ECONOMIC ACTIVITY (SICKNESS FUNDS): THE AOK CASE

Subject: "Economic activity"
Price fixing
Associations of undertakings
Proportionality
"General economic interest"

Industry: Sickness funds

Parties: AOK Budesverband et al
Ichthyol-Gesellschaft Cordes et al

Source: Opinion of Advocate General Francis Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 (*AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes and Others*), summarized in Court Statement CJE/03/44, dated 22 May 2003

(Note. This litigation turns on whether German sickness funds are pursuing an economic activity, in which case they meet the primary test for being subject to the rules on competition, and then on whether the price fixing carried on by the sickness funds are compatible with those rules. The Advocate General considers that the fixing of amounts paid for certain medicines by German sickness funds is, in principle, contrary to competition law, but is capable of justification. In his view, it is for the national courts to determine whether the sickness funds have exercised any margin of discretion left open to them by national law in an anti-competitive manner and whether the setting of fixed amounts is a manifestly disproportionate method for ensuring the provision of a service of general economic interest. The view of the Advocate General is not binding on the Court of Justice. The task of an Advocate General is to propose to the Court, in complete independence, a legal solution to a case. The Court now has to give its ruling.)

Under German law, the great majority of employees are required to belong to a statutory health insurance system unless their income exceeds a certain level. The system is funded by compulsory contributions from the insured persons and their employers. Ordinarily, the insurance funds are required to purchase medical services and supplies and supply them to their insured persons. However, for certain products a maximum fixed price is set and where the cost of the product exceeds that fixed price, the insured person must bear the remainder of the cost. Only about 7% of medicinal products to which a fixed amount applies are priced at a level above that amount.

The fixed amounts are decided in a two stage process. First, a committee, composed of representatives of the leading sickness fund associations and associations of doctors, decide which types of products are to be subject to a fixed amount. These selections are approved by the Ministry of Health. Secondly, the

associations of sickness funds together determine the fixed amounts following certain criteria laid down by law. Once set, the fixed amounts are subject to annual review and must be adapted to reflect changes in the market. They are also required to be published and are open to challenge before the Courts.

A number of pharmaceutical companies (the respondents) challenged decisions of the leading associations of sickness funds in Germany (the appellants) to alter the fixed amount payable for their products. The respondents argued that the decision to fix prices was anti-competitive behaviour, prohibited by Community competition law. The German courts hearing the appeals referred questions to the Court of Justice of the EC as to whether Community competition law was applicable to these associations of sickness funds, whether the decisions to set fixed amounts was contrary to Community law and whether those decisions could be justified as being necessary for the provision of a service of general economic interest.

Advocate General Jacobs delivered his Opinion in this case on 22 May. He believes that Community competition law is applicable in this case. In this respect the Advocate General recalls that an activity must be economic in nature, the decision taken must relate to that activity, and the decision must be taken by an association of undertakings for Community competition law to be applicable. Whilst the Court has previously held that certain social security schemes are not economic in nature, the Advocate General considers that, in this case, the existence of a certain degree of competition between the sickness funds, and between the sickness funds and private insurers demonstrates that the activity is economic in nature as it could be carried out for profit by a private undertaking. In addition, the Advocate General considers that the fixing of certain prices falls within the sphere of that economic activity as a sickness fund's decision regarding the parameters of the services to be offered cannot be dissociated from their core activity of the provision of health insurance. Finally, the Advocate General is of the opinion that, at least at the second stage of the procedure for setting fixed amounts, the leading associations of sickness funds can be said to act as associations of undertakings, given that, at that stage, there is no requirement to obtain the prior approval of the Ministry, the decision-making body is made up exclusively of the appellants' representatives, and the applicable criteria are insufficiently distinct from the appellants' own interest in setting fixed amounts at a low level.

Advocate General Jacobs considers that, in principle, the collective decisions to fix amounts are prohibited by Community competition law. He states that such a practice effectively fixes the price for certain medicinal products, which has the object and effect of restricting competition and is expressly identified in the EC Treaty as being an anti-competitive practice.

However, the Advocate General notes that Community competition law is applicable to anti-competitive conduct engaged in by undertakings only on their own initiative. If such conduct is required by national law, competition law cannot apply. It is for the national courts to determine whether the German law eliminates any scope for autonomous conduct on the part of the appellants when

setting the fixed amounts. In this respect the Advocate General suggests that the appellants were unable to avoid fixing an amount and that the appellants were not entirely free to choose the fixed amount because of the requirement to determine the amount on the basis of the lowest price of the comparator group. Advocate General Jacobs therefore suggests that the national courts should examine whether the appellants had used any remaining discretion that they had to create an appreciably greater restriction on competition than would have resulted from another permissible decision.

If the appellants have acted autonomously, there remains the possibility of justifying their conduct as being a necessary and proportionate means of ensuring the provision of a service of general economic interest. Advocate General Jacobs considers that the sickness funds are charged with such a service. He believes that in principle the appellants could defend their position. However, it is for the national courts to determine whether the setting of fixed amounts is necessary in order to allow the appellants to carry out their general interest task, that is whether the setting of fixed amounts is indeed necessary to assure the financial stability of the sickness funds. In doing so it would have to be shown that the system was manifestly disproportionate for ensuring the ability of the sickness funds to perform their tasks of general economic interest in conditions of financial stability for such a defence to fail. ■

State Aid: The BMW Case

The Commission has closed the formal proceedings into planned aid amounting to €37.2m for BMW's engine plant in Steyr. The Commission found that a total amount of €29.9m for regional aid, training aid, environmental aid and R&D aid was compatible with the respective Community rules. A further €7.3m could not be reconciled with these rules and should not be granted. The Research and Development aid concerns investments into the development of new diesel engine technology. However, as BMW would, even in the absence of aid, have to undertake the research for the remaining R&D projects in order to stay competitive, the necessary incentive effect for these projects has not been proven. Consequently, the planned aid for these projects is not compatible with the common market. Investment aid for innovation in the motor vehicle sector can be authorised only in duly justified cases, as an incentive to industrial or technological risk-taking. The project concerns investments into state of the art testing and measuring equipment. The Commission took the view that the project could not be regarded as genuinely innovative in the sense that the technology had not yet been used or marketed by other parties operating in the industry. In addition, the aid was not considered as an incentive for industrial or technological risk-taking, as BMW would have to carry out the investment even in the absence of state aid. Consequently, the planned innovation aid was not allowed.

Source: Commission Statement IP/03/755, dated 27 May 2003