JUDGMENT OF THE COURT (Second Chamber)
17 October 1995 *

In Joined Cases C-140/94, C-141/94 and C-142/94,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Amministrativo Regionale per il Veneto (Italy) for a preliminary ruling in the proceedings pending before that court between

DIP SpA

and

Comune di Bassano del Grappa (C-140/94),

and between

LIDL Italia Srl

and

Comune di Chioggia (C-141/94),

and between

Lingral Srl

* Language of the case: Italian.

and

Comune di Chioggia (C-142/94,)

on the interpretation of Articles 30, 85 and 86 of the EC Treaty,

THE COURT (Second Chamber),

composed of: G. Hirsch, President of the Chamber, G. F. Mancini and F. A. Schockweiler (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— DIP SpA, by I. Cacciavillani and P. Piva, of the Venice Bar,

— LIDL Italia Srl and Lingral Srl, by B. Barel, of the Treviso Bar, and by P. Piva, of the Venice Bar,

— the Commission of the European Communities, by G. Marenco, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of DIP SpA, LIDL Italia Srl, Lingral Srl and the Commission at the hearing on 11 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 6 July 1995,

gives the following

Judgment

1 By three orders of 24 February 1994, received at the Court on 24 May 1994, the Tribunale Amministrativo Regionale per il Veneto (Regional Administrative Court for the Veneto Region) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 85, 86 and 30 of the EC Treaty to enable it to give a decision on the compatibility with those provisions of the Italian legislation concerning licences to open shops.

2 The question was raised in proceedings between DIP, LIDL Italia and Lingral and the Municipalities of Bassano del Grappa and Chioggia relating to the refusal by the mayors of those municipalities to grant those companies licences to open retail outlets.

3 Under Article 24 of Law No 426 of 11 June 1971 concerning the regulation of retail trading (Official Journal of the Italian Republic No 168 of 6 July 1971, 'the Italian Law'), opening a new shop is subject to the issue of a licence by the

mayor on the opinion of a municipal committee, taking into account the criteria laid down in a commercial development plan drawn up by each municipality after consulting the committee.

4 The composition of the committee appointed by the town council is governed by Articles 15 and 16 of the Italian Law.

5 Where the municipality is the administrative centre of a province or has more than 50 000 inhabitants, the committee consists of 14 members as follows:

— the mayor or his delegate acting as chairman,

— an urban planning expert and a traffic expert, both appointed by the town council,

— the director of UPICA (public provincial office representing industry, commerce and artisans),

— a representative of the provincial tourist office,

— five experts on distribution problems, of whom three are appointed by unions of shopkeepers with fixed premises, one by the consumers' cooperative organizations and one by the union of stallholders,

— four representatives nominated by the national workers' confederation.

6 Where the municipality has fewer than 50 000 inhabitants, the committees consist of 10 members:

— the mayor or his delegate,

— an urban planning expert and a traffic expert, both appointed by the town council,

— three experts on distribution problems, appointed by the town council on the advice of traders' organizations and consumers' cooperative organizations,

— three workers' representatives,

— a representative of the social security office.

7 Article 43 of the Italian Law provides that, until the commercial development plans have been approved, licences are to be granted by the mayor on the basis of

the favourable opinion of the committee, in compliance with the criteria laid down by the law.

8 DIP, LIDL Italia and Lingral applied to the municipalities of Bassano del Grappa and Chioggia for trading licences to open shops.

9 The decisions refusing their applications, which were adopted by the mayors of the municipalities concerned after obtaining the opinion of the municipal committees, are the subject of actions for annulment by those companies.

10 The Tribunale Amministrativo Regionale per il Veneto stayed those proceedings and referred the following question to the Court for a preliminary ruling:

'Do Articles 85 and 86 of the Treaty give rise to a prohibition on the introduction by a Member State of:

(1) legislation providing for a planning forecast for the commercial network incorporating predetermined lists of goods subject to quotas, thus precluding the opening of new shops when the market is deemed, in accordance with the plan, to be adequately served already;

(2) legislation requiring an opinion to be obtained from a collective body whose members include representatives of traders already operating on

the market both when the plan is drawn up and when new licences are granted?'

11 In the LIDL Italia case (C-141/94) the national court also refers to Article 30 of the Treaty on the ground that the plaintiff in the main proceedings is a subsidiary of a company established in another Member State.

12 By order of 29 June 1994, the President of the Court decided pursuant to Article 43 of the Rules of Procedure to join the three cases for the purposes of the written and oral procedures and the judgment.

13 The question asked by the Tribunale Amministrativo Regionale per il Veneto must be understood as seeking in essence to ascertain whether Articles 3(g), 5, 85, 86 and, where appropriate, 30 of the Treaty preclude legislation adopted by a Member State from requiring a licence issued by the mayor of the municipality to be obtained before a shop may be opened, as provided for by the Italian Law.

Articles 85 and 86 of the Treaty

14 It should be recalled that, strictly speaking, Articles 85 and 86 of the Treaty are 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 read in conjunction with Article 5, Articles 85 and 86 of the Treaty require Member States to refrain from introducing or maintaining in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (as regards Article 85 of the Treaty, see the judgments in Case 267/86 *Van Eycke* v *Aspa* [1988] ECR 4769, paragraph 16, Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14 and Case C-153/93 *Germany* v *Delta Schiffahrts-und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; as regards Article 86 of the Treaty, see the judgment in Case 13/77 *NV GB-INNO-BM* v *ATAB* [1977] ECR 2115, paragraph 31).

15 The Court has held that Articles 5 and 85 are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or where it deprives its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see the judgments in *Van Eycke*, paragraph 16, *Reiff*, paragraph 14 and *Delta Schiffahrts-und Speditionsgesellschaft*, paragraph 14).

16 In *Reiff* (paragraph 15) and *Delta Schiffahrts-und Speditionsgesellschaft* (paragraph 15), the Court 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.

17 As regards rules such as those contained in the Italian Law, it should first be pointed out that members appointed or nominated by traders' organizations are in a minority on the municipal committees, side by side with workers' representatives, representatives of public authorities and experts appointed by the latter.

18 Moreover, as expressly indicated in that law, the members appointed or nominated by traders' organizations are present as experts on distribution problems and not in order to represent their own business interests, and in drawing up its opinions the municipal committee is to observe the public interest.

19 It follows from the foregoing considerations that in a trading licence system such as that established by the Italian Law, the opinions adopted by the municipal committee cannot be regarded as agreements between traders which the public authorities have required or favoured or the effects of which they have reinforced.

20 It must next be considered, as the Court stated in *Reiff* (paragraph 20) and *Delta Schiffahrts-und Speditionsgesellschaft* (paragraph 19), whether the public authorities have delegated their powers in the matter of trading licences to private economic operators.

21 The Italian Law provides that licences are to be issued by the mayor of the municipality concerned, taking into account the criteria laid down in the municipal commercial development plan. The purpose of that plan is to provide the best possible service for consumers and the best possible balance between permanent trading establishments and foreseeable demand from the population.

22 Furthermore, the municipal committee is called on to give the mayor merely an opinion on individual licences. It is only where the municipality does not yet have

an approved commercial development plan that licences may not be issued unless the committee's opinion is favourable.

23 It follows from the foregoing considerations that, in a system such as that established by the Italian Law, the public authorities have not delegated their powers to private economic operators.

24 Articles 3(g), 5 and 86 of the Treaty could apply to rules such as those contained in the Italian Law only if it were proved that that law creates a position of economic strength for an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, the consumers (judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

25 The Court has held that Article 86 of the Treaty prohibits abusive practices resulting from the exploitation, by one or more undertakings, of a dominant position on the common market or in a substantial part of it, in so far as those practices may affect trade between Member States (judgment in Case C-393/92 *Almelo and Others* v *Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 40).

26 In order to find that a collective dominant position exists, the undertakings in question must be linked in such a way that they adopt the same conduct on the market (judgment in *Almelo*, paragraph 42).

27 National rules which require a licence to be obtained before a new shop can be opened and limit the number of shops in the municipality in order to achieve a balance between supply and demand cannot be considered to put individual traders in dominant positions or all the traders established in a municipality in a collective dominant position, a salient feature of which would be that traders did not compete against one another.

28 It follows that Articles 85 and 86, in conjunction with Articles 3(g) and 5, of the Treaty do not preclude rules such as those contained in the Italian Law.

Article 30 of the Treaty

29 On this point, it is sufficient to observe that rules such as those contained in the Italian Law make no distinction according to the origin of the goods distributed by the businesses concerned, that their purpose is not to regulate trade in goods with other Member States and that the restrictive effects which they might have on the free movement of goods are too uncertain and indirect for the obligation which they impose to be regarded as being capable of hindering trade between Member States (judgment in Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 24, and the decisions cited above).

30 Article 30 does not therefore preclude legislation such as the Italian Law.

31 In the light of all the foregoing considerations, the answer to the question referred by the Tribunale Amministrativo Regionale per il Veneto must be that on a proper

construction Articles 3(g), 5, 85, 86 and 30 of the Treaty do not preclude rules of a Member State which make the opening of new shops subject to the grant of a licence issued by the mayor on the mandatory opinion of a municipal committee, where the members of that committee appointed or nominated by traders' organizations to give expert advice are in the minority and its opinions must have regard to the public interest, and where the mayor, who holds the power of decision, is obliged to take into account public interest criteria laid down in a commercial development plan drawn up by the municipality.

Costs

32 The costs incurred by the Commission of the European Communities, which has 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 (Second Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per il Veneto by orders of 24 February 1994, hereby rules:

On a proper construction Articles 3(g), 5, 85, 86 and 30 of the Treaty do not preclude rules of a Member State which make the opening of new shops subject to the grant of a licence issued by the mayor on the mandatory opinion of a

municipal committee, where the members of that committee appointed or nominated by traders' organizations to give expert advice are in the minority and its opinions must have regard to the public interest, and where the mayor, who holds the power of decision, is obliged to take into account public interest criteria laid down in a commercial development plan drawn up by the municipality.

Hirsch Mancini Schockweiler

Delivered in open court in Luxembourg on 17 October 1995.

R. Grass
Registrar

G. Hirsch
President of the Second Chamber