JUDGMENT OF THE COURT (Fourth Chamber)

8 June 2000 *

In Case C-258/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretore di Firenze (Italy) for a preliminary ruling in the criminal proceedings before that court against

Giovanni Carra and Others

on the interpretation of Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC),

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— the Italian Government, by Professor U. Leanza, Head of the Legal Affairs Department, Ministry of Foreign Affairs, acting as Agent, assisted by D. Del Gaizo, Avvocato dello Stato,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by S. Moore, Barrister,

— the Commission of the European Communities, by L. Pignataro, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government and the Commission at the hearing on 27 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 November 1999,

gives the following

Judgment

1 By order of 20 June 1998, which was received at the Court on 15 July 1998, the Pretore di Firenze (Magistrate, Florence) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC).

2 Those questions arose in criminal proceedings against Mr Carra, Mrs Colombo and Mrs Gianassi, who were charged with acting as intermediaries between demand for and supply of employment on the labour market.

3 In Italy, the employment market was subject, until 8 January 1998, to a mandatory placement system administered by public placement offices and was regulated by Law No 264 of 29 April 1949 (Suppl. GURI No 125 of 1 June 1949), as amended (hereinafter 'Law No 264/49'). 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 person who pursues a placement activity contrary to that provision or engages employees other than through the intermediary of a placement office is liable, according to Law No 264/49, 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.

4 The first paragraph of Article 1 of Law No 1369 of 23 October 1960 (GURI No 289 of 25 November 1960, hereinafter 'Law No 1369/60'), prohibits a person from acting as an intermediary in employment relationships. A person who infringes those rules is liable to the penal sanctions provided for in Article 2 of that law. Under the final paragraph of Article 1, persons employed in breach of the first paragraph of Article 1 are regarded in all respects as engaged by the undertaking which has in fact used their services.

5 Article 2 of Law No 196 of 24 June 1996 laying down rules on the promotion of employment (Suppl. GURI No 154 of 4 July 1997, hereinafter 'Law No 196/97'), provides that only undertakings registered with the Ministry of Employment and Social Security and in possession of a licence issued by that ministry may provide temporary employment services. Article 10 of Law No 196/97 provides that any unregistered person providing those services is liable to the sanctions provided for in Law No 1369/60.

6 Legislative Decree No 469 of 23 December 1997 conferring on the regions and other local authorities responsibilities and tasks relating to the employment market (GURI No 5 of 8 January 1998, hereinafter 'Decree No 469/97'), entered into force on 9 January 1998. Article 10(2) of that decree provides that activity as an intermediary between supply of and demand for employment may be pursued, after authorisation by the Ministry of Employment and Social Security, by undertakings or groups of undertakings, by cooperatives whose subscribed capital is not less than ITL 200 million and by non-commercial bodies whose assets are not less than ITL 200 million. Article 10(13) of Decree No 469/97 provides that Law No 264/49 as amended and supplemented does not apply to

persons authorised to act as intermediaries between supply of and demand for employment.

7 The charge laid before the Pretore di Firenze is that Mr Carra, Mrs Colombo and Mrs Gianassi, 'by together running the undertakings "Gruppografica" and "Balex", in Mrs Gianassi's case since April 1994 as regards Balex alone, acted for reward as intermediaries between supply of and demand for employment, in Florence since at least December 1993 and in Prato since April 1994, representing a further offence by Mr Carra within a five-year period', contrary to Article 110 of the Criminal Code and Articles 1, 11 and 27 of Law No 264/49.

8 During the course of the proceedings the accused sought acquittal on the ground that the criminal sanctions laid down in the provisions cited above were no longer applicable, following the judgment of the Court in Case C-55/96 *Job Centre* [1997] ECR I-7119 (hereinafter '*Job Centre II*').

9 The Pretore di Firenze considered that the outcome of the proceedings pending before him depended on an interpretation of Articles 86 and 90 of the Treaty; he therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do Articles 86 and 90 of the Treaty, as interpreted in the judgment of the Court of Justice of the European Communities of 11 December 1997, have 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 an 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?'

First question

10 By its first question the court of reference seeks to ascertain whether Article 90(1) of the Treaty, read in conjunction with Article 86 of the Treaty, has direct effect.

11 It suffices to point out in that regard that it is clear from the case-law of the Court that, even within the framework of Article 90, Article 86 has direct effect and confers on individuals rights which the national courts must protect (see, in particular, 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 and Others* [1999] ECR I-5665, paragraph 21).

12 The court of reference then asks whether Articles 86 and 90 of the Treaty, read together, preclude national legislation which prohibits any activity as intermediary between supply of and demand for employment in employment relations where it is not carried out by public placement agencies.

13 In that regard, it suffices to refer to paragraph 38 of the judgment in *Job Centre II*, where the Court held 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, 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.

14 Those conditions are cumulative.

15 Finally, the court of reference asks whether the direct effect of Articles 86 and 90 of the Treaty, read together, requires the national court to regard any private activity as a placement intermediary as lawful and, accordingly, to refuse to apply the provisions of national law which make that activity an offence.

16 In that regard, it is settled law 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 (see judgment in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, paragraph 24).

17 In the light of all the foregoing considerations, the first question should be answered as follows:

— Even within the framework of Article 90 of the Treaty, Article 86 of the Treaty has direct effect and confers on individuals rights which the national courts must protect.

— Public placement offices are subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct

the particular task conferred on them. A Member State which prohibits any activity as intermediary between supply and demand on the employment market, unless it is 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.

— 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.

Second question

18 By its second question, the court of reference seeks essentially to ascertain whether Articles 86 and 90 of the Treaty preclude a system such as that established by Law No 196/97 and Decree No 469/97.

19 However, the court of reference has provided no information concerning the legal framework within which the interpretation which it seeks is to be given or any reason why it considers that examination of the compatibility with Community law of a national system such as that referred to in the second question is material to the outcome of the main action, the facts of which predate the adoption of that system.

20 The second question must therefore be declared inadmissible (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17; Joined Cases 98/85, 165/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6; and Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14).

Costs

21 The costs incurred by the Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Pretore di Firenze by order of 20 June 1998, hereby rules:

Even within the framework of Article 90 of the EC Treaty (now Article 86 EC), Article 86 of the EC Treaty (now Article 82 EC) has direct effect and confers on individuals rights which the national courts must protect.

Public placement offices are subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the particular task conferred on them. A Member State which prohibits any activity as intermediary between supply and demand on the employment market, unless it is 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.

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.

Edward Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 8 June 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fourth Chamber