OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 25 November 1999 *

I — Introduction

1. The Magistrate of a district court in Florence, Italy, seeks clarification concerning the interpretation to be given to the judgment of the Court of Justice on 11 December 1997 in the second *Job Centre* case (hereinafter 'the *Job Centre II* judgment'),[1] and also about the consequences in national law of the doctrine it establishes.

Specifically, the national court harbours doubts as to whether individuals may rely, in judicial proceedings, on the prohibitions contained in Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC), so that the national court must disapply national provisions conflicting with them, and as to whether certain national provisions create a situation which is incompatible with Articles 90 and 86 of the EC Treaty, read together.

II — The facts

2. Giovanni Carra, Alessandra Colombo and Barbara Gianassi are charged with a criminal offence under Article 110 of the Criminal Code and Articles 1, 11 and 27 of Law No 264 of 29 April 1949 (hereinafter 'the 1949 Law'),[2] for acting, jointly and with a view to profit, as intermediaries between supply of and demand for employment, the first two of the defendants at least since December 1993, and the third at least since April 1994. The provisions which are alleged to have been infringed confer on public placement offices the exclusive right to undertake the placement of employees.

3. At the hearing in the national proceedings, counsel for the accused contended that his clients should be acquitted because the penal sanctions laid down by the provisions cited above had ceased to be applicable by reason of the judgment of this Court in *Job Centre II*.

* Original language: Spanish.

1 — Case C-55/96 ECR [1997] I-7119.

2 — Supplement to GURI No 125, 1 June 1949.

III — Applicable national law

4. In Italy, placement is subject to a regime administered exclusively by the public placement offices. That regime is governed by the Law of 1949. Specifically, Article 11(1) of that law provides:

' [T]he pursuit of any placement activity, even unremunerated, is prohibited where that activity has been entrusted to the authorised offices.'

5. Any placement activity pursued in breach of that rule, and the engagement of workers otherwise than through the intermediary of the public placement office, is subject, under the 1949 Law, to penal or administrative sanctions. Furthermore, employment contracts concluded in breach of that rule may be annulled by the courts following a complaint by the public placement office, and at the request of Public Prosecutor's Office, a complaint which must be made within one year from the engagement of the worker.

6. The first and second subparagraphs of Article 1(1) of Law No 1369 of 23 October 1960,[3] prohibit intermediation and interposition in employment relationships. According to those provisions:

['A]n entrepreneur shall not entrust, by contract or subcontract or otherwise, even to cooperatives, the mere performance of work by means of labour engaged and remunerated by the contractor or the intermediary, whatever the nature of the work or of the service to which such performance relates.

In addition, the entrepreneur shall not entrust to intermediaries, whether employees, third parties or companies, even if they be cooperatives, the performance of piecework by labour engaged and remunerated by such intermediaries.'

7. Article 2 of that Law imposes penal fines for failure to comply with the prohibition, without prejudice to the penal sanctions provided for breach of the 1949 Law.

Law No 196 of 24 June 1997 (hereinafter 'the 1997 Law'),[4] which contains provisions concerning the promotion of employment, provides that only undertakings which are registered with the Ministry of

3 — GURI No 289, 25 November 1960.

4 — Supplement to GURI No 136, 4 July 1997.

Employment and Social Security and hold a permit issued by the Ministry may carry out activities relating to temporary placement.

8. Legislative Decree No 469 of 23 December 1997 (hereinafter 'the 1997 Decree'), [5] which assigns functions and tasks concerning the labour market to regions and local bodies, entered into force on 9 January 1998. Article 10(2) of the Decree provides that the activity of acting as an intermediary between demand for and supply of employment may be pursued, with the authorisation of the Ministry of Employment and Social Security, by undertakings or groups of undertakings, by cooperatives with a subscribed capital of not less than ITL 200 million and by non-commercial bodies whose assets are not less than the same amount. Under paragraph 13 of that article, the provisions of the 1949 Law, as amended and supplemented are not to apply to persons authorised to act as intermediaries between demand for and supply of employment.

IV — The questions referred for a preliminary ruling

9. By order dated 20 June 1998, the Pretore di Firenze decided to stay proceedings and refer the following two questions to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC):

'1. Do Articles 86 and 90, as interpreted in the judgment of the Court of Justice of the European Communities of 11 December 1997, have any direct effect in the sense that they require Member States not to impose any general and absolute prohibition on acting as an intermediary between supply of and demand for employment and consequently require the national court to treat any activity as a private intermediary for the placement of employees as not being contrary to criminal law, with the consequence that it must refuse to apply the relevant provisions of national law which make such activity an offence?

2. Are Articles 86 and 90 of the Treaty to be interpreted as meaning that a system like that deriving from the legislative amendments made by Law No 196 of 24 June 1997 and Legislative Decree No 469 of 23 December 1997 constitutes an abuse of a dominant position?'

V — The observations submitted

10. The Italian Government maintains that both of the questions referred for a pre-

5 — GURI No 5, 8 January 1997.

liminary ruling are inadmissible because they are manifestly irrelevant.

With regard to the first question, the Italian Government points out that, as a consequence of the *Job Centre II* judgment, the national legislation was amended by the 1997 Decree which abolished the absolute prohibition which had been in force until that time. The penal sanctions established by the 1949 Law no longer apply to persons who, like the accused in the main proceedings, carried on placement activities before the Decree entered into force.

The second question referred for a preliminary ruling is inadmissible, according to the Italian Government, because it is directed to assessing whether the national legalisation is compatible with Community law and, furthermore, because that legislation is not applicable, by reason of the principle of non-retroactivity, to the facts of the case.

11. The United Kingdom Government, for its part, points out that the case-law of the Court of Justice has consistently held that Article 90(1), when applied in conjunction with Article 86, may create rights on which individuals may rely before the national courts. Consequently, it is for the national court to ascertain whether the conditions established by the Court in the *Job Centre II* judgment are satisfied and, if so, to disapply the penal provisions in question.

The United Kingdom Government submits no observations in respect of the second question.

12. Finally, the Commission states that the three requirements of the *Job Centre II* judgment have to be considered cumulatively. It also states that Article 90(1) and Article 86 have direct effect and that the primacy of Community law renders conflicting rules of criminal law inapplicable. In relation to the second question, the Commission contends that Article 90(1) and Article 86 must be interpreted as meaning that the fact that they have direct effect does not automatically imply that every private activity as an intermediary in the employment market is lawful. Furthermore, the Commission considers that, as there is no information about the period of time during which the accused carried out their activities, the Court of Justice must declare the question inadmissible.

VI — Analysis of the first question referred for a preliminary ruling

13. By its first question the Pretore wishes to know, to begin with, whether Articles 90 and 86 of the EC Treaty, interpreted in accordance with the aforementioned judgment, have direct effect.

14. The Court has repeatedly held that, even within the framework of Article 90, the prohibition contained in Article 86 has direct effect and confers on individuals rights which the national courts must safeguard. [6].

The same conclusion is implicit in several other judgments. [7]

15. In *Job Centre II* the third question formulated by the Corte di appello, Milan, was essentially the same as the one I am considering here. [8]

Advocate General Elmer expressed the same view in the Opinion he delivered on 15 May 1997. More specifically, he stated, at point 59:

'Lastly, the national court asks whether Articles 90(1) and 86 of the Treaty have direct effect, the answer to which must be in the affirmative. Accordingly, it is clear from the Court's case-law that the provisions in question can be relied on by individuals before the national courts, which are therefore bound to set aside any national provision incompatible therewith.'

Although, in its judgment, the Court of Justice did not deal expressly with the possibility of directly relying on the prohibition in question, this was probably because it considered that an affirmative reply was obvious in the light of the other grounds it had stated and of its own case-law. [9]

6 — Case 155/73 *Sacchi* [1974] ECR 409, paragraph 18, relating to the State monopoly of television advertising, in Case C-179/90 *Merci convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 23, Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 57, and Case C-22/98 *Becu* [1999] ECR I-5665, paragraph 21, relating to dock services subject to a monopoly.

7 — See, for example, the judgments in Case C-163/96 *Raso* [1998] ECR I-533, in Case 260/89 *ERT* ECR I-2925, and in Case C-320/91 *Corbeau* [1991] ECR I-2533, in all of which it was acknowledged that a defendant in criminal proceedings may plead, in his defence, that State monopolies in the sectors of dock services, radio and television and postal services, respectively, are compatible with Articles 86 and 90.

8 — The third question referred by the Corte di appello was: '[I]n the event that the abovementioned legislation of the Italian State concerning operation of an employment agency or an employment business is in breach of the principles of Community law mentioned in the foregoing question, must the judicial and administrative authorities of that Member State consider themselves bound to apply those principles directly, allowing public and private bodies and undertakings to act as intermediaries between those offering and those seeking employment and temporary work, provided that the provisions governing employment contracts and mandatory social security are complied with and subject to the controls provided for by law?'

9 — This seems to have been the understanding of the Corte di appello in its order of 11 March 1998 ruling, on appeal, on the application by Job Centre coop.arl. for approval of its constitutive document, the company's object as stated therein — acting as intermediary in the employment market, — being prohibited under Italian law. Even though it confined itself to holding the applicant to have discontinued its action, it nevertheless holding that 'the judgment of the Court of Justice of the European Communities of 11 December 1997 in this case has found these prohibitions to be unlawful because, as they are absolute, they are incompatible with Community law, which takes precedence. The reasons stated by the [court of first instance] as the basis for its decision have therefore ceased to be valid. This was also the view taken by the Public Prosecutor when he asked for the application to be allowed'.

16. In the result, the reply to be given to the first part of the first question referred by the Pretore di Firenze is that the prohibition imposed by Article 90(1) in conjunction with Article 86 has direct effect in that it creates for individuals rights which the national courts must safeguard.

17. The Pretore then asks — still as part of his first question — whether that direct effect requires the national court to hold any activity as a private intermediary for the placement of employees not to be contrary to criminal law, with the result that the relevant penal provisions of national law must be disapplied.

18. The reply to this twofold question is also to be found in the case-law of the Court of Justice.

19. It must be borne in mind, in this connection, that an undertaking vested with a statutory monopoly occupies a dominant position within the meaning of Article 86 of the EC Treaty, [10] monopoly extends may constitute a substantial part of the common market, within the meaning of the same provision. [11]

20. I should also point out that Article 86 of the EC Treaty does not prohibit the dominant position, as such, but its abuse. Therefore, within the framework of Article 90(1), what is incompatible with the common market is not a dominant position arising out of the exercise of exclusive rights but the possibility that an undertaking which enjoys such rights may be compelled, by the applicable legal provisions, to abuse it. [12]

21. With regard to the activity with which this case is concerned — that of acting as intermediaries between the demand for and supply of employment — the Court of Justice has held that Article 90(1) is infringed if the public placement offices cannot avoid infringing Article 86, which is the case, in particular, when the following three conditions are present:

— the public placement offices are manifestly unable to satisfy demand on the market for all types of activity;

— the actual placement of employees by private companies is rendered impossi-

10 — See, for example, the judgment in Case 311/84 *CBEM* [1985] ECR 3261, paragraph 16 and — specifically in relation to employment placement — the judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 28.

11 — See the judgments in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28 and in *Höfner and Elser*, cited above, paragraph 28.

12 — See, amongst others, the aforementioned judgments in *CBEM*, paragraph 17, *Höfner and Elser*, paragraph 29, *Corbeau*, paragraph 11 and *Job Centre II*, paragraph 31 and also the judgment in Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 18.

ble by the maintenance in force of statutory provisions under which such activities are prohibited and non-observance of that prohibition gives rise to penal and administrative sanctions;

— the placement activities in question could extend to the nationals or to the territory of other Member States. [13]

22. It may therefore be concluded from the *Job Centre II* judgment that what is incompatible with Community law is not every reservation to specific public bodies of the activity of intermediary between demand for and supply of employment by means of the application of legal provisions prohibiting private undertakings from carrying on such activities, on pain of penal or administrative sanctions, *but* such reservation in a situation in which the public placement offices are manifestly unable to satisfy the demand on the market for all types of activity. Furthermore, for Community law to come into operation, the placement activities in question must be able to extend to the nationals or to the territory of other Member States.

The three conditions stated by the Court in the *Job Centre II* judgment are, therefore, obviously cumulative. They reflect respectively the prerequisites of 'abuse of dominant position', 'grant of exclusive rights' and 'effect on trade between the Member States'.

23. If, as seems to be the case, the Italian rules which reserve the activity in question to public placement offices and whose compatibility with Community law the court *a quo* is required to examine, entail possible penal or administrative sanctions, that court will still have to assess whether the offices holding the statutory monopoly are able to satisfy the demand on the market for all types of activity and whether the placement activities in question extend to the nationals or to the territory of other Member States.

24. Assuming that those circumstances exist, the Pretore still wishes to know what are the consequences in national law of the primacy of Community law.

25. It is sufficient to recall the words of the Court of Justice in its judgment of 13 July 1972 in *Commission* v *Italy*, [14] according to which the effect of Community law 'is a prohibition having the full force of law on the competent national authorities against applying a national rule recognised as incompatible with the Treaty and, if the

13 — See the *Job Centre II* judgment and, *mutatis mutandis*, the judgment in *Höfner and Elser*, cited above.

14 — Case 48/71 [1972] ECR 529, paragraph 7.

circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied.'

The consequences of the primacy of Community law were expressed particularly clearly and unequivocally in the judgment of 9 March 1978 in *Simmenthal*.[15] The Court held that 'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.'

26. In other words, with regard to the present case, the primacy of Community law requires the national court, if it establishes that the three requirements specified in the *Job Centre II* judgment are satisfied, not to apply any national provision, regardless of its nature, which proves to be incompatible with Community law.

27. The Italian Government insists that this question should be declared inadmissible because — it its opinion — the penal sanctions laid down by the 1949 Law are not applicable to persons who, like the accused in the main proceedings, carried on an activity as an intermediary before the 1997 Decree entered into force. For my part, I consider that there is not sufficient evidence in the documents before the Court for the provisions of the 1997 Decree to be interpreted unequivocally in the decriminalising sense attributed to them by the Italian Government. In these circumstances, it is for the national court to assess the applicability and scope, in national law, of that systems of sanctions.

28. In the light of the above considerations, I propose that the Court should state, in reply to the first question referred for a preliminary ruling by the Pretore di Firenze, that the prohibition arising under Articles 90(1) and 86 of the EC Treaty are to be interpreted as meaning that it confers on individuals rights which the national courts must safeguard. It follows that a national court may be called upon to disapply a provision of national law incompatible with that prohibition.

For the rest, a Member State infringes Article 90(1) when it creates a situation in which the public placement offices cannot avoid contravening Article 86. This happens, in particular, when the three requirements stated earlier are satisfied concurrently, namely: manifest inability to satisfy demand, prohibition on the private pursuit of the placement activity, and possibility of

15 — Case 106/77 [1978] ECR 629. See, expressed in similar terms more recently, the judgment of 5 March 1998 in Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30.

extension to the nationals or to the territory of other Member States.

VII — Analysis of the second question referred for a preliminary ruling

29. By the second question it has referred for a preliminary ruling, the national court wishes to know whether Articles 86 and 90 of the EC Treaty preclude rules like those introduced by the 1997 Law and the 1997 Decree.

30. The Pretore does not state which specific aspects of the rules are liable to compel an undertaking granted exclusive rights to abuse its dominant position. Nor does he indicate the reason why he considers that examination of the compatibility of those rules with Community law is relevant for the purpose of deciding the case in the main proceedings, the facts of which predate their adoption.

31. In those circumstances, the second question could be declared inadmissible on the ground that the national court has not defined with sufficient accuracy the legal context in which the interpretation requested should be placed, [16] and that it has not been established that a reply to the question corresponds to an objective need for the purpose of deciding the case in the main proceedings. [17]

32. Notwithstanding this, given that, in any event, it does not seem that the reply to the second question can differ from the reply I propose for the first question, I think it preferable for me to refer to the latter. [18] In doing so, I have particular regard to the specific wording of the question, to the abstract form which the reply must take, and also to the presumption of relevance which the Court ascribes to the questions referred to it by the national courts for a preliminary ruling. [19]

33. National rules such as those introduced by the 1997 Law and the 1997 decree will therefore be in breach of the prohibition resulting from the combined provisions of Articles 90(1) and 86 of the EC Treaty

16 — Judgments in Case 244/78 *Union laitière normande* [1979] ECR 2663, paragraph 5, and in Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735, paragraph 6.

17 — See, for example, the judgments in Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17, Joined Cases 98/85, 162/85 and 258/85 *Bertini* [1986] ECR 1885, paragraph 6, and in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14.

18 — At the hearing, the Commission's representative argued that the principles stated in the *Job Centre II* judgment cannot be applied to the 1997 rules because these introduce 'rules on competence'. If that is the case — and it is not for the Court of Justice to give a general or hypothetical initial opinion — the national court will reach the conclusion that the requirement relating to the prohibition on the pursuit of placement activities by individuals is not met under any circumstances.

19 — Judgment of 7 September 1999 in Case C-355/97 *Beck and Others* [1999] ECR I-4977, paragraph 22.

when the three aforementioned requirements are met, namely: manifest inability to satisfy the demand, prohibition on the private pursuit of the placement activity, and possibility of extension to the nationals or to the territory of other Member States. It is for the national court to verify that those requirements are met.

VIII — Conclusion

34. In the light of the foregoing considerations, I propose that the Court should reply to the questions referred for a preliminary ruling by the Pretore circondariale di Firenze as follows:

(1) The prohibition resulting from Article 90(1) of the EC Treaty (now Article 86 EC) and Article 86 of the EC Treaty (now Article 82 EC) must be interpreted as meaning that it creates for individuals rights which the national courts must safeguard. It follows that a national court may be called upon to disapply a provision of national law incompatible with that prohibition.

(2) A Member State infringes Article 90(1) when it creates a situation in which the public placement offices cannot avoid contravening Article 86. This happens, in particular, when the following three requirements are concurrently satisfied:

— the public placement offices are manifestly unable to satisfy demand on the market for all types of activity;

— the actual placement of employees by private undertakings is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited and non-observance of that prohibition gives rise to penal and administrative sanctions;

— the placement activities in question could extend to the nationals or to the territory of other Member States.