DOMINANT POSITION (INSURANCE): THE WOUDE CASE

Subject: Dominant position

Industry: Insurance
(Implications for other industries)

Parties: Hendrik van der Woude
Stichting Beatrixoord
Commission of the European Communities (intervener)
The Netherlands (intervener)
Sweden (intervener)
United Kingdom (intervener)

Source: Judgment of the Court of Justice, dated 21 September 2000, in Case C-222/98 (Hendrik van der Woude v Stichting Beatrixoord)

(Note. This seems at first to differ little from the Pavlov case reported in our last issue; but there are some refinements which give it both interest and importance. Once again an insurance scheme is under attack; but this time it is a sickness insurance scheme and not a pension scheme. Once again, the plaintiff is complaining about a situation in which he cannot make a choice or, if he makes a choice, cannot be compensated; but this time, he claims that health insurance is not a form of remuneration, like a pension, and that this differentiates the circumstances of the case. Once again, the plaintiff failed; this time, at least in part, because he did not fully establish the facts in his allegation of abuse of a dominant position.

Cases of this sort reflect a wish in some quarters that agreements between employees' unions and agreements between employees and employers could be subject to the same rules as agreements between undertakings. But, whether this is socially desirable or not, the rules need to be tailor-made for the purpose and not simply a stretching of the rules which exist at present.)

[Paragraphs 1 to 18 set out the facts. For the purposes of the following paragraphs, it is useful to know that the initials IZZ refer to the medical insurance scheme and the intitials VGZ to the commercial insurer running it.]

Question by the national court

18. The national court is asking essentially whether the provisions of a collective labour agreement which relate to sickness insurance for employees covered by the agreement and under which employers' contributions are paid only in respect of insurance taken out with the insurer or insurers selected for the purposes of implementing that agreement are compatible with Articles 85 and 86 of the Treaty.

19. Despite being notified of the judgments in Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie*, Joined Cases C-115/97 to C-117/97 *Brentjens' Handelsonderneming* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* and Case C-219/97 *Maatschappij Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, the national court considers it necessary to maintain its reference on the grounds that, in the present case, operation of the IZZ Medical Expenses Scheme had been subcontracted to IZZ, which called upon the commercial insurer VGZ to carry on the insurance business in question.

20. Mr Van der Woude submitted at the hearing that in *Albany*, *Brentjens'* and *Drijvende Bokken* the Court had given an answer, in the main, to the question which has been referred. He nevertheless submitted that the exception to the application of Article 85 of the Treaty recognised in those cases did not apply to health care insurance. He argued that insurance premiums relating to health care, unlike pension contributions which form part of the direct remuneration for work, do not fall within the core subjects negotiated in the framework of collective labour agreements. In addition, he submits that the collective labour agreement has a direct influence on third parties, namely other providers of health care insurance, since it entails an obligation to become a member of VGZ.

21. The Netherlands Government, supported by the Swedish and United Kingdom Governments and the Commission, also referred to *Albany*, *Brentjens'* and *Drijvende Bokken* at the hearing, submitting that the agreement entered into in the present case between six associations of employers and 28 organisations representing employees evolved from dialogue between management and labour, was concluded in the form of a collective agreement and concerned employees' terms of employment. A collective labour agreement of that kind would therefore satisfy the criteria set out in the case-law mentioned above. It added that the fact that the insurance business was not carried on by management and labour and that IZZ subcontracted the business to VGZ did not affect the nature or purpose of the collective labour agreement at issue in the main proceedings.

22. It should be noted that, in *Albany*, *Brentjens'* and *Drijvende Bokken*, the Court held that agreements entered into in the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 85(1) of the Treaty.

Nature and purpose of the agreement

23. It is therefore necessary to consider whether the nature and purpose of the agreement at issue in the main proceedings warrant its exclusion from the scope of Article 85(1) of the Treaty.

24. First, the agreement in point in the main proceedings was concluded in the form of a collective agreement and constitutes the result of collective bargaining between organisations representing employers and those representing employees.

25. Second, regarding its purpose, the agreement establishes in a given sector a health care insurance scheme which contributes to improving the working conditions of the employees, not only by ensuring that they have the necessary means to meet medical expenses but also by reducing the costs which, in the absence of a collective agreement, would have to be borne by the employees.

26. The fact that the insurance business in question was subcontracted cannot prevent the exception from the prohibition in Article 85 of the Treaty, which was established by *Albany*, *Brentjens'* and *Drijvende Bokken*, from applying in the case of a collective labour agreement such as that in point in the main proceedings. To accept such a limitation would constitute an unwarranted restriction on the freedom of both sides of industry who, when they enter into an agreement concerning a particular aspect of working conditions, must also be able to agree to the creation of a separate body for the purpose of implementing the agreement and this body must be able to have recourse to another insurer.

27. It must therefore be concluded that the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.

Dominant position

28. As far as Article 86 of the Treaty is concerned, Mr Van der Woude has submitted that the relevant geographic market was the Netherlands and that the market for the product concerned was that of supplying and concluding private health care insurance for employees who were subject to the Collective Labour Agreement. He argues that Article 32 of the Collective Labour Agreement resulted in the creation of a sub-market since, as regards those employees subject to the agreement, ordinary health insurance could not be substituted for insurance provided by IZZ/VGZ. Those insurers therefore enjoyed a dominant position for the purposes of Article 86 of the Treaty and, since the employers paid 50% of the premium, IZZ/VGZ were able to act independently of their competitors.

29. Mr Van der Woude asserts, in addition, that IZZ/VGZ abused their dominant position by imposing unfair prices or other unfair trading conditions. He claims that, in spite of deriving advantages as regards costs from the contested body of provisions of the Collective Labour Agreement, IZZ/VGZ none the less offered less advantageous conditions than any of their potential competitors, as is apparent from the observations set out in paragraph 14 above. He also draws attention to Article 2(1A) of the IZZ's rules on health care, the consequence of which is that an employee who for personal reasons does not become a member, or ceases to be a member, of IZZ/VGZ may not join or rejoin the IZZ scheme, a provision which further strengthens the link between the assured and IZZ/VGZ.

30. In that regard, it is sufficient to note that it does not appear from either the papers provided by the national court or from the written and oral observations that the system laid down in the Collective Labour Agreement has induced the undertaking responsible for managing the insurance scheme at issue in the main

proceedings to abuse any dominant position it might have or that the services provided by the undertaking do not meet the needs of the employees concerned.

31. Questions concerning whether the term under which former members may not rejoin the IZZ scheme, or the fact that unfair pricing or trading conditions are imposed in the present case, constitute an abuse of a dominant position do not fall within the scope of the main proceedings, which concern only the compatibility with the competition rules of rules laid down in the Collective Labour Agreement as to which sickness insurance scheme employers may contribute to.

32. The answer to be given to the question referred for a ruling must therefore be that the provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty.

Costs

33. The costs incurred by the Netherlands, Swedish and United Kingdom Governments and by the Commission, 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.

Court's Ruling

The Court, in answer to the question referred to it by the Kantongerecht te Groningen by order of 20 May 1998, hereby rules:

The provisions of a collective labour agreement which relate to the sickness insurance of employees covered by the agreement and under which employer contributions may be paid only in respect of insurance taken out with insurer(s) selected in the context of implementing the agreement are compatible with Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC). ■

The full text of the foregoing case is freely available on the web-site of the Court of Justice of the European Communities. It is not, however, definitive and may be subject to changes of wording and expression.

The full text of the document, on which there is a report on pages 245 to 250 of this issue, and of related documents on the subject of horizontal agreements, may be found on the web-site of the Commission of the European Communities.