherwise apply.

Costs

39 The costs incurred by the Belgian, Netherlands and Portuguese Governments and by 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 action 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 Rechtbank van Eerste Aanleg te Gent by judgment of 27 January 1999, hereby rules:

1. **Article 6 of Council Directive 89/592/EEC of 13 November 1989 co-ordinating regulations on insider dealing does not preclude the application of**

legislative provisions of a Member State which, as regards the prohibition of use of inside information, are more stringent than those laid down by the directive, provided that the scope of the definition of inside information used for applying that legislation is the same for all natural or legal persons subject to the legislation.

2. If provisions of national law run counter to Article 6 of Directive 89/592, by reason of the fact that certain natural or legal persons are specifically exempted from a more stringent prohibition of use of inside information than that laid down by the directive, the national court must disapply those more stringent provisions with regard to all persons to whom they might otherwise apply.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 3 May 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber