JUDGMENT OF THE COURT (Sixth Chamber)
11 December 1997 *

In Case C-55/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Corte d'Appello, Milan, Italy, for a preliminary ruling in the non-contentious proceedings (giurisdizione volontaria) brought before that court by

Job Centre Coop. arl

on the interpretation of Articles 48, 49, 55, 56, 59, 60, 62, 66, 86 and 90 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, G. F. Mancini and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Job Centre Coop. arl, by Pietro Ichino, of the Milan Bar, Christian Jacobs, Rechtsanwalt, Bremen, Renzo Morresi, of the Bologna Bar, and Caterina Rucci, of the Milan Bar,

— the Italian Government, by Umberto Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and Danilo del Gaizo, Avvocato dello Stato,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Bernd Kloke, Regierungsrat in the same Ministry, acting as Agents,

— the Norwegian Government, by Irvin Høyland, Deputy Director General in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Enrico Traversa, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Job Centre Coop. arl, the Italian Government and the Commission at the hearing on 13 March 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 May 1997,

gives the following

Judgment

1 By order of 30 January 1996, which was received at the Court on 23 February 1996, the Corte d'Appello (Court of Appeal), Milan, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 48, 49, 55, 56, 59, 60, 62, 66, 86 and 90 of the EC Treaty.

2 Those questions were raised in the context of an appeal under Article 2330(4) of the Italian Civil Code against a refusal by the Tribunale Civile e Penale (Civil and Criminal District Court), Milan, to confirm the instrument establishing Job Centre Coop. arl ('JCC').

3 JCC is a cooperative society with limited liability which is in the course of being set up, with its head office in Milan. Under its statutes, its business is to include, in particular, serving as an intermediary between supply and demand on the employment market and providing temporary staff for third parties. Its object is to enable workers and undertakings, whether they are members or not, to draw on such services on the employment market in Italy and the Community.

4 In Italy, the employment market is subject to a mandatory placement system administered by public placement offices and regulated by Law No 264 of 29 April 1949. Article 11(1) of that Law prohibits the pursuit of any activity, even unremunerated, as an intermediary between supply of and demand for paid employment. Any placement contrary to those rules or engagement of employees through an intermediary other than a placement office gives rise, according to Law No 264, to penal or administrative sanctions. Furthermore, employment contracts concluded in breach of those rules may be annulled by the courts following a complaint by the placement office, which must be lodged within one year from the engagement of an employee, and at the request of the Public Prosecutor.

5 The first paragraph of Article 1 of Law No 1369 of 23 October 1960 lays down a prohibition on acting as an intermediary in employment relationships, whether as an employment agency or as an employment business, failure to comply with which gives rise to the penal sanctions provided for in Article 2 thereof. Under the final paragraph of Article 1, any persons employed in breach of the first paragraph of Article 1 are legally regarded in all respects as engaged by the undertaking which has in fact used their services.

6 On 28 January 1994, the chairman of JCC, which was in the course of being set up, applied to the Tribunale Civile e Penale, Milan, for confirmation of the instrument establishing it in accordance with Article 2330(3) of the Italian Civil Code. By order of 31 March 1994, that court stayed the confirmation procedure and submitted to the Court of Justice for a preliminary ruling two questions concerning various articles of the EC Treaty that it considered relevant to its decision on the application for confirmation of the instrument establishing JCC.

7 In its judgment of 19 October 1995 in Case C-111/94 *Job Centre* [1995] ECR I-3361, the Court held that it had no jurisdiction to rule on the questions raised by the Tribunale Civile e Penale, Milan, on the ground that when the national court rules under the 'giurisdizione volontaria' procedure on an application for confirmation of the instrument establishing a company with a view to its registration, it is performing a non-judicial function which, in other Member States, is entrusted to administrative authorities. It is exercising administrative authority without being at the same time called upon to settle any dispute.

8 Following that judgment, by decision of 18 December 1995 the Tribunale Civile e Penale, Milan, dismissed the application for confirmation of the instrument establishing JCC submitted by its representative, on the ground that its business objects were incompatible with certain mandatory rules of Italian employment legislation.

9 JCC appealed against that refusal, under Article 2330(4) of the Italian Civil Code, to the Corte d'Appello, Milan, seeking to have the Tribunale's decision set aside and the instrument establishing it confirmed.

10 The Corte d'Appello considered that JCC's appeal raised questions of interpretation of Community law and decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling the following questions:

'1. May the provisions of Italian national law contained in Article 11(1) of Law No 264 of 29 April 1949 and the first paragraph of Article 1 of Law No 1369 of 23 October 1960, whereby the business of acting as an intermediary and negotiator between supply and demand on the employment market, whether as an employment agency or as an employment business, is prohibited unless carried on by the public offices specified in those provisions, be regarded as relating to the exercise of official authority within the meaning of the combined provisions of Articles 66 and 55 of the EC Treaty in view of the fact that they are treated by Italian law as relating to matters of public policy because their purpose is to protect the interests of workers and the national economy?

2. Must those provisions, in view of their general scope, be regarded as conflicting with the principles of Community law laid down by Articles 48, 49, 59, 60, 62, 66, 86 and 90 of the said Treaty concerning the right to work, freedom of economic initiative, freedom of movement for workers and others, freedom of supply and demand for work and services, free and fair competition between economic agents and the prohibition of abuse of dominant positions?

3. In 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?'

11 It appears from the file in the main proceedings that by those questions the national court is asking, essentially, whether the provisions of the Treaty concerning freedom of movement for workers, freedom to provide services and competition preclude national legislation under which any activity as an intermediary between supply and demand in employment relationships is prohibited unless carried on by public placement agencies.

12 JCC is a cooperative society with limited liability in the course of being set up which, in the main proceedings, has claimed the right to act as an intermediary between supply and demand on the employment market and to provide temporary staff.

13 In so far as the questions refer to provisions concerning freedom of movement for workers, it need merely be pointed out that it does not follow from the fact that workers are among the founding members of JCC that Article 48 is applicable, since once JCC has been set up and is in operation it will be an independent legal person.

14 Accordingly, the provisions concerning freedom of movement for workers have no relevance for the dispute in the main proceedings.

15 In so far as the questions refer to Articles 86 and 90 of the Treaty, they raise the problem of the extent of the exclusive right granted to public placement offices, and hence of the prohibition, giving rise to penal and administrative sanctions, of any activity as an intermediary between supply and demand on the employment market by private companies.

16 Consideration must therefore be given first of all to the interpretation of those provisions of the Treaty.

Interpretation of Articles 86 and 90 of the Treaty

17 JCC claims, essentially, that the prohibition of the business of acting as an intermediary between supply and demand on the employment market, unless carried on by public bodies, is contrary to Articles 86 and 90 of the Treaty, since public placement offices are not able to satisfy market demand for such activities. In that connection JCC refers, in particular, to Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979.

18 The German and Norwegian Governments, and the Commission, maintain that an exclusive right to place employees should be assessed in the light of the principles that can be extracted from the judgment in *Höfner and Elser*, cited above.

19 The Italian Government states, first, that the legislation at issue in the main proceedings does not grant any undertaking special or exclusive rights as regards the sub-contracting of employment, but is confined to prohibiting any type of activity as an intermediary in employment relationships. It then considers that, in the light of the particular characteristics and social objectives of the public placement of employees in Italy, it cannot be regarded as an economic activity, and therefore as a business activity. Lastly, it maintains that the public monopoly on placement is not capable of causing the effects referred to in Article 86(b) of the Treaty.

20 Having regard to the foregoing considerations, it is necessary to establish whether public placement offices such as those referred to in Article 11(1) of Law No 264 may be regarded as undertakings within the meaning of Articles 85 and 86 of the Treaty (see *Höfner and Elser*, cited above, paragraph 20).

21 It must be observed, in the context of competition law, first, that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of its status and the way in which it is financed and, second, that the placement of employees is an economic activity.

22 The fact that the placement of employees is normally entrusted to public offices cannot affect the economic nature of such activities. Placement of employees has not always been, and is not necessarily, carried out by public entities.

23 The Italian Government further contends that according to Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *Assurances Générales de France and Others* [1993] ECR I-637, a social security body acting under a monopoly system is not an undertaking within the meaning of Article 86 of the Treaty; in paragraphs 18 and 19 of that judgment the Court held that such activity was not an economic activity, since it was based on the principle of national solidarity and was entirely non-profit-making.

24 However, although it is clear from that judgment that administering mandatory social security schemes such as those described in the references for a preliminary ruling in *Poucet and Pistre*, cited above, does not constitute an economic activity, that conclusion, in paragraph 17, was based on the same criteria as had been applied in *Höfner and Elser* when it was concluded that employment procurement must be described as a business activity within the meaning of the Community competition rules.

25 A body such as a public placement office may therefore be classed as an undertaking for the purposes of the Community competition rules.

26 Public placement offices entrusted under the legislation of a Member State with the operation of services of general economic interest, such as those envisaged in Article 11(1) of Law No 264, remain subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with discharge of their duties (see Case 155/73 *Sacchi* [1974] ECR 409, paragraph 15, and *Höfner and Elser*, cited above, paragraph 24).

27 As regards the operation of public placement offices enjoying an exclusive right, compliance with which is ensured by a prohibition of any activity as an intermediary in employment relationships on pain of penal and administrative sanctions such as those provided for in Laws Nos 264 and 1369, it must be stated that the application of Article 86 of the Treaty cannot obstruct the performance of the particular task assigned to those offices if they are manifestly not in a position to satisfy demand in that area of the market.

28 Whilst it is true that Article 86 concerns undertakings and may be applied within the limits laid down by Article 90(2) to public undertakings or undertakings vested with exclusive rights or specific rights, the Treaty nevertheless requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision (see Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, paragraphs 31 and 32, and *Höfner and Elser*, cited above, paragraph 26). Article 90(1) provides that the Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the Treaty, in particular those provided for in Articles 85 to 94.

29 Consequently, any measure adopted by a Member State which maintains in force statutory provisions that create a situation in which public placement offices cannot avoid infringing Article 86 is incompatible with the rules of the Treaty.

30 In the first place, an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (see Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261, paragraph 16), and the territory of a Member State to which that monopoly extends may constitute a substantial part of the common market (see Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28).

31 Secondly, the mere creation of such a dominant position by granting an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty (see *CBEM*, cited above, paragraph 17; *Höfner and Elser*, cited above, paragraph 29; Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 11; and Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne* [1994] ECR I-5077, paragraph 18). A Member State will contravene the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position (see Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 51).

32 Pursuant to Article 86(b) of the Treaty, such abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it.

33 As the Commission has rightly pointed out, the market in the provision of services relating to the placement of employees is both very extensive and extremely diverse. Supply and demand on that market cover all sectors of production and relate to a range of jobs requiring anything from unskilled labour to the scarcest and most specialized professional qualifications.

34 On such an extensive and differentiated market, which is, moreover, subject to enormous changes as a result of economic and social developments, public placement offices may well be unable to satisfy a significant portion of all requests for services.

35 By prohibiting, on pain of penal and administrative sanctions, any activity as an intermediary between supply and demand on the employment market unless carried on by public placement offices, a Member State creates a situation in which the provision of a service is limited, contrary to Article 86(b) of the Treaty, if those offices are manifestly unable to satisfy demand on the employment market for all types of activity.

36 Thirdly, the question of the responsibility imposed on a Member State by virtue of Articles 86 and 90(1) of the Treaty arises only if the abusive conduct on the part of the placement agency concerned is liable to affect trade between Member States. That does not mean that the abusive conduct in question must actually have affected such trade. It is sufficient to establish that it is capable of having such an effect (see *Michelin* v *Commission*, cited above, paragraph 104).

37 A potential effect of that kind on trade between Member States arises in particular where the placement of employees by private companies may extend to the nationals or to the territory of other Member States.

38 In view of all the foregoing considerations, the reply to the national court must be that public placement offices are subject to the prohibition contained in Article 86 of the Treaty, so long as application of that provision does not obstruct the performance of the particular task assigned to them. A Member State which prohibits any activity as an intermediary between supply and demand on the employment market, whether as an employment agency or as an employment business, unless

carried on by those offices, is in breach of Article 90(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, in the following circumstances:

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

— the actual placement of employees by private companies 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; and

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

Interpretation of Article 59 et seq. of the Treaty

39 Since the prohibition of any activity as an intermediary between supply and demand on the employment market unless carried on by public placement offices, as referred to in the questions referred to the Court, is contrary to Articles 86 and 90(1) of the Treaty in the circumstances indicated in paragraph 38 of this judgment, there is no need for the Court to give a ruling on the interpretation of Article 59 et seq. of the Treaty.

Costs

40 The costs incurred by the Italian, German and Norwegian Governments and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Corte d'Appello, Milan, by order of 30 January 1996, hereby rules:

Public placement offices are subject to the prohibition contained in Article 86 of the EC Treaty, so long as application of that provision does not obstruct the performance of the particular task assigned to them. A Member State which prohibits any activity as an intermediary between supply and demand on the employment market, whether as an employment agency or as an employment business, unless carried on by those offices, is in breach of Article 90(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, in the following circumstances:

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

— the actual placement of employees by private companies 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; and

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

Schintgen Mancini Kapteyn

Delivered in open court in Luxembourg on 11 December 1997.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber