JUDGMENT OF THE COURT (Fifth Chamber)

9 September 1999 *

In Case C-108/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale Amministrativo Regionale della Campania, Italy, for a preliminary ruling in the proceedings pending before that court between

RI.SAN. Srl

and

Comune di Ischia,

Italia Lavoro SpA, formerly GEPI SpA,

Ischia Ambiente SpA,

on the interpretation of Articles 55 and 90(2) of the EC Treaty (now Articles 45 EC and 86(2) EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), C. Gulmann, D.A.O. Edward and L. Sevón, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Comune di Ischia, by Roberto Montemurro, of the Naples Bar,

— Italia Lavoro SpA, by Francesco Castiello and Giuseppe Ricapito, of the Rome Bar,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

— the Commission of the European Communities, by Michel Nolin and Laura Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of RI.SAN. Srl, represented by Arcangelo d'Avino, of the Naples Bar; of Italia Lavoro SpA, represented by Antonio Tizzano and Francesco Sciaudone, of the Naples Bar; of Ischia Ambiente SpA, represented by L. Bruno Molinaro, of the Naples Bar; of the Italian Government, represented

by Pier Giorgio Ferri; and of the Commission, represented by Michel Nolin and Laura Pignataro, at the hearing on 4 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 March 1999,

gives the following

Judgment

1 By orders of 19 November and 11 December 1997, received at the Court on 9 April 1998, the Tribunale Amministrativo Regionale della Campania (General Administrative Court for Campania) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 55 and 90(2) of the EC Treaty (now Articles 45 EC and 86(2) EC).

2 Those questions have been raised in proceedings between RI.SAN. Srl (hereinafter 'RI.SAN.') and the Municipality of Ischia, Italia Lavoro SpA (hereinafter 'Italia Lavoro'), formerly GEPI SpA (hereinafter 'GEPI'), and Ischia Ambiente SpA (hereinafter 'Ischia Ambiente') concerning the organisation by the Municipality of a solid urban waste collection service.

The national legislation

3 Article 22(3) of Law No 142/90 of 8 June 1990 on local autonomy (GURI No 135 of 12 June 1990) provides that municipalities and provinces may use the following management forms for local public services for which they are responsible under the law:

'(a) public management, where, owing to the small size or the characteristics of the service, it is not expedient to create an institution or an undertaking;

(b) concessions to third parties, where there are technical, economic or social expediency reasons;

(c) by special undertakings, *inter alia* for the management of several services of economic and commercial interest;

(d) by institutions, for the provision of social services not having any commercial interest;

(e) by mixed-capital limited companies with a majority public holding, where participation by other public or private persons appears expedient owing to the nature of the service to be provided.'

4 Article 4(6) of Law No 95/95 of 29 March 1995 on mixed-capital public service companies (GURI No 77 of 1 April 1995), amending Decree-Law No 26/95 of 31 January 1995 (GURI No 26 of 31 January 1995), provides:

'In order to promote employment or re-employment of workers, the municipalities and the provinces may form limited companies with GEPI SpA, *inter alia* for the purpose of operating local public services.'

5 Article 4(8) of that Law provides that 'the shareholdings of GEPI SpA in the companies referred to in this article shall be transferred within five years by public tender'.

6 GEPI is a financial company formed pursuant to Article 5 of Law No 184/71 of 22 March 1971 (GURI No 105 of 28 April 1971). Its objects are to assist in maintaining and increasing the level of employment. Its share capital is held entirely by the Treasury Minister.

Facts and main proceedings

7 By decision of the municipal council of 19 March 1996, the Municipality of Ischia formed a mixed-capital limited company under Article 22(3)(e) of Law No 142/90 to run the solid urban waste collection service. Pursuant to Article 4(6) of Law No 95/95, the share capital of the company was held as to 51% by the municipality and as to 49% by GEPI. By decision of 7 November 1996, the municipal council entrusted to that company, Ischia Ambiente, the solid urban waste collection service which had previously been provided by RI.SAN., which held a contract due to expire on 4 January 1997.

8 By two actions, RI.SAN. challenged the municipal council decisions claiming, in particular, that the choice of private partner should have been made through public tender procedure and that the waste collection service should also have been awarded under such a procedure.

9 The court which has made this reference has expressed doubts about the compatibility with community law, more particularly with the principle of freedom to provide services and the principle of free competition, of Article 4(6) of Law No 95/95, which allows a local authority to choose GEPI as a partner for the management of local public services without any prior invitation to tender.

10 It ruled, however, that Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) was not relevant in determining the case, since the case did not concern the award of a public service contract but the award of a public service concession.

11 In those circumstances the Tribunale Amministrativo Regionale della Campania decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1 Must Article 55 of the Treaty (which is applicable *inter alia* to the services sector by virtue of the reference in Article 66 of the Treaty), pursuant to which "[t]he provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority", be interpreted so widely as to include the activities of GEPI SpA (now Italinvest SpA) as a participant in local authorities' mixed companies for the management of local public services, within the meaning of Article 4(6) of Law No 95 of 29 March 1995 (converting into law, with amendments, Decree-Law No 26 of 31 January 1995), where that participation purports to be for the purpose of "promoting employment or re-employment of workers" already assigned

to the service the management of which is at issue, having regard to Article 5 of Law No 184 of 22 March 1971 establishing GEPI SpA, which gives GEPI the task of "contributing to the maintenance and growth of employment levels facing temporary difficulties, such as to demonstrate the specific possibility of reorganising the undertakings concerned", in the manner set out therein?

2. In view of the abovementioned legislation governing GEPI SpA (now Italinvest SpA), may there be applicable to this case the derogation provided for in Article 90(2) of the Treaty, according to which "[u]ndertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of those rules does not obstruct the performance in law or in fact, of the particular tasks assigned to them"?'

The subject-matter of the reference

12 The Municipality of Ischia, Italia Lavoro, Ischia Ambiente, the Italian Government and the Commission have submitted observations on the question whether the procedure for choosing the entity entrusted with running the waste collection service may be covered by the provisions of Directive 92/50.

13 That directive applies to the award of public service contracts which are defined, in Article 1(a), as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

14 The national court has, however, expressly excluded the relevance of Directive 92/50, on the ground that only a public service concession was involved, and not a public service contract.

15 The definition of public service concession within the meaning of the Community rules on public contracts and the question whether such a concession is excluded from the scope of Directive 92/50 are matters governed by Community law. Such questions may therefore be the subject of a reference for a preliminary ruling, under Article 177 of the Treaty, if a national court considers that a decision on one of those questions is necessary in order to give judgment.

16 However, even supposing, contrary to the position taken here by the referring court, that Directive 92/50 is relevant in determining the case before it, it must be observed that the reference and the questions raised relate only to the provisions of the Treaty and that the referring court has not provided the factual information which would be necessary for the Court to rule on the interpretation of that directive.

17 In those circumstances, the Court must confine its answer to the provisions of the Treaty expressly mentioned in the questions referred for a preliminary ruling.

The first question

18 By its first question, the referring court asks essentially whether Article 55 of the Treaty is to be interpreted as allowing a municipality to choose, without any prior invitation to tender, a financial company as a partner in a mixed-capital company with a majority public shareholding having as its object the running of the solid urban waste collection service.

19 As far as that question is concerned, it should be observed that the application of Article 55 of the Treaty, read in combination, where appropriate, with Article 66 of the EC Treaty (now Article 55 EC), in so far as they form a derogation from

the provisions of the Treaty relating respectively to freedom of establishment and to the freedom to provide services, presupposes that those latter provisions are applicable in principle.

20 According to the referring court's analysis, the correctness of which the Court is unable to verify, the award of a public service contract is not at issue in the main proceedings. However, that does not rule out the possibility that provisions of the Treaty on freedom of movement, which impose in particular on the Member States obligations to ensure equal treatment and transparency vis-à-vis economic operators from other Member States, may be relevant.

21 However, the case-file shows that RI.SAN., which challenges the legality of the choice made by the municipality, has its seat in Italy and does not operate on the Italian market in reliance on freedom of establishment or freedom to provide services.

22 Such a situation does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the free movement of persons and services.

23 The answer to be given to the first question must therefore be that Article 55 of the Treaty does not apply in a situation such as that in the main proceedings in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by

Community law in the area of the freedom of movement for persons and freedom to provide services.

The second question

24 By its second question, the national court asks essentially whether Article 90(2) of the Treaty is to be interpreted as allowing a municipality to choose, without any prior invitation to tender, a financial company as partner in a mixed limited company with a majority public shareholding having as its object the running of the solid urban waste collection service.

25 It must be remembered that Article 90(2) constitutes a derogation from the rules of the Treaty, in particular its competition rules, whose application it therefore presupposes.

26 However, as indicated above, in paragraphs 19 to 22, the provisions relating to freedom of movement for persons and freedom to provide services do not apply in a situation such as that existing in the main proceedings. Moreover, neither the order for reference nor the written observations provide the Court with the factual and legal information which would enable it to interpret the other rules of the Treaty, in particular the competition rules, in relation to the situation created by the choice, without a prior invitation to tender, of GEPI as partner in a company with a majority public shareholding having as its object the running of the solid urban waste collection service.

27 In those circumstances, the Court is unable to provide a useful answer to the second question.

Costs

28 The costs incurred by the Italian Government 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunale Amministrativo Regionale della Campania by orders of 19 November and 11 December 1997, hereby rules:

Article 55 of the EC Treaty (now Article 45 EC) does not apply in a situation such as that in the main proceedings in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services.

Puissochet Jann Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 9 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber