

JUDGMENT OF THE COURT

14 JULY 1971¹

**Ministère Public of Luxembourg
v Madeleine Hein, née Muller, and Others**
(Reference for a preliminary ruling
by the Tribunal d'arrondissement of Luxembourg)

Case 10/71

Summary

1. *Procedure — Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits*
(EEC Treaty, Article 177)
2. *Competition — Undertakings entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) of the EEC Treaty — Application of that provision — No rights conferred on individuals if Article 90 (3) not applied*

1. In applying Article 177 of the Treaty the Court is not competent to decide questions of compatibility of a provision of national law with Community law. It can, however, infer from the wording of the questions formulated by the national court, in the light of the facts as found by the latter, the matters involving interpretation of the Treaty.

2. An undertaking which enjoys certain privileges for the accomplishment of tasks entrusted to it by law, maintaining for this purpose close links with the public authorities, and which is responsible for ensuring the navigability of the State's most

important waterway, may fall under Article 90 (2) of the EEC Treaty.

The application of Article 90 (2) involves an appraisal of the requirements, on the one hand, of the particular task entrusted to the undertaking concerned and, on the other hand, the protection of the interests of the Community. This appraisal depends on the objectives of general economic policy pursued by the States under the supervision of the Commission. Consequently, and without prejudice to the exercise by the Commission of the powers conferred by Article 90 (3), Article 90 (2) cannot create individual rights which the national courts must protect.

In Case 10/71

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal d'Arrondissement of Luxembourg (criminal division) for a preliminary ruling in the action pending before that court between

¹ — Language of the Case: French.

MINISTÈRE PUBLIC OF LUXEMBOURG

and

MADELEINE HEIN, *née* MULLER,
ALPHONSE HEIN,
EUGÈNE HEIN and
ANDRÉ HEIN,

on the interpretation of the rules relating to competition in the EEC Treaty with regard to the establishment of a river port,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi (Rapporteur), Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and procedure

The facts giving rise to this case and the procedure may be summarized as follows:

The limited partnership J. P. Hein et fils, which formerly conducted dredging operations on the Moselle, was obliged to give up this work when the waterway was canalized. With a view to transferring its activities, it sought an authorization from the Luxembourg Ministry of Transport to extend the trans-shipment wharf which it has owned since 1940, so as to use it for the loading and unloading of boats using the canalized Moselle. Such authoriza-

tion, granted on a 'provisional basis and subject to revocation' on 17 April 1965 on the basis of a favourable opinion from the international Commission for the Moselle, was revoked on 28 July of the same year.

Following discussions between the interested parties regarding the legality of this revocation, the Hein company was authorized by the Ministry of Transport at the beginning of 1967, to use its wharf for the loading and unloading of specified materials taken from sand-pits and quarries for the company's own use.

By judgment of 20 February 1970, the Tribunal d'arrondissement of Luxembourg (criminal division) found Madel-

eine Hein, Alphonse Hein, Eugène Hein and André Hein, partners in the firm of J. P. Hein et fils, guilty of having carried out for the benefit of third parties trans-shipment of goods not covered by the governmental authorization of February 1967, and having thus contravened Article 12 of the Luxembourg Law of 22 July 1963 concerning the establishment of the river port of Mertert on the Moselle, as amended by the Law of 26 June 1968, with particular reference to Article 2 of the last-mentioned Law, which laid down the criminal sanctions applicable.

The judgment of 20 February 1970 analyses the privileged system established by these Laws for the company operating the port of Mertert (involving tax exemptions, the assumption of maintenance charges by the State, the company's right to be consulted before any authorization is granted to third parties, and so on), and emphasizes that under this system 'the operating conditions of any other wharf or port owner are more onerous and less favourable than those of the company operating the port of Mertert'. Consequently, it considers that 'freedom of competition does not seem to be possible in this sector; moreover, the evidence before the court shows beyond doubt that the company is striving to preserve its pre-eminent position and tending to transform itself into a *de facto* quasi-monopoly'. The judgment concludes that 'in these circumstances a question of principle relating to competition arises, first, of course, with regard to the scope, the direct application and the substantive content of Community law in this respect'. Although in the course of the hearing an infringement of Community law was alleged only by implication, the Tribunal d'arrondissement queried whether the Luxembourg legislation referred to is compatible with the EEC Treaty or the rules implementing it. Hence, in view of the precedence of Community law over national law, and 'in view of the great importance of uniformity of

judicial decisions, having regard also to the complexity of Community law on these matters, its specific character, and the autonomy of Community concepts asserted by the Court of Justice of the European Communities', the court felt bound 'to seek a preliminary ruling from the Court of Justice of the European Communities on the interpretation of the provisions of Community law concerning competition'.

By a judgment of 15 February 1971, the Cour supérieure de justice of the Grand Duchy of Luxembourg, to which the parties had appealed against the judgment of the Tribunal d'arrondissement, dismissed the appeal as unfounded subject to the outcome of the request of the Court of Justice of the European Communities for a preliminary ruling on the questions set out in the operative part of the judgment of the Tribunal d'arrondissement asking:

- '1—Generally, whether in this field rights are conferred directly by Community law on individuals subject to national law and, in particular, whether such is the case in the matter dealt with by the Luxembourg Law of 22 July 1963 governing the establishment and operation of a river port on the Moselle, as amended by the Law of 26 June 1968 on the same subject.
- 2—If the answer is in the affirmative, whether the provisions of the above-mentioned laws are, and to what extent, incompatible either with the letter and spirit of the Treaty of Rome, or with regulations or other obligations imposed by the competent bodies established by the said Treaties.'

The decision referring the questions was received at the Court Registry on 17 March 1971.

The partners in J. P. Hein et fils, defendants before the Luxembourg court, and the Commission of the European Communities submitted written observations in accordance with Article 20 of

the Protocol on the Statute of the Court of Justice.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to dispense with a preparatory inquiry.

The Luxembourg Government and the Commission presented oral argument at the hearing on 22 June 1971.

In the proceedings before the Court of Justice, the defendants in the main action were represented by N. Mosar, Advocate of the Luxembourg Bar, the Luxembourg Government was represented by its Agent, J. Hostert, and the Commission by its Legal Adviser, R. Baeyens.

The Advocate-General delivered his opinion at the hearing on 1 July 1971.

II—Written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice

The observation submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

The *defendants* in the action before the national court observe first, with regard to the formulation of the questions contained in the judgment, that according to the case-law of the Court of Justice, it can extract from the file such questions of interpretation or of validity as fall within its jurisdiction.

The first question

The *defendants* in the action before the national court observe that the rules relating to competition established by the EEC Treaty create directly applicable individual rights.

The *Commission of the European Communities*, whilst agreeing with this opinion, observes that the question can hardly be admitted as it relates to the simultaneous application to a particular case

of Community provisions which are not otherwise detailed and of legislative provisions of domestic law.

The second question

The *defendants* in the case before the national court observe that this question seeks to ascertain whether the fact that a Member State binds by means of a Law the activities of an undertaking operating on the largest river of the country and more especially a river that is common to several Member States of the Community, and the fact that this undertaking is granted specific powers and rights which enable it to control the market and to distort competition by the abuse of a dominant position which it has obtained by means of the Law, is compatible with the spirit and the letter of the EEC Treaty and the regulations implementing it.

The Law of 22 July 1963 empowers the Luxembourg Government to participate, on behalf of the State, in a joint stock company having as its aims the establishment of a river port on the Moselle and the industrial and commercial operation of that port. The Mertert river port company therefore has documents of constitution which confer special and exclusive rights and which therefore fall within Article 90 of the EEC Treaty. Even if this company were regarded as a transport undertaking, the fundamental problem would not be altered since Regulation No 1017/68 applies rules of competition to transport by inland waterway. Article 9 in particular of this regulation repeats the provisions of the EEC Treaty relating to public undertakings and undertakings to which Member States grant special or exclusive rights.

Making reference to the exception to the rules relating to competition contained in Article 90 (2) in favour of undertakings entrusted with the operation of services of general economic interest, the defendants observe that the Mertert port company was not entrusted

with a service of this nature. In fact the law relating to the establishment and operation of a river port on the Moselle provides, in Article 1, that the company is responsible for the industrial and commercial operation of the port but does not state that it is a special task of general economic interest.

Because of its position on a frontier river and because of the use of the port by companies in the three neighbouring countries, the undertaking, although situated in the Grand Duchy of Luxembourg, affects trade between the Member States by its activities. Article 12 of the Law of 1963 imposing on the Luxembourg Government the obligation to consult the Mertert port company before allowing the establishment or use of ports or wharfs for loading or unloading either on the Luxembourg or the German side of the river, clearly shows the Luxembourg Government's intention to ensure that this undertaking also has a monopolistic position with regard to the German side of the river. It is therefore an undertaking with a dominant position in a substantial part of the common market. The only undertaking which can at the present moment compete with the Mertert port company is the firm of J. P. Hein et fils.

By the means, on the one hand, of the system of consultation set up by Article 12 of the Law of 1963 and, on the other hand, of the penalties provided for by Article 2 of the Law of 26 June 1968 resulting in the automatic suppression of competing undertakings, the Mertert port company has abused its monopolistic position to make its unilateral will the law of the market, independent of all the normal rules of competition.

This situation is contrary to Articles 86 and 90 of the Treaty of Rome, the interpretation of which leads to the conclusion that it is contrary to the spirit of the Treaty that one undertaking should be in a *de facto* monopolistic situation and should use the privileges granted to it by the State to govern the market.

Whilst recalling that, according to the case-law of the Court, the latter is at pains to extract from the text of the decision making the reference only such questions as relate to the interpretation of Community provisions, the *Commission of the European Communities* believes that this question 'as formulated by the Tribunal d'arrondissement of Luxembourg in its judgment of 20 February 1970 does not relate to the interpretation of Community provisions and does not therefore fall within the jurisdiction conferred on the Court of Justice under Article 177 of the EEC Treaty'.

III—Oral observations submitted at the hearing on 22 June 1971

By letter from the Registrar dated 9 June 1971, the parties to the main action, the Commission of the European Communities and the Luxembourg Government were informed that the Court hoped that in such oral observations as they might submit they would develop the following matters:

1. The direct applicability of Article 90 (1) and (2);
2. The scope of these provisions in relation to the conduct of a State in granting special privileges and advantages to an undertaking operating a river port and in protecting its preeminent position on the market by authorizing any competing activity only on the basis of obligatory consultation with that undertaking, covering in particular restrictions on the nature, the origin or destination and the quantities of goods to be loaded or unloaded.

At the hearing on 22 June 1971 the principal submission of the Representative of the *Grand Duchy of Luxembourg* was that the two questions referred by the Luxembourg court were inadmissible because they did not relate

to the abstract interpretation of the Treaty but to its application to a well-defined law.

In addition he maintained with regard to the first point set out in the above-mentioned letter of 9 June 1971 that Article 90 (1) could not be directly applicable, as its application presupposes that the implementing measures laid down by Article 90 (3) have been complied with. Article 90 (1), on its own, goes no further than restating, with regard to the particular case of public undertakings, the obligations incumbent upon Member States of the Community by virtue of Article 5 of the Treaty.

Article 90 (2) implies a margin of discretion for the Member States in reconciling possibly conflicting national and Community interests. It is for the Commission to review this discretion and there is no possibility of direct effect.

With regard to the second point set out in the letter of 9 June 1971, the Luxembourg Government observes that the legislation relating to the port of Mertert does not engender any discrimination within the meaning of Article 7 of the Treaty. In addition, since the section of the Moselle running adjacent to Luxembourg is merely 40 kilometres in length, there can be no question of this law concerning a substantial part of the common market. Moreover, trade between Member States is not thereby affected; on the contrary, the establishment of the port of Mertert has had a favourable influence on the develop-

ment of international trade. Finally, it states that the Moselle is subject to a special condominium vested in Luxembourg and Germany by virtue of the Treaty of Aix-la-Chapelle of 1816 in which rules were established on a political basis independent of all economic considerations; consequently the Luxembourg Government doubts whether the economic rules laid down by the EEC Treaty may be applicable to such a situation.

The *Commission of the European Communities* maintains that Article 90 (1) is directly applicable independently of any measure taken by the Commission by virtue of Article 90 (3). Paragraph (2) of the same article is also directly applicable, at least in so far as it directly governs the activities of undertakings. Both the application of paragraph (3) and the existence of discretionary evaluations of the interests in question are merely possibilities and can therefore not affect the direct applicability of the above mentioned provisions.

With regard to the second point raised by the letter of 9 June 1971, the Commission observes that Article 86 of the Treaty prohibits the abuse of a dominant position by undertakings and therefore does not directly concern the adoption of legislation by Member States. Regulation No 1017/68 cited by the defendants does not apply to activities such as those carried out by port undertakings, which cannot be regarded as undertakings involved in transport.

Grounds of judgment

- ¹ By judgment of 20 February 1970, received at the Court Registry on 17 March 1971, the Tribunal d'arrondissement of Luxembourg, (criminal division), has referred, pursuant to Article 177 of the EEC Treaty, two questions concerning the interpretation of that Treaty in relation to national laws governing the setting up and development of a river port on the Moselle (port de Mertert).

- ² The first question asks 'generally, whether in this field rights are conferred directly by Community law on individuals subject to national law and, in particular, whether such is the case in the matter dealt with by the Luxembourg Law of 22 July 1963 governing the establishment and operation of a river port on the Moselle, as amended by the Law of 26 June 1968 on the same subject'.
- ³ In the event of the first question's being answered in the affirmative, it is then asked 'whether the provisions of the abovementioned laws are, and to what extent, incompatible either with the letter and spirit of the Treaty of Rome, or with regulations or other obligations imposed by the competent organs established by the said Treaties'.
- ⁴ Despite the imprecise nature of the questions, the grounds of judgment of the national court clearly show the subject-matter of this reference.
- ⁵ In particular, the national court observes that, by reason of the advantages and privileges conferred by legislation on the Société du port de Mertert, the body entrusted with the operation of the said port, and the resultant unfavourable competitive position of other port undertakings on the Moselle, it doubts whether those Laws are in conformity with the Community rules relating to competition.
- ⁶ Before imposing on individuals the criminal sanctions prescribed by Article 2 of the Law of 26 June 1968 for cases of infringement of the provisions restricting the activities of third parties in this field, the national court considered it necessary to refer the matter to the Court of Justice in order to obtain an interpretation which would enable it to resolve the problem of the compatibility with the Community's rules on competition of subsequent rules of domestic law.
- ⁷ Although the Court, in applying Article 177 of the Treaty, is not competent to decide on the compatibility of a national provision with Community law, it can infer from the wording of the questions formulated by the national court, in the light of the facts as found by the latter, the matters involving interpretation of the Treaty.
- ⁸ From the information supplied by the Tribunal d'arrondissement it appears that the questions raised fall within the sphere of application of Article 90 of the Treaty.
- ⁹ Article 90 (1) imposes a general prohibition on Member States, in respect of public undertakings and undertakings to which they grant special or exclusive

rights, against enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

- ¹⁰ However, Article 90 (2) provides that undertakings entrusted with the operation of services of general economic interest shall be subject to these rules, and in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings, but subject to the condition that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
- ¹¹ An undertaking which enjoys certain privileges for the accomplishment of the task entrusted to it by law, maintaining for this purpose close links with the public authorities, and which is responsible for ensuring the navigability of the State's most important waterway, may fall within this provision.
- ¹² To answer the questions referred, therefore, it is necessary to consider whether Article 90 (2) is of such a nature as to create individual rights which the national courts must protect.
- ¹³ Article 90 (2) does not lay down an unconditional rule.
- ¹⁴ Its application involves an appraisal of the requirements, on the one hand, of the particular task entrusted to the undertaking concerned and, on the other hand, the protection of the interests of the Community.
- ¹⁵ This appraisal depends on the objectives of general economic policy pursued by the States under the supervision of the Commission.
- ¹⁶ Consequently, and without prejudice to the exercise by the Commission of the powers conferred by Article 90 (3), Article 90 (2) cannot at the present stage create individual rights which the national courts must protect.

Costs

- ¹⁷ The costs incurred by the Government of the Grand Duchy of Luxembourg and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the Government of the Grand Duchy of Luxembourg and the Commission of the European Communities;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 90 and 177;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Tribunal d'arrondissement of Luxembourg (criminal division) by judgment of that court of 20 February 1970, hereby rules:

Without prejudice to the exercise by the Commission of the powers conferred by Article 90 (3), Article 90 (2) cannot at the present stage create individual rights which the national courts must protect.

Lecourt

Donner

Trabucchi

Monaco

Mertens de Wilmars

Pescatore

Kutscher

Delivered in open court in Luxembourg on 14 July 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 1 JULY 1971¹

*Mr President,
Members of the Court,*

The origins of the present case are somewhat distant.

By a treaty signed in Luxembourg on 27 October 1956 relating to the canal-

ization of the Moselle, the Federal Republic of Germany, the French Republic and the Grand Duchy of Luxembourg concluded a very complex agreement whereby they undertook to make the stretch of the Moselle between Thionville and Koblenz accessible to ships up

¹ — Translated from the French.