OPINION OF ADVOCATE GENERAL ELMER

delivered on 15 May 1997 *

Introduction

1. In this case the Court has been asked to answer a number of questions on the relationship between various provisions in the Treaty and Italian legislation concerning the prohibition against private employment procurement and the hiring out of temporary staff. Those questions correspond in substance to those referred to the Court in Case C-111/94 *Job Centre* [1] (*'Job Centre I'*), in which I delivered an Opinion on 8 June 1995.

2. The Court decided to dismiss that case as inadmissible on the ground that it lacked jurisdiction, since it found that the Tribunale Civile e Penale (Civil and Criminal District Court), Milan, had referred the questions to the Court in the context of the Italian system of non-contentious proceedings (giurisdizione volontaria) where it was not exercising a judicial function. The Court stated *inter alia* that only where a case is brought against a refusal to confirm a company's articles of association is a judicial function being exercised.

3. After the Tribunale Civile et Penale, Milan, had refused to confirm the instrument establishing Job Centre Coop. arl ('Job Centre'), which was in the course of being set up, Job Centre appealed to the Corte di Appello, Milan, which referred to the Court a number of questions designed to enable it to reach a decision.

4. Accordingly, there is no problem of admissibility in this case, and the Court can therefore give a ruling on the substantive issues.

5. The close relationship between this case and *Job Centre I* would of itself allow me to refer to a large extent to the remarks concerning the substance of the case in my earlier Opinion. I nevertheless consider it appropriate, *inter alia* in the light of the hearing in this new case, to deliver a fresh, separate Opinion which will take into account certain new information and the most recent case-law of the Court.

* Original language: Danish.

1 — [1995] ECR I-3361.

The national legislation

6. Article 11(1) of Italian Law No 264 of 29 April 1949 ('the 1949 Law') prohibits mediation and other activities as an intermediary between the supply of and demand for paid work by any other than public employment offices even if such activities are carried out free of charge. The various offices organized under the Italian Ministry of Labour thus have an exclusive right to undertake employment procurement in Italy. [2]

Employers must not in general take on staff except through an employment office. There are however exceptions to this rule, *inter alia* for management positions or for staff selected on the basis of open competitions, and domestic help. [3] Originally employers were only allowed to inform the employment office what qualifications and so forth were required ('richiesta numerica'), whereupon the employment office would assign to them staff selected on the basis of objective criteria, *inter alia* on the basis of their relevant family or financial situation, length of time they have been unemployed and so forth. However, by Article 25(1) of Law No 223 of 23 July 1991, employers were also given the opportunity of choosing the employee they wished to appoint from a list drawn up by the employment office ('richiesta nominativa').

Employers with more than 10 employees (excluding management and apprentices) must moreover reserve 12% (at present) of new jobs for employees who have become unemployed as a result of their previous employers' bankruptcy or the like, or have been unemployed for more than two years.

According to the 1949 Law, any employment procurement contrary to those rules and taking on of employees otherwise than through the employment offices is punishable by criminal or administrative penalties. Moreover, on the application of the 'pubblico ministero' (an authority with special duties in civil and criminal proceedings) the courts may within a year of the appointment declare employment contracts entered into contrary to the rules to be void.

2 — Certain occupations (in particular, entertainment businesses and the hotel industry, bakeries and shipping) come under a special system with various special offices for the provision of labour.

3 — For the agricultural sector the rules are to be found in Law No 83 of 11 March 1970.

7. The first and second paragraphs of Article 1 of Law No 1369 of 23 October 1960 ('the 1960 Law') provide as follows:

'The management of an undertaking shall not arrange for the performance of normal working tasks by means of labour appointed and paid by a contractor or by an intermediary, by contract or subcontract or otherwise, or by cooperative companies, whatever the nature of the work or services concerned.

In addition the management of an undertaking shall not entrust to intermediaries, whether employees, third persons or companies, even cooperative companies, work to be performed as piece-work by employees appointed and paid by such intermediaries.'

Breach of those rules is punishable by criminal penalties and in law the person hiring the labour is regarded under Article 1(5) of the Law in all respects as the employer.

8. At the hearing in this new case, the Italian Government admitted that certain information that it had furnished at the hearing in *Job Centre I* was not correct. It has now stated that the prohibitions contained in the first and second paragraphs of Article 1 of the 1960 Law also cover the hiring out of temporary staff by an Italian undertaking to an undertaking in another Member State and a foreign undertakings's hiring out of temporary staff to an undertaking established in Italy.

Facts of the case

9. Job Centre is a cooperative company in the course of being set up, with its head office in Milan, Italy, having capital of LIT 1 300 000, corresponding at present to some ECU 670. According to Article 4(c) and (d) of its articles of association, its objects are *inter alia* as follows:

'(c) Setting up a permanent office to collect, store, process, select and deliver for members of the company or third parties who may be interested — free of charge in the case of members of the company or third parties who are employees — the greatest possible quantity of information regarding demand for or supply of employment on the labour market in Italy and the Community with a view to bringing employers and employees into contact with one another.

(d) Setting up an office for finding and selecting Italian or foreign staff for Italian or foreign employers interested in employing such staff.'

10. In pursuance of Article 2330(3) of the Italian Codice Civile Job Centre applied to the Tribunale Civile e Penale, Milan, for approval of the company's articles of association. According to that provision, if it is found that the company's articles meet the conditions laid down by the law, and after hearing the Pubblico Ministero, the Tribunale shall decide that the company be entered in the register. Article 2331(1) provides that the company is to acquire the status of a legal person (only) upon entry in the register.

11. By decision of 18 December 1995 — after the Court of Justice had declined to answer the questions referred to it in *Job Centre I* — the Tribunale Civile e Penale, Milan, refused to hear the application for confirmation of Job Centre's articles of association, on the ground that its objectives were contrary to Italian legislation.

12. Pursuant to Article 2330(4) of the Code Civile, Job Centre appealed against that decision to the Corte di Appello, Milan, seeking to have its application for confirmation of its articles approved.

The questions referred for a preliminary ruling

13. By order of 30 January 1996, the Corte d'Appello, Milan, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'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?'

14. The questions submitted by the national court can be split into two groups.

First, the Corte d'Appello requests the Court of Justice to interpret Article 48 of the Treaty on freedom of movement for workers and Articles 59 and 60 on freedom to provide services in relation to employment procurement and so forth. Only to the extent to which those rules are applicable will it be necessary for it to rule whether employment procurement and so forth are exempted from free movement under the provisions on activities connected with the exercise of official authority in Articles 48(4), 55 and 66.

The national court then seeks the Court's assessment of rules on employment procurement such as the Italian rules in relation to Article 90(1) of the Treaty which, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, requires the Member States to refrain from enacting or maintaining in force any measure contrary to the Treaty provisions in conjunction with Article 86, which prohibits undertakings from abusing a dominant position.

The rules on free movement

15. Job Centre claims that the prohibitions in Article 11(1) of the 1949 Law and the first and second paragraphs of Article 1 of the 1960 Law conflict with Articles 48, 52 and 59 of the Treaty. In its view, the provisions are contrary to Article 48 of the Treaty because the inability of the public employment offices to satisfy demand is particularly detrimental to workers from other Member States and because the prohibition against the hiring out of temporary staff removes from those workers an important means of gaining a foothold in the Italian labour market. The Italian legislation is furthermore contrary to Article 52 of the Treaty, since it

impedes undertakings from other Member States from establishing themselves in Italy. On this point Job Centre referred to the fact that the members of the cooperative which is in the course of being set up include *inter alia* a German and a French undertaking. Lastly, the prohibitions contained in the Italian legislation do not allow for exemptions. They therefore prevent Italian undertakings from offering services in the other Member States in the form of employment procurement or the hiring out of temporary staff, and accordingly in Job Centre's view the provisions are also contrary to Article 59 of the Treaty.

16. The Italian, German and Norwegian Governments, and the Commission, claim that Articles 48, 52 and 59 are not applicable to the present case. Job Centre is an Italian undertaking which is seeking to establish itself in Italy. There is therefore no necessary link between the facts of the case and the situations governed by the said provisions of the Treaty. At the hearing the Commission pointed out that the relevant provision was Article 52 of the Treaty, dealing with the establishment of undertakings, but that insufficient evidence had been produced to decide whether that provision was applicable in the present case, and that that question had not, moreover, been raised by the national court.

17. I find it difficult to see how Article 48 of the Treaty on freedom of movement for workers can be relevant to this case. Job Centre is not an employee, but a company, which under its articles would operate as an employment agency. The fact that among those setting up the company there are employees cannot make any difference in that regard, since once the company has been set up and is exercising its activity it will be an independent legal person.

18. Nor has any information been provided to justify the view that Job Centre, on its own account or by way of transfer or representation, might be able to lay claim to the rights which employees could acquire should there have been a case of employment procurement. It cannot be excluded that the prohibition contained in Article 11(1) of the 1949 Law and the first and second paragraphs of Article 1 of the 1960 Law could make it more difficult for those seeking work from other Member States to have access to the Italian labour market. They are, however, very general rules, which are applied without discrimination. Accordingly, there is nothing to suggest that the public monopoly on employment procurement does not fulfil the requirement in Article 5 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [4] according to which a national of a Member State who seeks employment in the territory of another Member State is to receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment. Furthermore,

4 — OJ, English Special Edition 1968 (II), p. 475, as most recently amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 amending Part II of Regulation (EEC) No 1612/68 (OJ 1992 L 245, p. 1).

the effects of the prohibition against the hiring out of temporary staff contained in the 1960 Law are, in my opinion, so general and uncertain that they are not capable of constituting an impediment to freedom of movement of workers as set out in Article 48 [5] of the Treaty. The prohibition does not therefore affect specific groups of workers and it does not prohibit workers from other Member States from having access to the Italian labour market by other means.

19. *Prima facie* it would appear more relevant to consider the activities to be exercised by Job Centre under its articles in relation to the rules on freedom to provide services set out in Articles 59 and 60. Article 11(1) of the 1949 Law prohibits generally anyone other than the public monopoly from procuring employment, which means that an undertaking such as Job Centre is debarred from carrying on business in Italy and hence from offering its services to jobseekers and employers in other Member States.

20. As regards the rules in the 1960 Law concerning the hiring out of temporary staff, the Italian Government stated at the hearing in *Job Centre I* that Italian legislation did not prevent an undertaking established in Italy from hiring temporary staff to employers in other Member States. As stated above, at the hearing in the present case, the Italian Government admitted, however, that the information which it provided at the hearing in *Job Centre I* and which it did not subsequently rectify was incorrect, since the prohibition in the first and second paragraphs of Article 1 of the 1960 Law does legally also cover such activity.

21. Even if, in the light of the information now available, the Italian legislation is a greater impediment to the export of services than appeared to be the case on the basis of the information given by the Italian Government in *Job Centre I*, it continues to be my view that Article 59 of the Treaty is not applicable to this case. What is involved is a general ban on the exercise of a particular business activity in relation to undertakings which are either established or in the course of establishing themselves in the territory of the Member State in question and wish to exercise that activity.

22. As stated in paragraph 27 of my Opinion in *Job Centre I*, that view is in my opinion corroborated by the Court's case-law concerning Article 34 of the Treaty on quantitative export restrictions and measures having equivalent effect. Under settled case-law, Article 34 of the Treaty does not preclude a national prohibition on the production of a given product, even if the export of the

5 — Reference should be made to the Court's case-law concerning Article 30 of the Treaty, according to which provisions which have solely an indirect and uncertain effect on free movement fall outside the scope of that provision (see Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 24).

product in question is thereby made impossible. [6] Article 34 of the Treaty thus 'concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question'. [7]

23. I would further refer to the Court's recent judgment in *Gebhard*. [8] That case concerned a German lawyer who pursued a professional activity in Italy directed partly at German-speakers and partly at Italian-speakers in Germany and Austria. The activities thus had an export element. Mr Gebhard was refused the right to use the title '*avvocato*' by the Italian Bar Council and was then suspended from pursuing his professional activity for six months for having used the title. In paragraph 28, the Court held that that situation was covered by Article 52 of the Treaty concerning the right of establishment rather than Article 59, since Mr Gebhard was pursuing a professional activity on a stable and continuous basis in Italy.

24. The foregoing is, in my view, in accordance with the Court's decision in *Alpine Investments*. [9] That case concerned national rules which prohibited the use of a specific form of marketing — so called 'cold calling' — of an otherwise wholly lawful 'product', namely financial services. The prohibition was general and neither its purpose nor effect was to give domestic undertakings any advantage in relation to service-providers from other Member States. The fact that the Court nevertheless found that Article 59 was applicable is attributable, in my view, to the fact that they were not general rules governing the services that could lawfully be produced in the territory of the Member State in question, but rather rules governing the marketing in another Member State of a lawfully-produced service In such a case what is involved is not a condition governing the establishment of an undertaking but rather the conditions under which a lawfully-produced service may be exported.

25. In my opinion therefore, it is the rules governing establishment in Article 52 of the Treaty rather than the rules governing the provision of services in Article 59 that are relevant in this case, regardless of the fact that, under its Articles, Job Centre envisages exporting its services to the other Member States. That export is, in fact, subject to the condition that the undertaking is first established. The prohibitions in the 1949 and 1960 Laws prevent that, unless those prohibitions are found to conflict with Article 52 of the

6 — See, for example, Case 15/79 *Groenveld* [1979] ECR 3409.

7 — See, most recently, Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 24.

8 — C-55/94 [1995] ECR I-4165.

9 — Case C-384/93 [1995] ECR I-1141.

Treaty. To assume that Article 59 was applicable would further entail that undertakings in purely domestic situations to which Article 52 was not therefore applicable could challenge such general domestic prohibitory rules by reference to the fact that the provisions in question prevented them from exporting services. Such a legal position would not, in my view, be in harmony with the scheme of the Treaty.

26. The national court has not asked the Court to interpret Article 52 of the Treaty. It is, however, clear from the questions referred to the Court that their purpose is to obtain the Court's assistance in clarifying whether the provisions in Article 11(1) of the 1949 Law and the first and second paragraphs of Article 1 of the 1960 Law are compatible with the basic Community rules on the free movement of persons and services. In the light of the spirit of cooperation on which the preliminary ruling procedure of Article 177 of the Treaty is based, I therefore consider that the Court should also interpret Article 52 of the Treaty. [10]

27. It follows from paragraph 37 in the *Gebhard* judgment [11] that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

28. A general prohibition against private employment procurement and the hiring out of temporary staff, such as that contained in the 1949 and 1960 Laws constitutes an absolute impediment to private undertakings' being able to pursue that form of activity in Italy. In my view they are therefore measures which are substantively covered by Article 52 of the Treaty and conflict with that provision unless the four conditions specified in the *Gebhard* judgment are satisfied.

29. Under the Court's settled case-law, Article 52 is not, however, applicable to purely internal situations which therefore have no connection with any of the situations envisaged by Community law. [12] An Italian national's establishment of an undertaking in Italy does not therefore fall within the scope of Article 52.

10 — See Case C-130/92 *OTO* [1994] ECR I-3281, paragraph 14, and Case C-55/94 *Gebhard*, cited in footnote 8, in which the Court found that the relevant provision was Article 52 of the Treaty and therefore replied to the questions referred to it in the light of that provision, regardless of the fact that the question submitted did not refer to that article.

11 — See footnote 8.

12 — See Case C-152/94 *Van Buynder* [1995] ECR I-3981, paragraph 12, and Case 204/87 *Bekaert* [1988] ECR 2029.

30. Under Article 52 of the Treaty, the right of establishment includes *inter alia*, the right to set up agencies, branches or subsidiaries. In my view it must be concluded that Article 52 is only applicable if there is an essential link between one or more undertakings or persons from the Member State in question and the entity being established in another Member State.

31. In the present case, Job Centre has stated that two of the cooperative's members are the German undertaking Adia and the French undertaking Ecco. No further clarification has been given, however, as to what their participation consists in and in particular what influence they have on the running of Job Centre. I do not therefore consider that there is enough information in the present case to form a view as to whether there is establishment within the meaning of the Treaty.

32. In view of the foregoing, I am of the opinion that the Court's answer to the questions concerning the rules on free movement should be that Articles 52 and 59 of the EC Treaty must be interpreted to the effect that there is nothing to preclude a Member State from prohibiting the establishment in its territory of an undertaking which intends to pursue the activities of employment procurement and the temporary hiring out of staff, where there is no essential link between one or more physical or legal persons from another Member State and the undertaking in question.

Relationship to Article 90 in conjunction with Article 86 of the Treaty

33. Job Centre claims that the exclusive right to undertake employment procurement conflicts with Article 90 in conjunction with Article 86 of the Treaty, since the public employment offices are not in a position to satisfy market demand. Job Centre states in that connection that the labour market in a modern economy is very fragmented and diverse, and hence there is a need for a whole range of special services. Even the most effective public employment services can at most satisfy 25-30% of demand. It is clear from an investigation carried out by the Italian National Bank that the Italian employment procurement monopoly places a maximum of 5% of all employees. Job Centre further referred to a report prepared by the International Labour Organization, [13] in which it was recommended that the 1949 ILO Convention No 96 should be revised in order to allow private undertakings to operate employment and temporary manpower agencies.

34. The Italian Government stated that the pursuit of employment procurement activities cannot be considered to be covered by the competition rules of the Treaty, since they are not an economic activity. It further stated that over the period between June 1995 and June 1996 the employment procurement monopoly arranged more than 1 million contacts between employees and

13 — *The role of private employment agencies in the functioning of labour markets*, International Labour Conference, Geneva, 1994.

employers. That figure covers, in addition to instructions in the form of 'richiesta numerica' and 'richiesta nominativa' (see point 3 above), cases where the employees and employers themselves established the necessary contact and subsequently informed the monopoly.

35. The Commission and the German and Norwegian Governments stated that the exclusive right to undertake employment procurement should be assessed on the basis of the guidelines to be found in the Court's judgment in *Höfner and Elser*, [14] and that the Italian prohibition against the hiring out of temporary staff is not covered by the Treaty's competition rules, since it is a general prohibition. At the hearing, the Commission added that in the present case it was possible, without any specific investigation of the effectiveness of the monopoly, to ascertain that it was not able to satisfy demand on the market. That followed from the structure of the market itself, which was characterized by being on the one hand extremely large and on the other extremely diverse. In such a market no monopoly could satisfy total demand and hence there was an infringement of Articles 90 and 86 of the Treaty.

36. I would first point out that Article 90(1) of the Treaty is only applicable if special or exclusive rights are conferred on one or more undertakings. The 1949 Law indubitably confers on the public monopoly an exclusive right to undertake employment procurement. The principal requirement for the application of Article 90(1) is therefore satisfied.

37. That condition for the application of Article 90(1) does not, on the other hand, appear to be immediately satisfied as far as the prohibition against the hiring out of temporary staff contained in the first and second paragraphs of Article 1 of the 1960 Law is concerned. That prohibition is wholly general, since according to the evidence, the Italian Republic does not itself offer to hire out temporary staff or confer on individual undertakings special rights to operate such services. The background to the rules contained in the 1960 Law would, according to the evidence, appear to be the desire to protect employees against exploitation and the weakening of their rights as a consequence of separating the real employer from the person who is formally described as the employer but is in reality simply a middleman.

38. Job Centre stated that the principal objectives of the 1960 Law were to preclude any form of private employment procurement and that the prohibition in the 1960 Law is therefore inextricably linked to the public employment procurement monopoly.

14 — Case C-41/90 [1991] ECR I-1979.

39. If the real objective of the prohibition in the 1960 Law is to protect the exclusive right which, under the 1949 Law is conferred on the public employment procurement monopoly, in my view it would be appropriate to treat that prohibition against the hiring out of temporary staff as part of the overall monopoly arrangement. It is, however, for the national court to decide on the real purpose of the prohibition in the 1960 Law, since that is a question of interpretation of national law.

40. Application of Article 86 of the Treaty, to which *inter alia* Article 90(1) refers, is subject to there being an 'undertaking' within the meaning of the competition provisions. The Court has, however, in the above-cited *Höfner and Elser* case, [15] already held that a public body carrying out employment procurement satisfies that condition. The Court stated, in paragraphs 20 to 23:

'Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency ... may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty [paragraph 20].

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 the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity [paragraph 21].

The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment [paragraph 22].

It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules [paragraph 23].'

41. It is apparent from the above that the decisive criterion is whether an economic activity is being engaged in and that the employment procurement activity satisfies that condition. The Court's conclusion is general, and accordingly cannot be regarded as providing a basis for distinguishing between various forms of undertaking and various branches of industry. That is consistent, moreover, with the fact that these days employment procurement is also carried out

15 — See footnote 14.

or could be carried out on a commercial basis in relation to a whole range of groups of employees. [16]

42. The Court's judgment in Joined Cases C-159/91 and 160/91 *Poucet and Pistre* [17] does not, in my view, alter that legal position. That decision, which did not, moreover, concern employment procurement, is expressly based on the criteria which emerged in the *Höfner and Elser* judgment, to which reference is made in paragraph 17 of the judgment. The Court held that the management of compulsory social security schemes was not covered by Article 86 precisely because, in its view, what was involved was not an economic activity for the purposes of competition law. The Court attached weight *inter alia* to the fact that the organizations charged with managing the schemes, which fulfilled a social function and were based on the principle of solidarity, were not able to influence the amount of the contributions, use of the assets or the level of benefits, and that the schemes were compulsory. [18] The schemes could hardly, therefore, in the form they took, be regarded as offered on a commercial basis.

43. Thus employment procurement can, in my view, present a greater or lesser element of social involvement which, according to the circumstances, would make it impossible or at least inappropriate for such an undertaking to be operated commercially. A clear example is the criminal rehabilitation services' work in getting prisoners released with a view to enabling them, under supervision and provided they undergo alcohol or drug addiction treatment, to survive outside prison without further criminal behaviour. That effort requires resources both financial and human if it is to succeed. [19] Similarly, in the general field of social work, a significant and substantial contribution is required to help those on welfare move into the general labour market.

44. It should also be noted that the public authorities in certain Member States defray the costs of training and even supplement pay in order to get long-term unemployed young persons and other unemployed persons into work. Such public authorities must necessarily be in a position to ensure that the public funds used in the context of such work generation are employed in the best possible way and that the scheme succeeds.

16 — That is presumably the reason why the majority of Member States have either never ratified or have latterly withdrawn from the 1949 ILO Convention No 96, which prohibits private employment procurement. Part II of the Convention, under which fee-charging employment agencies conducted with a view to profit are to be progressively abolished has, according to the evidence, been signed by Belgium, France, Ireland, Italy, Spain and Luxembourg. Finland, Germany and Sweden have withdrawn from the Convention.

17 — [1993] ECR I-637.

18 — That decision should be compared with the judgment in Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* [1995] ECR 4013, in which the Court found that the administration of an optional pension scheme based on the principle of capitalisation, in which the benefits to which the scheme gave entitlement depended solely on the contribution paid in and on the financial results of the management organisation's investments, was an economic undertaking covered by Article 86 of the Treaty.

19 — It is altogether another matter whether such tasks are suitable for privatization in the sense of their performance being entrusted to private firms following a tendering procedure in return for payment from the public purse.

45. It is, moreover, a condition for the application of Article 86 of the Treaty that there be a dominant position on a substantial part of the common market. The Court held in paragraph 28 of *Höfner and Elser* [20] that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market.

46. The simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 90(1) is not, however, according to settled case-law, as such incompatible with Article 86 of the Treaty. [21]

47. Article 90(1) of the Treaty requires Member States, however, not to enact or maintain in force any measure which could undermine the intended effect of Article 86. A Member State is in breach of that obligation if the undertaking on which an exclusive right has been conferred, merely by exercising that exclusive right, cannot avoid abusing its dominant position. [22]

48. Under Article 86(b) of the Treaty, such abuse may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers and the Court held in paragraph 31 of *Höfner and Elser* [23] that a Member State acts contrary to that provision when the undertaking to which it grants an exclusive right is manifestly not in a position to satisfy the demand prevailing on the market for a particular form of services, which in *Höfner and Elser* was executive recruitment, and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited.

49. A Member State is therefore in breach of its obligations under Articles 90(1) and 86 of the Treaty if it maintains in force a statutory monopoly which is manifestly not in a position to satisfy consumer demand, that is to say, job-seekers' and employers' demand for employment procurement services.

50. As the Commission stated at the hearing, the market for employment procurement services is, on the one hand, very large and on the other very diverse. It is accordingly appropriate to assume that the different types of service will not, either from the point of view of those seeking or of those supplying such services, necessarily be substitutable and that they will not therefore

20 — See footnote 14.

21 — See Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph 18, Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 11, and paragraph 29 of *Höfner and Elser* cited in footnote 14.

22 — See Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 51, and paragraphs 26 and 29 of *Höfner and Elser* cited in footnote 14.

23 — See footnote 14.

form part of the same market. The limiting of the market in the product in question is assessed, under settled case-law, from the consumers' point of view. Products which, in the eyes of the consumer, from the point of view of price, use and other characteristics are especially suitable for satisfying recurrent demand and that are therefore difficult to replace with other products are regarded as belonging to the same product market. On the basis of those criteria the Court has held *inter alia* that beer sold in retail shops and beer sold through publicly licensed premises do not belong to the same product market and nor do tyres for new cars and spare tyres. [24] If those offering a particular service can quickly adapt their organization to offering another type of service as well, the relevant product market will nevertheless be able to consist of both those categories of service, regardless of the fact that from the consumer's point of view they cannot be substituted for each other. [25]

51. The Report of the International Labour Organization mentioned in point 33 [26] distinguishes between 16 different categories of employment procurement activity, including traditional employment procurement in the form of activity as an intermediary, [27] temporary manpower agencies, which must be regarded as covered by the prohibition in the 1960 Law, [28] agencies specializing in executive recruitment and the recruitment of other particularly sought-after employees, [29] career advice and personnel selection on the basis of personal interviews and various forms of tests. It appears from the said Report that in those Member States where such activities are lawful there is a large and ever-increasing number of undertakings in the individual categories. [30] For example, in 1992 there were 3 500 undertakings in the United Kingdom carrying out traditional employment procurement as intermediaries and in France 5 011 temporary manpower agencies. It is further clear from the Report that the cause of that growth should be sought *inter alia* in the requirement of increased flexibility on the labour market, changed requirements in respect of employees' qualifications, an increased tendency on the part of undertakings to let third-parties carry out various functions, the ability of private agencies to find candidates who meet the individual employer's requirements, which ensures more rapid integration of new employees,

24 — See Case C-234/89 *Delimitis* [1991] ECR I-935 and Case 322/81 *Michelin* [1983] ECR 3461.

25 — See Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.

26 — See pp. 13-22.

27 — Services in this category typically consist in putting jobseekers and employers in contact with each other and choosing the best-fitted candidates. Those offering the service will be specialized in certain areas or in a particular category of employees. See the report mentioned in footnote 13, at p. 13.

28 — It appears from p. 15 of the Report referred to in footnote 13 that temporary agencies typically act as the employer in relation to employees who are made available on a temporary basis to a third party. It further appears that temporary manpower agencies constitute the largest category of private labour procurement undertakings in relation both to turnover and to number.

29 — An activity that requires a high degree of expertise with regard to selection methods, the assessment of qualifications and negotiating techniques, together with a thorough knowledge of the market and of the client undertaking (see p. 18 of the Report referred to in footnote 13).

30 — See p. 25 et seq. of the Report.

and increasing reliance in the market on private employment agencies.

52. It must be assumed that every category named in the report will constitute a separate market, since the different services satisfy different requirements on the part of clients. More traditional employment procurement in the form of activities as an intermediary thus satisfy the need of employers and job-seekers to be brought into contact with each other. Services in the form of personnel selection involve in addition the testing of individual applicants and the choice of a single candidate, and thereby perform a task that the employer did not consider it could perform satisfactorily itself, or which the employer in question wishes to purchase. The recruitment of executives often involves an undertaking seeking out employees who have the appropriate executive capabilities, whereas temporary agency activities are aimed at satisfying the client's temporary need for suitable manpower, which typically involves a prior testing of candidates in conjunction with the agency, and knowledge of the individual employer's needs.

53. Furthermore, the individual category of services must be regarded as divisible into a number of market areas, in which those offering the service are specialized in satisfying the special requirements of the individual sector. Effective employment procurement will in fact in a whole range of cases presuppose that those offering the service are acquainted with developing trends in the individual sectors and are therefore aware of the employer's present and future needs. Manpower constitutes a significant cost these days and often involves considerable investment in the form of training. What is required of the intermediary in the way of knowledge of the individual employer increases moreover in line with the intermediary's participation in the selection process itself. It should furthermore be taken into consideration that overall demand consists on the one hand of job-seekers and on the other of employers, and that those two groups do not necessarily have the same needs.

54. On such a large and varied market which, as a result of economic and social developments is subject to major changes, it must, as the Commission stated, be regarded as excluded that a single offeror of services will be able to satisfy all the needs of the market, irrespective of how effective it might be. Thus it will hardly be possible in practice for a single undertaking to have available to it all the expertise and resources necessary to satisfy total demand.

55. The varied nature of the market also means, however, that in assessing whether a public monopoly is able to satisfy demand not all employment procurement services can be treated in the same way. In my view a separate investigation should be carried out in respect of the individual markets and areas of a market into which the overall market for employment procurement services can be divided. Thus it cannot be excluded that a

State employment procurement monopoly might be able to satisfy demand for traditional employment procurement services in relation to, for example, unskilled labour, where less prior knowledge of the individual worker or employer on the part of the intermediary is required, but that is perhaps not the case as regards computer programmers or experts, engineers, lawyers or other highly-qualified staff or in relation to the selection and procurement of executives, which presupposes thorough knowledge of the undertaking and the individual candidate's qualifications.

56. It must be for the national court, which has fuller knowledge of the function of the monopoly and the conditions on the labour market in question, to carry out the ultimate assessment of the extent to which the Italian employment procurement monopoly is able to satisfy demand in the individual markets and market areas which make up the total overall market for employment procurement services.

57. Under Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are exempted from *inter alia* the prohibition in Article 86 of the Treaty if the application thereof would obstruct the performance, in law or in fact, of the particular tasks assigned to them. As the Court held in paragraph 25 of *Höfner and Elser*, [31] those conditions are not met in the case of an employment procurement monopoly which is manifestly not in a position to satisfy demand.

58. Lastly, it is a condition for application of Articles 90(1) and 86 of the Treaty that the abuse found should affect trade between the Member States. The Court held in *Höfner and Elser* [32] that that condition is not solely satisfied if the abusive conduct has actually affected trade. It is sufficient to establish that that conduct is capable of having that effect, and that condition is satisfied *inter alia* where executive recruitment by private companies may extend to the nationals or to the territory of other Member States. [33] That will only be the case here if employment procurement can be regarded as taking place in relation to employees and employees in other Member States. Furthermore, the prohibition in the 1949 Law must generally preclude undertakings in other Member States from extending their activities to Italy. [34]

31 — See footnote 14.

32 — See paragraph 32 of the judgment cited in footnote 14.

33 — See paragraph 33 of *Höfner and Elser* cited in footnote 14.

34 — I would refer to *Corbeau*, cited in footnote 21, in which the Court held that the Belgian post monopoly was covered by Article 90 of the Treaty in a case where the specific breach of the monopoly giving rise to the main proceedings concerned a Belgian citizen's distribution of post in the Liège area.

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. [35]

60. The second group of questions must therefore, in my opinion, be answered to the effect that a Member State which has conferred on a public undertaking the exclusive right to undertake employment procurement is in breach of Articles 90(1) and 86 where it creates a situation in which that undertaking cannot avoid infringing Article 86 of the Treaty. That is the case in the following circumstances:

— the public employment procurement offices are manifestly unable to satisfy demand on the market for such services, which must be assessed separately in relation to each individual market and market area into which the overall market can be divided; and

— the actual employment procurement which private companies wish to undertake is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited.

Conclusion

61. In view of the foregoing considerations, I would propose that the Court answer the questions referred to it as follows:

(1) Articles 52 and 59 of the EC Treaty must be interpreted to the effect that there is nothing to preclude a Member State from prohibiting the establishment in its territory of an undertaking which intends to pursue the activities of

35 — See, for example, *Corbeau*, cited in footnote 21, and Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889.

employment procurement and the hiring out of temporary staff, where there is no essential link between one or possibly more physical or legal persons from another Member State and the undertaking in question.

(2) A Member State which has conferred on a public undertaking the exclusive right to undertake employment procurement is in breach of Articles 90(1) and 86 where it creates a situation in which that undertaking cannot avoid infringing Article 86 of the Treaty. That is the case in the following circumstances:

— the public employment procurement offices are manifestly unable to satisfy demand on the market for such services, which must be assessed separately in relation to each individual market and market area into which the overall market can be divided; and

— the actual employment procurement which private companies wish to undertake is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited.