REPORT FOR THE HEARING
in Case C-41/90 *

I — Facts and procedure

1. *Legal background*

(a) *International law*

1. At its 31st session, the General Conference of the International Labour Organization adopted on 9 July 1948 Convention No 88, the Employment Service Convention 1948 (International Labour Conventions and Recommendations 1919-1981, p. 93). Article 1 of that Convention requires ILO members for which the Convention is in force to maintain or ensure the maintenance of a free public employment service. Pursuant to Article 2, that service is to consist of a national system of employment offices under the direction of a national authority. Article 6 provides that the service is to be so organized as to ensure effective recruitment and placement.

2. Article 10 provides that all possible measures are to be taken by the employment service and, where appropriate, by other public authorities, in cooperation with employers' and workers' organizations and other interested bodies to encourage full use of employment service facilities by employers and workers on a voluntary basis. Finally, Article 11 requires the competent authorities to take the measures necessary to ensure effective cooperation between the public employment service and the private employment agencies not conducted with a view to profit.

3. Convention No 96, adopted by the General Conference on 1 July 1949 at its 32nd session concerns fee-charging employment agencies (International Labour Conventions and Recommendations 1919-1981, p. 102). Article 1 of that Convention distinguishes between fee-charging employment agencies which are conducted with a view to profit and those which are not. Fee-charging employment agencies are defined as any person, company, institution, agency or other organization which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving directly or indirectly any pecuniary or other material advantage.

4. Article 2 grants members ratifying the Convention a choice between accepting the provisions of Part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit, and the provisions of Part III, providing for the regulation of fee-charging agencies, including agencies conducted with a view to profit. The progressive abolition of the latter agencies, in accordance with Part II of the Convention, is not, however, absolute.

* Language of the case: German

Article 5(1) provides that exceptions to the rule requiring abolition are to be allowed by the competent authority in exceptional cases in respect of categories of persons exactly defined by national laws or regulations, for whom appropriate placing arrangements cannot conveniently be made within the framework of the public employment service, but only after consultation, by appropriate methods, with the organizations of employers and workers concerned. Article 5(2) lays down the conditions applicable to such exceptions. The agency concerned is to be subject to the supervision of the competent authority, must hold a special licence, may only charge fees and expenses indicated on a scale approved by the competent authority and may place or recruit workers abroad only if permitted to do so by the competent authority and under conditions determined by the laws or regulations in force.

5. Article 8 provides that appropriate penalties, including the withdrawal when necessary of the licences and authorizations provided for by the Convention, are to be prescribed for any infringement of the provisions of Part II of the Convention or of any laws or regulations giving effect to them.

6. Convention No 96 has been ratified by all the Member States of the Community except Denmark and the United Kingdom.

(b) *National law*

7. The employment service in Germany is governed by the Arbeitsförderungsgesetz (Law on the promotion of employment, hereinafter referred to as 'the AFG'). Paragraph 1 specifies the aim of the AFG; measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve the structure of the labour market and thus to promote economic growth. Paragraph 3 entrusts the attainment of the general aim described in Paragraph 2 to the Bundesanstalt für Arbeit (Federal Office for Employment, hereinafter referred to as 'the Bundesanstalt'). Employment procurement and the management of unemployment benefits are among the tasks entrusted to it.

8. The concept of employment procurement is defined in Paragraph 13 of the AFG as bringing prospective employees into contact with employers with a view to their concluding a contract of employment. For the purposes of employment procurement, the Bundesanstalt is vested with an exclusive right under Paragraph 4. Paragraph 18 states in that connection that recruitment and procurement for employment abroad, and recruitment and procurement abroad for employment in Germany, are to be carried out only by the Bundesanstalt. Other institutions may, however, undertake such cross-frontier activities after obtaining the consent of the Bundesanstalt. In adopting its decisions, the Bundesanstalt takes account of the interests of German workers and of the German economy and the state of the labour market. It may attach conditions and obligations to its decision. According to Paragraph 18(2), the provisions of Community law are to be unaffected.

9. Paragraph 23 provides for another possible derogation from the exclusive right of employment procurement. The Bundesanstalt may, in exceptional cases and after

consulting the workers' and employers' associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations. However, their activities remain subject to the supervision of the Bundesanstalt.

10. The Bundesanstalt must, by virtue of Paragraphs 20 and 21, exercise its exclusive right of employment procurement impartially and without charging a fee. The sixth title of the AFG deals with the financial resources enabling the Bundesanstalt to carry out its activities on that basis. Paragraph 167 thus allows the Bundesanstalt to collect contributions from employers and workers.

11. The eighth title of the AFG contains provisions concerning penalties and fines. Paragraph 227 provides that any person who, without the prior consent provided for in Paragraph 18 or without being instructed to do so by the Bundesanstalt under Paragraph 23, carries out employment procurement activities in respect of a German worker abroad or a foreign worker in Germany is liable to imprisonment or a fine. Paragraph 228 enables fines to be imposed for the conduct of any activity in breach of the AFG.

12. Notwithstanding the Bundesanstalt's exclusive right to undertake employment procurement, specific employment procurement business has developed in Germany specifically for executives. That activity is carried on by recruitment consultants who assist undertakings regarding personnel policy. The Bundesanstalt has reacted to that development in two ways. First, in September 1957 it published a circular on the principles according to which the borderline between recruitment consultants' activities and employment procurement in the strict sense is defined (*Amtliche Nachrichten der Bundesanstalt für Arbeit*, 1957, p. 457). In that circular, the Bundesanstalt states that, under an agreement with several professional associations, it will tolerate certain activities on the part of recruitment consultants. That circular was superseded on 6 November 1970 by a new document (*Amtliche Nachrichten der Bundesanstalt für Arbeit*, 1970, p. 889)

13. Secondly, the Bundesanstalt decided to open an executive agency (Büro für Führungskräfte der Wirtschaft), entrusted with the placement of highly qualified people in executive posts in large undertakings.

14. Finally, it is to be noted that the scope of the Bundesanstalt's employment procurement monopoly has been the subject of several judicial decisions in Germany. The Bundesverfassungsgericht thus held, by judgment of 4 April 1967 (*Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 21, p. 245) that, having regard to the public interest, that monopoly was not incompatible with the right freely to choose an occupation. The monopoly was considered necessary in order to avoid the abuses discovered in the past and to make up for the shortcomings of private employment procurement businesses conducted with a view to profit. According to the Bundesverfassungsgericht, it also extends to employment procurement for business executives, even though that sector is to be distinguished from employment procurement in general. It would be difficult to establish a monopoly of differing extent for the various occupations and to do so would undermine the effectiveness of the Bundesanstalt. For its part, the Bundesgerichtshof considers that the monopoly applies to business executives (judgment of 23 October 1974 — IV ZR 7/73, *Betriebsberater* 2-20, January 1975, p. 96). The activities of recruitment consultants do not fall outside that monopoly unless they consist mainly in giving advice and if assistance with procurement does not involve the

charging of specific fees. Payment of the fees charged for employment procurement for executives, where those conditions are not met, cannot be enforced by legal proceedings (judgment of 12 April 1978 — IV ZR 157/75, *Betriebsberater* 28, October 1978, p. 1415). Paragraph 134 of the German Civil Code provides that contracts which fail to observe a legal prohibition are void.

2. *Facts and procedure before the national court*

15. The proceedings before the national court are between two recruitment consultants, Messrs Höfner and Elser, German nationals residing in Germany, and Macrotron GmbH, a company whose registered office is in Munich. The two parties had concluded a contract for the procuring and selection of candidates for a post as sales director with Macrotron. On completion of their task, Messrs Höfner and Elser presented to the company a candidate, Mr R. Dechert, a German national, whom they considered suitable. However, Macrotron decided not to engage Mr Dechert and declined to pay the recruitment consultants' fees. The latter then commenced proceedings against Macrotron before the Landgericht Munich I, seeking an order that the defendant pay them the agreed fees. The Landgericht dismissed their claim by judgment of 27 October 1987. The plaintiffs appealed to the Oberlandesgericht München (Higher Regional Court, Munich).

3. *The questions referred to the Court*

16. The Chamber of the Oberlandesgericht dealing with the matter expressed the view in its order of 31 January 1990 that the contract concluded between the parties was a contract for the hire of services and that it was void by virtue of Paragraph 134 of the German Civil Code (Bundesgesetzbuch) in conjunction with Paragraph 13 of the AFG. The national court refers, in that context, to the case-law of the Bundesgerichtshof according to which the obligation to pay fees lapses if they were agreed in respect of employment procurement not authorized under the AFG. It considers the employment procurement in this case not to be so authorized. It also considered that the claim could not be based on Paragraph 812 of the Civil Code (relating to unjust enrichment) since the appellants had not furnished the requisite evidence.

17. In the court's view, the claim had therefore to be dismissed in so far as it was based on national law. However, the position might be different under Community law. Therefore, by order of 31 January 1990, the Oberlandesgericht München stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Does the provision of business executives by personnel consultants constitute a service within the meaning of the first paragraph Article 60 of the EEC Treaty and is the provision of executives bound up with the exercise of official authority within the meaning of Articles 66 and 55 of the EEC Treaty?

(2) Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down in Paragraphs 4 and 13 of the Arbeitsförderungsgesetz, constitute a professional rule justified by the public interest or a monopoly, justified on

grounds of public policy and public security (Articles 66 and 56(1) of the EEC Treaty)?

(3) Can a German personnel consultant rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings?

(4) In connection with the provision of business executives is the Bundesanstalt für Arbeit (Federal Employment Office) subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?'

4. *Procedure before the Court*

18. The order for reference was received at the Court Registry on 14 February 1990.

19. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the appellants in the main proceedings, represented by Dr Joachim Müller, Rechtsanwalt, Munich, and by Volker Emmerich, Professor of Law at the University of Bayreuth, by the respondent in the main proceedings, represented by Holm Tipper, Rechtsanwalt, Munich, by the German Government, represented by Ernst Röder, Regierungsdirektor, Federal Ministry of the Economy, acting as Agent, and by the Commission of the European Communities, represented by Étienne Lasnet, Legal Adviser, and by Bernhard Jansen, a member of the Commission's Legal Department, acting as Agents.

20. By decision of 10 October 1990, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. *The concept of service*

21. *Messrs Höfner and Elser* consider that the concept of services within the meaning of Article 60 of the EEC Treaty should be construed broadly. It comprises all kinds of activities undertaken on an independent basis for remuneration, and the aim pursued is immaterial. The fact that the service must be provided for remuneration simply means that it must be paid for. The payment does not necessarily have to be made by the person benefiting from the service but may come from a third party. The nature, amount and time of the payment are not important. Payment may even be out of public funds through taxes or levies.

22. According to the appellants, it is apparent from the judgment of the Court in Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35 that employment procurement is a service within the meaning

of Article 60 of the EEC Treaty. That applies in particular to executive recruitment. There are several ways in which that service differs from general employment procurement. By contrast with general employment procurement, executive recruitment does not depend on the initiative of the prospective employee. It is the undertaking which, on its own initiative, contacts a recruitment consultant for assistance in finding and selecting candidates. The consultant is rarely involved in the final choice of the candidate but instead offers all the facilities needed for that purpose. There is no possibility therefore, in the view of Messrs Höfner and Elser, that the activities of recruitment consultants could give rise to the same risks of exploitation of workers as arise in the case of private general employment agencies.

23. In the appellants' view, that difference is also confirmed by the practice prevailing in the employment market in Germany and in other Member States. The fact that the Bundesanstalt has opened an office specializing in the recruitment of executives clearly shows that a specific sector is involved. In that sector, according to Messrs Höfner and Elser, there are between 700 and 800 consultants operating in Germany, with a turnover of between DM 750 million and 1 200 million. Because of their particular features, the activities of those consultants are not even regarded as employment procurement in the strict sense.

24. According to Messrs Höfner and Elser, the fact that the Bundesanstalt's statutory monopoly extends in principle to those activities does not mean that they are not covered by the Community rules on the freedom to provide services. Those rules also concern services provided under public authority (see for example the judgment in Case 155/73 *Sacchi* [1974] ECR 409). Nor can those rules be disregarded merely because the Bundesanstalt offers its services without charge, since remuneration is in fact paid through the employers' and workers' contributions, pursuant to Paragraph 167 of the AFG. Messrs Höfner and Elser consider that, if that were not the case, the Member States could remove certain services from the purview of Article 59 et seq. of the EEC Treaty by having them provided by a monopoly financed by compulsory contributions.

25. The *German Government* states that the Court already held in *Van Wesemael*, above, that the placement of entertainers is a service within the meaning of Article 60 of the EEC Treaty. The category of persons for whom employment is found is of scant importance.

26. The *Commission* also refers to that judgment of the Court of Justice. The fact that there are not only recruitment consultants offering employment procurement services in respect of executives but also a public body such as the Bundesanstalt, which does not charge fees, does not change the position at all. The existence of those undertakings shows that there are many transactions which are carried out for remuneration. According to the Commission, it is of little importance that the existence of such firms is attributable to the Bundesanstalt's tolerant attitude to this encroachment upon its monopoly.

2. *The exercise of public authority*

27. According to *Messrs Höfner and Elser*, it is apparent from the judgment of the Court in Case 2/74 *Reyners* [1974] ECR 631 that

the exercise of public authority is a Community concept, which must be strictly interpreted. It comes into operation only if the activity concerned constitutes direct and specific involvement in the exercise of public authority. That condition is not fulfilled merely because the activity concerned is a public duty and is carried out by a public body such as the Bundesanstalt. Messrs Höfner and Elser also consider that it is inconceivable that the selection of business executives should be classified as involving the exercise of public authority.

28. *Macrotron* observes that one of the essential objectives of the welfare State is full employment. That requires an active policy on the part of the State which, in Germany, is implemented *inter alia* by the AFG. The exclusive right of employment procurement granted to the Bundesanstalt for all personnel of whatever category thus directly and specifically reflects the assumption of tasks incumbent upon the public authorities. Executive recruitment is therefore covered by Article 55 of the EEC Treaty.

29. The *German Government* shares the opinion of the respondent in the main proceedings. It considers that national law must be applied in determining whether or not the exercise of public authority is involved. In its view that concept embraces not only the application of constraints in areas affecting citizens' liberties but also all forms of administrative action in which the citizen has dealings with a body vested with some degree of State authority. A transfer of such authority was made for the benefit of the Bundesanstalt under the AFG in view of the importance of its task. It has to take care of the interests of employees and of the economy in general, limiting as far as possible the upsets caused by shifts in the employment market and providing appropriate social cover. In the present case, the task at issue is one for which the Federal State assumes special responsibility under Conventions Nos 88 and 96, mentioned above, and which, pursuant to Paragraph 3 of the AFG the Bundesanstalt must carry out 'within the economic and social policy of the Federal Government'. To carry out its tasks, the Bundesanstalt must enjoy a general monopoly over employment procurement, enabling it to achieve an overall view of the employment market. That view would be undermined if different types of employment procurement were distinguished according to the category of persons involved. The German Government observes that the need for protection in relation to employment procurement does not vary according to the profession or occupation involved.

30. The *Commission* considers, on the other hand, that the exercise of public authority is a Community concept and that its scope cannot be made dependent on the fact that the activities concerned are reserved in certain Member States to public bodies. It is of essential importance to determine whether the activity concerned involves the exercise of public powers by the State. That is certainly not so in the case of employment procurement activities, which are brought into the public sphere in order to protect workers against abuse. The fact that the placement of private-sector executives is tolerated confirms that no exercise of public authority is involved.

3. *Justification of the prohibition*

31. *Messrs Höfner and Elser* observe that Article 59 of the EEC Treaty prohibits not only discriminatory rules but also rules which, without discriminating against foreign providers of services, hinder the

freedom to provide services. In the present case, rules which apply without distinction to foreigners and to Germans hinder that freedom in several ways. The Bundesanstalt's monopoly prevents recruitment consultants in other Member States from providing employment procurement services in Germany and requires German undertakings to use the Bundesanstalt.

32. In the appellants' view, restrictions of that kind may nevertheless be justified, according to the case-law of the Court, by considerations connected with the public interest, such as protecting workers and maintaining good relations in the employment market (judgment in *Van Wesemael*, above and judgment in Case 279/80 *Webb* [1981] ECR 3305). Such justification only applies where the rules are proportional in relation to the legitimate objective pursued. According to Messrs Höfner and Elser, that requirement of proportionality is not fulfilled if the Member State where the service is to be provided does not take account of the rules to which the provider is subject in the Member State where he is established. In the present case, the German prohibition takes no account of the foreign rules on employment procurement. The prohibition is categorical, even though the AFG envisages the possibility that authorization may be given for that activity.

33. The appellants contend that that failure to observe the principle of proportionality affects in particular the activities of recruitment consultants which are not regarded in any Member State as involving the public interest. They observe that even the Bundesanstalt acknowledges in its circulars of 1957 and 1970 that those activities are to be distinguished from employment procurement in general. Despite acknowledging that fact, the Bundesanstalt seeks to monopolize that sector, even though it is not capable of properly satisfying the demand.

34. *Macrotron* denies that Bundesanstalt is not able to satisfy the demand. It notes that in 1988 the Bundesanstalt had a 16% share of the executive market in terms of placement and of about 30% in terms of candidates. No private employment procurement agency achieves such figures.

35. Macrotron also considers that the German rules establishing the monopoly fulfil all the conditions laid down by the Court of Justice for a derogation from the freedom to provide services to be justified (see the judgments in *Van Wesemael* and *Webb*, above, and also the judgment in Case 33/74 *Van Binsebergen* [1974] ECR 1299). The Bundesanstalt's monopoly derives from a policy choice made in the public interest. It continues to be necessary in order to bring about favourable conditions on the labour market in Germany, where there are many unemployed, and to safeguard workers' social welfare. In Macrotron's opinion, the prohibition of any employment procurement activity otherwise than within the monopoly applies equally to German nationals and nationals of other Member States. Moreover, there can be no question of any excessive monopoly. Derogations are entirely possible and the appellants could well have addressed that possibility.

36. The *German Government* submits that Articles 66 and 56 of the EEC Treaty are not relevant to the present case. The

employment procurement monopoly is not 'special treatment for foreign nationals'.

37. The German Government describes the historical developments leading to the establishment of the monopoly. In the past, private employment procurement agencies accorded priority, with a view to securing a favourable cost-benefit ratio, to the placement of highly qualified specialists and abused their position by exploiting the difficult circumstances in which unemployed people found themselves or encouraged people to breach their contracts in order to obtain their commission as intermediaries. Impartial employment procurement by the Bundesanstalt, provided free of charge, has put an end to those practices. The service must be available to all employees, regardless of their qualifications and their competitiveness. In order to protect those in less favourable circumstances, it is necessary, in the German Government's view, to avoid dividing the labour market into a private sector dealing with the placement of specialized and skilled workers and a public sector seeking employment for people of lower productive capacity. That is particularly true in the case of the German labour market where there is considerable unemployment and a shortage of manpower in certain areas of employment.

38. The *Commission* states with respect to the second question submitted by the national court that the prohibition at issue is not absolute. It is absolute only for the activities not covered by the 1970 circular. Even if they comply with the circular, recruitment consultants cannot enforce their contractual rights since Paragraph 134 of the German Civil Code prevents them from doing so. The Commission considers that civil penalty to constitute a restriction on the freedom to provide services.

39. The Commission considers that there are three cases in which such a restriction might be justified. The first relates to effective measures to counteract unemployment. The activities of recruitment consultants do not appear to detract from that objective. Theirs is a relatively small and specialized sector whose impact on the market in general is limited. The fact that the Bundesanstalt, which has primary responsibility for measures to reduce unemployment, tolerates private business in that sector confirms that analysis. In those circumstances, the restriction on that activity is disproportionate.

40. According to the Commission, the same applies to the second possibility, which concerns the prevention of abuse. The executives to whom the activities of recruitment consultants relate are not in a situation of dependency like the usual unemployed person. Against that background, the existence of the circular is indicative of the disproportionate nature of the restriction.

41. The Commission considers that a third possible justification might derive from the international obligations laid down in the conventions of the International Labour Organization. The Commission observes that Article 5 of Convention No 96, however, makes express provision for derogations from the prohibition of private employment procurement agencies conducted with a view to profit for the placement of certain categories of persons. That provision probably influenced the Bundesanstalt when publishing its circulars. However, the circulars do not in fact legalize the situation of recruitment consultants. The Commission considers, therefore, that Germany has failed to fulfil its obligations under Article 59 of the EEC Treaty by not granting a specific derogation

for recruitment consultants in accordance with Article 5 of Convention No 96.

42. The Commission is also of the opinion that the national court should consider submitting a further preliminary question under Article 177 if it should appear in the course of the main proceedings that other possible grounds exist which might justify the restriction on the freedom to provide services.

4. *The possibility of invoking Articles 7 and 59 of the EEC Treaty*

43. Messrs *Höfner and Elser* observe in the first place that the Court has consistently held that it is for the national court, under the division of powers between the Court of Justice and the national courts under Article 177 of the EEC Treaty, to decide whether preliminary questions are relevant. In the present case the questions concern the problem of reverse discrimination.

44. They consider that it is first necessary to establish that the business of recruitment consultants in general includes sufficient cross-frontier elements to bring it within the scope of Community law. Several situations might be involved: a foreign consultant might undertake inquiries in Germany or vice versa, and a foreign principal might contact a German executive or vice versa. In the appellants' view, there is likewise a Community element in the present case. The contract which they concluded with Macrotron covered the possibility of seeking German or other candidates residing in other Member States.

45. Messrs Höfner and Elser then state that Article 7 of the EEC Treaty is a fundamental provision which expressly prohibits all discrimination on grounds of nationality and therefore redounds to the benefit of all Community citizens, regardless of their factual circumstances. By virtue of that equality of opportunity, it is improper to place one's own nationals at a disadvantage by comparison with foreigners. Messrs Höfner and Elser observe that those conclusions are consonant with the case-law of the Court (see for example the judgment in Case 115/78 *Knoors* [1979] ECR 399). In those cases where the Court has held that Article 7 did not exclude rules severer than those in force abroad, the rules at issue were national rules that were compatible with Community law (judgments in Case 185/78 *Van Dam* [1979] ECR 2345 and Case 155/80 *Oebel* [1981] ECR 1993). In the present case, on the other hand, the rule is incompatible and unjustified.

46. The appellants observe that Article 59 of the EEC Treaty contains a general prohibition which also benefits a national who provides a service in which there are cross-frontier elements. That appears to be confirmed by the third paragraph of Article 60 of the EEC Treaty, which provides that foreigners must be accorded the same treatment as a State's own nationals. If those provisions were to be interpreted as allowing discrimination against a State's own nationals, Article 59 would change the conditions of competition to the detriment of the latter. In the view of the appellants, the Court has also held that a person may invoke Article 59 against his own Member State (judgments in *Knoors*, above, and in Case 107/83 *Klopp* [1984] ECR 2971).

47. Messrs Höfner and Elser state that, if that possibility were not available to nationals, the consequences of the reverse discrimination would be contrary to the aims of Articles 2, 3 and 8a of the EEC Treaty. In order to conduct their business freely, German recruitment consultants would have to establish themselves in other Member States, without it being necessarily justified for them to do so from the economic standpoint. They also observe that the freedom to provide services also involves the freedom to choose not to use cross-frontier services. If Article 59 could not be invoked in a case such as this one, German undertakings would be compelled to approach foreign recruitment consultants.

48. *Macrotron* observes that the applicability of Article 59 of the EEC Treaty depends on the presence of cross-frontier element in the factual situation at issue. In its view, there is no such element in the present case. The fact that the appellants have fabricated such an element in theory and in the abstract is not sufficient to bring Articles 7 and 59 into play. They are not in the same situation as a foreign recruitment consultant who is affected by the Bundesanstalt's monopoly.

49. The *German Government* also considers that the facts of this case have no link with any foreign country. It is not clear from the order for reference from the Oberlandesgericht München where the services were to be provided. In the absence of more precise information, the most usual situation must be deemed to exist, namely that the contract applied only within Germany.

50. According to the *Commission*, Article 7 is operative only where the Treaty contains no specific provisions. In the present case, therefore, Article 59 must be examined. The Commission observes that no case-law yet exists concerning the application of that provision to factual situations wholly internal to a Member State. The case-law on other provisions of the Treaty might give the impression that Article 59 does not apply where there are no cross-frontier elements (judgments in Case 175/78 *Saunders* [1979] ECR 1129, Joined Cases 36/82 *Morson* [1982] ECR 3723 and Case 20/87 *Gauchard* [1987] ECR 4879). The Commission observes, however, that the Court adopted a wide interpretation of the matters to which Article 59 applies in its judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377. The Commission therefore considers that Article 59 could be invoked in the present case, in so far as the contract at issue does not expressly exclude the possibility of seeking candidates in other Member States. However, it is for the national court to take the final decision on that question.

5. *Articles 59, 86 and 90 of the EEC Treaty*

51. *Messrs Höfner and Elser* observe that, according to the case-law of the Court and the views of the Commission, the concept of undertaking includes every entity engaged in economic activities. The Bundesanstalt must be considered as an undertaking since it carries out such activities. Its public status does not remove it from the purview of the Treaty provisions (judgments in *Sacchi*, above, and in Case 41/83 *Italy* v *Commission* [1985] ECR 873). In their

opinion, the Bundesanstalt is therefore a public undertaking within the meaning of Article 90(1) of the EEC Treaty, which has been vested with exclusive rights by the AFG. Undertakings of that kind are, subject to Article 90(2), subject to all the provisions of the Treaty, including Article 59.

52. Messrs Höfner and Elser concede that the Bundesanstalt is an undertaking to which the legislature has, by public statute, namely the AFG, entrusted a service of general economic interest, whatever doubts may be felt as to the extension of that service to the business of recruitment consultants. However, that fact does not by itself satisfy the conditions for the application of Article 90(2). It is also necessary for the accomplishment of those tasks to be hampered by the application of the rules contained in the Treaty. Messrs Höfner and Elser consider in that regard that the fact that the accomplishment of those tasks might be rendered more difficult is not sufficient. The exception provided for in Article 90(2) is available only if the tasks in question can be achieved only by means of action contrary to the Treaty. The application of the Treaty must in some degree render those tasks impossible. That condition is not fulfilled in this case. The activities of recruitment consultants do not in any way prevent the Bundesanstalt from accomplishing the tasks specifically entrusted to it by the AFG. On the contrary, as a result of their effectiveness, those activities contribute to the accomplishment of those tasks.

53. According to Messrs Höfner and Elser, all the conditions for the application of Article 86 are fulfilled. Because of its statutory monopoly, the Bundesanstalt holds a dominant position in a substantial part of the Community, namely German territory. The fact that the Bundesanstalt may not be dominant in the recruitment consultancy market is of no importance. In the first place, it is not certain that that market is different from the employment procurement market in general. In the second place, Article 86 also applies if the undertaking concerned holds a dominant position in a market other than that where it commits the abuse. Finally, Messrs Höfner and Elser state that, in any event, the Bundesanstalt can impose certain constraints on private recruitment consultants, enabling it to exclude them from the recruitment consultancy market.

54. Messrs Höfner and Elser maintain that the Bundesanstalt is abusing its dominant position by extending its statutory monopoly to activities which private undertakings may carry out just as well or more efficiently. That extension seems to them not to be justified by any public interest. Messrs Höfner and Elser add that, in breach of Article 86(d), the Bundesanstalt compels German undertakings to use its services. Such abuses affect trade between Member States, since they prevent German and foreign recruitment consultants from providing their services in Germany and abroad without distinction.

55. The appellants conclude that the Federal Republic of Germany has failed to fulfil its obligations under Article 90(1) by permitting such abuses. By adopting measures that deprive the Community competition rules of their effectiveness, it has also infringed Articles 3, 5 and 86 (judgment in Case 13/77 *GB-Inno* v *Atab* [1977] ECR 2115).

56. *Macrotron* states that the rules at issue involve a superior public interest of the kind referred to in the case-law of the Court and that it is consequently not subject to the competition rules.

57. The *German Government* also considers that the employment procurement service is not within a field to which the competition rules apply. The Bundesanstalt carries out an exclusively State task in the public interest, and does not pursue any economic objective. Moreover, the Court has held that a monopoly granted by the State to an undertaking governed by private law may be compatible with Articles 86 and 90 (see judgment in *Sacchi*, above).

58. The *Commission* observes that it is still not apparent from the case-law of the Court whether the exception envisaged in Article 90(2) applies also to Article 59. That is a result, in the Commission's view, of the fact that Article 59 is addressed to the Member States, whereas the competition rules are addressed to undertakings. In the present case, it considers that it is sufficient to establish that the tasks entrusted to the Bundesanstalt — measures to counteract unemployment and to maintain balanced relations in the employment market — are in no way affected by the existence of private recruitment consultants. The best evidence of that finding is to be found in the 1970 circular referred to above.

59. The Commission also considers the statutory monopoly in the light of Articles 86 and 90. The legislative provisions governing that monopoly and the Bundesanstalt's practice together have the effect of limiting production within the meaning of Article 86(b). In practice, the Bundesanstalt declines to enforce its monopoly, so that it is not properly satisfying the existing demand for recruitment consultants' services (see judgment in Case 238/78 *Volvo* [1988] ECR 6211). The statutory monopoly nevertheless remains in force. As a result, private consultants are unable to carry on business legally, by virtue of Paragraph 134 of the German Civil Code, and supply falls short of actual demand. The Commission considers that this abuse is potentially capable of affecting trade between Member States since the placement of executives often involves people from other Member States. The Commission states that it will initiate the procedures provided for by the Treaty in order to examine those practices.

P. J. G. Kapteyn
Judge-Rapporteur