JUDGMENT OF THE COURT (Sixth Chamber)
9 June 1994 *

In Case C-153/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landgericht Duisberg (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Federal Republic of Germany

and

Delta Schiffahrts- und Speditionsgesellschaft mbH

on the interpretation of the second paragraph of Article 5 and Article 85(1) of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco, C. N. Kakouris, F. A. Schockweiler (Rapporteur) and P. J. G. Kapteyn, Judges,

* Language of the case: German.

Advocate General: M. Darmon,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by E. Röder, Ministerialrat, and C.-D. Quassowski, Regierungsdirektor in the Federal Ministry of the Economy, acting as Agents,

— the United Kingdom, by S. L. Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by N. Paines, Barrister,

— the Commission of the European Communities, by M. B. Langeheine, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 19 April 1994,

gives the following

Judgment

1 By order of 4 March 1993, received at the Court on 13 April 1993, the Landgericht Duisberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the second paragraph of Article 5 of that Treaty in order to enable it to rule on the compatibility with Community

law of the provisions of the compulsory approval procedure prescribed by German law for tariffs for commercial inland waterways traffic.

2 That question arose in proceedings between the Federal Republic of Germany, represented by the Wasser- und Schiffahrtsdirektion West (Western Board for Waterways and Inland Navigation) and the Delta Schiffahrts- und Speditionsgesellschaft mbH (hereinafter 'Delta') regarding an action brought by the German State against Delta for payment of the difference between the transport tariff adopted by the Federal Minister for Transport and the price actually charged to Delta by a carrier.

3 In the Federal Republic of Germany commercial inland waterway traffic is governed by the Binnenschiffsverkehrsgesetz (Law on Inland Waterways Traffic, hereinafter 'the BinnSchVG') which, according to Paragraph 33, is intended to ensure an economically judicious distribution of work among the modes of transport by means of prices adapted to the market and of fair competition between the modes of transport.

4 The tariffs are determined by freight commissions on the basis of certain factors specified in the BinnSchVG. The freight commissions consist of two numerically equal groups of representatives of shipping and shippers appointed by the supervisory authority acting on a proposal from the professional associations concerned (Paragraph 25 of the BinnSchVG).

5 In cases where the shipping group and the shippers' group cannot agree on a particular remuneration within the freight commissions, expanded commissions are to

deliberate on that remuneration. The expanded commissions consist of the inland waterway traffic group, the shippers' group, an independent chairman and two independent assessors, one of whom is appointed by the inland waterway traffic group and the other by the shippers' group. The chairman, the two assessors, the shipping group and the shippers' group each have one vote (Paragraphs 25 and 27b of the BinnSchVG).

6 The members of the freight commissions and of the expanded commissions hold honorary office and are not bound by orders or instructions (Paragraph 25 of the BinnSchVG).

7 The decisions of the commissions must be approved by the Federal Minister for Transport. The approved decisions of the commissions are issued by the Minister in the form of orders and are binding on the undertakings (Paragraphs 28, 29, 30 and 31 of the BinnSchVG). The Federal Minister for Transport may, substituting himself for the commissions, himself fix the tariffs, if this is required in the public interest.

8 If the price charged for transport is below the tariff rate, that rate is payable. If the parties to the contract have knowingly or recklessly agreed a different rate, the difference is to be paid to the Federal Government. The amount is to be recovered by the Wasser- und Schiffahrtsdirektion (Paragraph 31 of the BinnSchVG).

9 Since Delta had had goods transported at a price below the tariff rate, the Wasser- und Schiffahrtsdirektion brought proceedings against it for payment of the difference between the price agreed with the carrier and the tariff rate.

10 It was in the context of those proceedings that the Landgericht Duisburg stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is the Federal Republic of Germany's statutory procedure for determining tariffs pursuant to Paragraph 21 et seq. of the Binnenschiffsverkehrsgesetz (Law on Inland Waterways Traffic) compatible with Article 85(1) and the second paragraph of Article 5 of the EEC Treaty, or are the tariffs fixed under the above provisions void under Article 85(2) of the EEC Treaty because they infringe Article 85(1) and the second paragraph of Article 5 of the EEC Treaty?'

11 It must first be pointed out that although it is not for the Court, in proceedings bought under Article 177 of the EEC Treaty, to rule on the compatibility with Community law of provisions of national law, it does, however, have jurisdiction to provide the national court with all such factors relating to the interpretation of Community law as may enable that court to determine the compatibility of those provisions with Community law.

12 Secondly, the rules on competition laid down in the Treaty, and in particular those contained in Articles 85 and 90, apply to the transport sector (see, most recently, the judgment in Case C-185/91 *Gebrüder Reiff* [1993] ECR I-5801, hereinafter 'the judgment in *Reiff*').

13 In those circumstances, the question referred to the Court by the Landgericht Duisburg must be understood as seeking to ascertain, essentially, whether Article 3(f), the second paragraph of Article 5 and Article 85 of the Treaty preclude rules of a Member State from providing that the tariffs for commercial inland waterway traffic are to be determined by freight commissions and made compulsory for all economic operators after approval by the public authorities under conditions such as those laid down in the BinnSchVG.

14 Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation. The Court has consistently held, however, that Article 85 of the Treaty, in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, 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, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see the judgment in Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16, and the judgment in *Reiff*, paragraph 14).

15 In its judgment in *Reiff* (paragraph 15) the Court, considering a similar question referred to it regarding the determination of tariff rates for the long-distance carriage of goods by road, held that, in order to give a helpful answer to the national court, it should first be considered whether the existence of an agreement, decision or concerted practice within the meaning of Article 85 of the Treaty could be inferred from rules such as those in question in the main proceedings.

16 As regards rules such as those constituted by the BinnSchVG, it should first be noted that the members of the freight commissions, while not described as experts in tariff matters, unlike the members of the tariff commissions set up by the Law on the carriage of goods by road which was in point in the judgment in *Reiff*, hold an honorary office and are not bound by orders or instructions. As regards the expanded freight commissions, the BinnSchVG expressly underlines the independent role of the chairman and the two assessors who have three of the five votes.

17 Furthermore, the BinnSchVG does not allow the freight commissions to determine tariffs on the basis solely of the interests of carriers and shippers, but, in Paragraph 21, requires them to take into account the interests of the agricultural sector

and of medium-size businesses or of areas which are economically weak and have poor transport services.

18 It follows that, under a tariff-fixing system such as that set up by the BinnSchVG, the members of the freight commissions, although appointed by a public authority acting on a proposal from the professional associations concerned, may not be regarded as representatives of those associations, called upon to negotiate and conclude agreements on prices.

19 It must next be considered, as the Court stated in its judgment in *Reiff* (paragraph 20), whether the public authorities have delegated their powers in the matter of fixing tariffs to private economic operators.

20 The BinnSchVG, like the Law on the carriage of goods by road, is intended, according to Paragraph 33, to bring about an optimum transport service and confers on the Federal Government the task of harmonizing the conditions of competition between modes of transport and to ensure an economically judicious division of tasks between them. To that end, the BinnSchVG expressly makes the Federal Minister for Transport responsible for harmonizing services and prices in order to avoid unfair competition.

21 For the purpose of carrying out that task, the Federal Minister for Transport has the power to establish the freight commissions and expanded commissions which are subject to his control. Even though, contrary to what is provided by the Law on the carriage of goods by road, the Minister for Transport is not entitled to be a member of the freight commissions, he may himself fix the tariffs by substituting

his decision for that of the commissions if the tariffs decided by them are not in accordance with the public interest which, by virtue of his office, it is his duty to safeguard.

22 It follows that under a system for the determination of tariffs for commercial inland waterway traffic such as that set up by the BinnSchVG the public authorities have not delegated their powers in the matter of fixing tariffs to private economic operators.

23 The answer to the question put to the Court should therefore be that Articles 3(f), 5 and 85 of the Treaty do not preclude rules of a Member State from providing that tariffs for commercial inland waterway traffic be determined by freight commissions and made compulsory for all economic operators, after approval by the public authorities, if the members of those commissions, although chosen by the public authorities acting on a proposal from the professional circles concerned, are not representatives of those circles, called upon to negotiate and conclude an agreement on prices, but are responsible for fixing tariffs independently and on the basis of considerations relating to the public interest and if the public authorities, by ensuring that the commissions determine tariffs on the basis of those considerations and by substituting, if need be, their own decision for that of the commissions, do not relinquish their powers.

Costs

24 The costs incurred by the German 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 (Sixth Chamber),

in answer to the question referred to it by the Landgericht Duisburg by order of 4 March 1993, hereby rules:

Articles 3(f), 5 and 85 of the Treaty do not preclude rules of a Member State from providing that tariffs for commercial inland waterway traffic be determined by freight commissions and made compulsory for all economic operators, after approval by the public authorities, if the members of those commissions, although chosen by the public authorities acting on a proposal from the professional circles concerned, are not representatives of those circles, called upon to negotiate and conclude an agreement on prices, but are responsible for fixing tariffs independently and on the basis of considerations relating to the public interest and if the public authorities, by ensuring that the commissions determine tariffs on the basis of those considerations and by substituting, if need be, their own decision for that of the commissions, do not relinquish their powers.

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 9 June 1994.

R. Grass

Registrar

G. F. Mancini

President of the Sixth Chamber