OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 15 January 1991 *

My Lords,

1. This case comes to the Court by way of a reference for a preliminary ruling from the Oberlandesgericht München. It raises a number of questions about the applicability of the Treaty provisions on the free movement of services and on the competition rules to what is, to all appearances, a situation purely internal to a Member State.

2. The plaintiffs in the main proceedings are German personnel consultants based in Germany. The defendant is a German company based in Munich. The parties entered into a contract under which the plaintiffs were to assist the defendant in the recruitment of a sales director. The plaintiffs put forward a candidate whom they considered suitable for the post, namely Mr R. Dechert, a German national. However, the defendant decided not to engage Mr Dechert and refused to pay the contractually agreed fee to the plaintiffs, who thereupon commenced proceedings before the German courts. It appears that the plaintiffs cannot succeed under German law because the contract is void; in Germany the *Bundesanstalt für Arbeit*, which is an organ of the State, has a monopoly over recruitment services, and private recruitment agencies are prohibited in accordance with an ILO Convention. The plaintiffs contend that the German provisions prohibiting private recruitment agencies are contrary to certain provisions of Community law, in particular Articles 59 and 86 of the EEC Treaty. The Oberlandesgericht München has requested a preliminary ruling on the following questions:

' I. Does the provision of business executives by personnel consultants constitute a service within the meaning of the first paragraph of Article 60 of the EEC Treaty and is the provision of executives bound up with the exercise of official authority within the meaning of Articles 66 and 55 of the EEC Treaty?

II. Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down by Paragraphs 4 and 13 of the Arbeitsförderungsgesetz, constitute a professional rule justified by the public interest or a monopoly justified on grounds of public policy and public security (Articles 66 and 56(1) of the EEC Treaty)?

* Original language: English.

III. Can a German personnel consultant rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings?

IV. In connection with the provision of business executives is the Bundesanstalt für Arbeit (Federal Employment Office) subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?'

The background to the case

(a) *The ILO Conventions*

3. Before those questions can be answered it is first necessary to examine the background to the case. The German provisions granting a monopoly over recruitment to the Bundesanstalt (as I shall henceforth refer to the Bundesanstalt für Arbeit) and prohibiting private recruitment agencies have their origin in international law. The Employment Service Convention 1948 (ILO Convention No 88; International Labour Conventions and Recommendations 1919-1981, p. 93) requires ILO members for which the Convention is in force to maintain or ensure the maintenance of a free public employment service (Article 1(1)). The essential duty of the employment service is 'to ensure, in cooperation where necessary with other public and private bodies concerned, the best possible organization of the employment market as an integral part of the national programme for the achievement and maintenance of full employment and the development and use of productive resources' (Article 1(2)).

4. The Fee-charging Employment Agencies Convention (Revised) 1949 (ILO Convention No 96; International Labour Conventions and Recommendations 1919-1981, p. 102) grants members ratifying the Convention a choice between accepting Part II of the Convention, which provides for the gradual abolition of fee-charging employment agencies conducted with a view to profit, or Part III of the Convention, which provides for the regulation of such agencies. Article 5 of the Convention, which belongs to Part II, provides that exceptions to the rule requiring the abolition of such agencies 'shall be allowed by the competent authority in exceptional cases in respect of categories of persons, exactly defined by national laws or regulations, for whom appropriate placing arrangements cannot conveniently be made within the framework of the public employment service, but only after consultation, by appropriate methods, with the organizations of employers and workers concerned'.

5. Convention No 96 has been ratified by all Member States except Denmark and the United Kingdom. It may be noted that Germany chose to be bound by the provisions of Part II of the Convention, rather than Part III (Law of 15 April 1954; Bundesgesetzblatt 1954, Teil II, p. 456).

(b) *National law*

6. Most of the relevant national law is contained in the *Arbeitsförderungsgesetz* (Law on the promotion of employment, hereafter 'the AFG'). The basic aims of the AFG are to ensure a high level of employment, to improve the structure of the labour market and thus to promote economic growth (Paragraph 1). The task of accomplishing those aims is entrusted to the Bundesanstalt (Paragraph 3). Under Paragraph 4, employment procurement may be performed only by the Bundesanstalt, subject to the provisions of Paragraph 18(1), second sentence, and Paragraph 23(1). Employment procurement is defined by Paragraph 13(1); it means bringing prospective employees into contact with prospective employers with a view to their concluding a contract of employment.

7. Paragraph 18 provides as follows:

'(1) Recruitment and procurement for employment abroad as an employee and recruitment and procurement abroad for employment in Germany as an employee are to be carried out by the Bundesanstalt. Other organizations and persons require, in order to be able to carry out those activities, the prior consent of the Bundesanstalt in each individual case, in so far as they have not been specially commissioned under Paragraph 23(1), second sentence. The Bundesanstalt shall take a decision, having regard to the legitimate interests of German workers and the German economy in the light of the state of the labour market ... .

(2) The legal provisions of the European Communities shall be unaffected.

... '

8. Paragraph 23(1) provides that:

'The Bundesanstalt may in exceptional cases, upon application and after hearing the relevant associations of employers and workers, commission organizations or persons to carry out employment procurement for individual professions or groups of persons, if it is appropriate to do so. Recruitment and procurement for employment abroad as an employee, together with recruitment and procurement abroad for employment in Germany as an employee, is permissible only on the basis of a special commission by the Bundesanstalt, without prejudice to Paragraph 18(1).'

9. Paragraph 23, unlike Paragraph 18, does not contain any proviso regarding Community law.

10. The Bundesanstalt provides its services free of charge in principle. If untoward expenditure is incurred, it may charge a fee to the employer (Paragraph 21). The Bundesanstalt is financed by contributions levied on employers and workers (Paragraph 167).

11. Anyone who engages in employment procurement without being commissioned to do so by the Bundesanstalt under Paragraph 23 commits an offence punishable by a pecuniary penalty of up to DM 30 000 (Paragraph 228). Anyone who procures employment for a worker abroad or who recruits or places a worker abroad for employment in Germany without the prior consent of the Bundesanstalt under Paragraph 18 or without being commissioned by the Bundesanstalt under Paragraph 23 commits a crime punishable by a maximum of three years' imprisonment or by a fine (Paragraph 227).

12. Under Paragraph 134 of the German Civil Code, a legal transaction that is contrary to a statutory prohibition is in principle void. The order for reference cites several decisions of the Bundesgerichtshof holding that that provision renders void an employment procurement contract entered into contrary to the terms of the AFG.

13. The compatibility of the Bundesanstalt's monopoly with German constitutional law has not gone unchallenged. In particular, it was argued in a case before the Bundesverfassungsgericht in 1967 that the monopoly was contrary to Article 12(1) of the Grundgesetz, which confers on all German citizens the freedom to choose their trade or profession, place of work and place of education. By judgment of 4 April 1967 (BVerfGE, vol. 21, p. 245) the Bundesverfassungsgericht held that the monopoly was not contrary to the Grundgesetz. Although the monopoly interfered with the citizen's freedom to choose his trade or profession, it was justified by the public interest in view of the abuses that had occurred in the past and owing to the fact that the global needs of the labour market could more efficiently be satisfied by a single entity than by a multiplicity of undertakings. The court examined the separate question whether the monopoly was also justified in relation to executive recruitment in view of the special characteristics of that sector. It concluded that the legislator was not obliged to exclude executive recruitment from the monopoly because its effectiveness would be damaged if it were broken up. Moreover, it was difficult, if not impossible, to distinguish in practice between different trades and professions and categories of employee.

(c) *The de facto situation in the field of executive recruitment*

14. It became apparent in the 1950s (according to the Commission) that a separate market existed for executive recruitment. As a result private undertakings, operating as 'personnel consultants', became active in the field of executive recruitment. The Bundesanstalt reacted to that development in two ways:

(i) In 1954 the Bundesanstalt set up a special office for the recruitment of executives and other highly qualified groups (*Kommentar zum AFG*, by A. Knigge, J. V. Ketelsen, D. Marschall and A. Wittrock, 2nd edition, paragraph 5 on Paragraph 189, p. 1427). According to the Commission's observations, its function is to supply highly qualified personnel to large under-

takings. It is common ground that the office is unable to satisfy all the demand for assistance in the recruitment of executives. According to information supplied by the Commission, the office assists in the filling of only 28% of vacancies for executives advertised on the open market in Germany. As a result, personnel consultants continue to exist and continue to engage in executive recruitment, notwithstanding the restrictions placed on them; according to the plaintiffs, there are between 700 and 800 such firms with a total annual turnover of between DM 750 million and DM 1 200 million.

(ii) In 1957 the Bundesanstalt issued a circular in which it expressed its willingness to permit personnel consultants to engage in executive recruitment. A 1970 version of the circular, appended to the Commission's observations, records the terms of an agreement — between the Bundesanstalt, the Federal Minister for Employment and two associations representing German employers and German personnel consultants — concerning the 'principles governing the distinction between personnel consultancy and employment procurement in connection with the filling of posts for executives'. The agreement purports to be an interpretation of the relevant provisions of the AFG. It begins by defining the term 'executives' *(Führungskräfte der Wirtschaft)*: an executive is a person who, by virtue of being in a special place of trust in relation to the employer, occupies a key position affecting the existence and development of the undertaking, inasmuch as he performs significant managerial functions or highly qualified work involving planning, supervision, design, investigation or consultation, essentially on his own initiative and with a high degree of responsibility (point 1.1.1 of the circular).

15. The agreement then distinguishes between personnel consultancy, which private undertakings are allowed to engage in, and employment procurement, which is reserved to the Bundesanstalt. Employment procurement is defined as in Paragraph 13(1) of the AFG. Personnel consultancy is defined as the activity that takes place when a personnel consultant, in the context of a consultancy contract, cooperates *inter alia* in the search for, and selection of, executives for appointment to vacant posts (point 1.2). A personnel consultant who is commissioned by an undertaking to help to fill executive vacancies in a specific case may place advertisements in newspapers and periodicals for the undertaking (point 2.1). Point 2.2 states that a personnel consultant may not *inter alia*:

(i) Assist in the recruitment of persons other than executives;

(ii) Assist in recruitment unless engaged by an undertaking in a specific case;

(iii) Place advertisements directed to executives or undertakings in his own name;

(iv) Put candidates who have contacted him in connection with a specific vacancy forward for other vacancies;

(v) Maintain a card index of candidates;

(vi) Publish lists of candidates or vacancies;

(vii) Retain documents produced by candidates after the vacancy in question has been filled;

(viii) Demand or accept fees from candidates.

16. Finally, the agreement provides for certain forms of cooperation between personnel consultants and the *Bundesanstalt*'s own employment procurement service.

17. Although the agreement set out in the Bundesanstalt's circular is described as an 'interpretation' of the AFG, it is clear that it really purports to derogate from that law by authorizing personnel consultants to engage in certain activities that appear to constitute employment procurement, within the meaning of Paragraph 13(1) of the AFG, and are therefore reserved exclusively to the Bundesanstalt under Paragraph 4 thereof. But the circular cannot affect the fact that such activities, when performed by private undertakings, are unlawful and that contracts concluded for such a purpose are void. The result is that executive recruitment agencies are in a thoroughly anomalous situation: their activities are openly tolerated by the authorities, so they are in no danger of incurring criminal or administrative penalties; but their activities are none the less unlawful, so they cannot enforce their contracts in the courts.

Question I

18. Neither Question I nor Question II will need to be answered in the present case, unless Question III is answered in the affirmative. Since, however, the issues raised by Question I are relatively straightforward and can be resolved on the basis of the Court's existing case-law, I will deal with them directly.

The first part of the question

19. The first part of Question I asks whether the provision of business executives by personnel consultants constitutes a service within the meaning of the first paragraph of Article 60 of the Treaty. That provision defines services in the following terms:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.'

20. There cannot be any doubt that the provision of executives by personnel consultants or recruitment agents falls within the above definition of a service. In fact, the point is not contested by any of the participants in the present proceedings. The only argument that could be raised against such a conclusion is that in Germany the service in question is normally provided free of charge by an organ of the State. But that does not change the fact that the service is also provided by private undertakings — both in other Member States and in Germany, in so far as the Bundesanstalt does not seek to enforce its monopoly — and that those private undertakings are normally remunerated for their services. It is in any case clear from the case-law of the Court that the services provided by fee-charging employment agencies fall within the definition of 'services' given in the first paragraph of Article 60: see Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35 and Case 279/80 *Webb* [1981] ECR 3305.

The second part of the question

21. The second part of Question I asks whether the provision of executives is bound up with the exercise of official authority within the meaning of Article 55 of the Treaty, in conjunction with Article 66.

22. I do not see how Article 55 could be invoked in relation to employment procurement. As an exception to a fundamental rule of the Treaty, Article 55 must be construed narrowly: see Case 2/74 *Reyners* v *Belgium* [1974] ECR 631, paragraph 43. The expression 'official authority' was defined in the same case by Advocate General Mayras in the following terms (at p. 664):

'Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.'

23. It is doubtful whether even the Bundesanstalt exercises official authority, in the above sense, when it performs its statutory functions. Certainly no official authority would be exercised by private undertakings if they were permitted to engage in employment procurement. The plaintiffs themselves do not exercise official authority; nor would an undertaking established in another Member State do so if it made use of its presumed freedom to provide services under Article 59. If therefore the general rule laid down in Article 59 entitles certain undertakings to engage in employment procurement in Germany, they cannot lose that right by virtue of the exception laid down in Article 55.

24. While on the subject of Article 55, there is another point that merits commentary, even though it is not directly in issue in the present proceedings. When the Bundesanstalt authorizes other persons to engage in employment procurement under Paragraph 23 of the AFG, that is regarded in German law as a delegation of public powers (*Delegation hoheitlicher Befugnisse*): see Gagel, *Arbeitsförderungsgesetz-Kommentar*, paragraph 13 on Paragraph 23.

None the less, I do not think that that is sufficient to enable the Bundesanstalt to invoke the proviso in Article 55 and so refuse to consider granting authorization to an undertaking from another Member State. I say so because a private undertaking that operates by virtue of such an authorization does not exercise any special prerogative vis-à-vis the public. Thus, in so far as the Bundesanstalt makes use of Paragraph 23, it must do so in a non-discriminatory manner.

Question II

25. Question II raises several issues that are both complex and novel. I propose therefore to examine Question III first and to revert to Question II only if it is necessary to do so in the light of the answer to Question III.

Question III

26. This question asks whether a German personnel consultant can rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings.

27. It is necessary to determine first of all whether Article 59 et seq. of the Treaty have any bearing at all on a situation purely internal to a Member State. Certainly there is nothing in the wording of Articles 59 and 60 to suggest that a German national established in Germany can invoke those provisions in order to claim the right to pursue an activity in Germany that is prohibited by German law. Article 59, first paragraph, requires the abolition of restrictions on freedom to provide services 'in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended'. Article 60, third paragraph, states that the provider of the service may 'temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals'. It is difficult to see how those provisions can be invoked in the circumstances of the present case. It may be noted that in Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399 the Court observed that the provisions of the Treaty relating to freedom of establishment and the provision of services 'cannot be applied to situations which are purely internal to a Member State'.

28. The plaintiffs attempt to surmount that obstacle by arguing that Article 59 permits a recruitment agency established in another Member State to provide services in Germany and that a similar facility must be extended to German undertakings by virtue of the rule against discrimination on grounds of nationality contained in Article 7.

29. There may indeed be circumstances in which an undertaking established in one Member State can invoke Article 59 in order to claim the right to provide a service in another Member State, even though the activity in question is the subject of a State monopoly in that other Member State. It is worth noting that Advocate General Warner suggested, in his Opinion in Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, at p. 872, that where a particular service was made the subject of a State monopoly, the consequent prohibition on the provision of the service by private persons did not necessarily extend to persons established in other Member States.

But that does not mean that undertakings established in the State where the monopoly has been set up may disregard a prohibition imposed by national law and provide the service that has been entrusted to the monopoly. Otherwise no service industry could ever be made the subject of a State monopoly; that Member States retain the power to establish such monopolies is, however, clear from the terms of Articles 90 and 222 of the Treaty.

30. I do not see how the above conclusion can be affected by Article 7 of the Treaty. Article 7, it should be noted, is concerned primarily with 'discrimination on grounds of nationality', not discrimination based on a person's place of establishment. Of course the latter type of discrimination might well be caught by Article 7, if that provision applied at all. But Article 7 only operates 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein'. Article 59 is, in relation to Article 7, in the nature of a *lex specialis*. Article 59 et seq. may be regarded as implementing, in relation to the freedom to provide services, the principle of non-discrimination laid down in Article 7, but they do so in accordance with their own detailed rules, amongst which are the provisions of the third paragraph of Article 60. If national legislation complies with the detailed rules of Article 59 et seq., it also complies with Article 7: see Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091, at p. 1126, paragraph 27. But Article 59 is concerned only with cross-frontier supplies of services, its primary aim being to ensure that undertakings established in one Member State can provide services in other Member States. That aim is in no way frustrated by a German law prohibiting undertakings established in Germany from providing certain services in Germany to German undertakings.

31. It follows that Question III must be answered in the negative. It is not therefore necessary to examine Question II.

Question IV

32. The purpose of Question IV is essentially to ascertain whether the Bundesanstalt is subject to the rules of the Treaty, in particular Article 59 and the competition rules, in the light of Article 90(2) of the Treaty, and whether the extension of the Bundesanstalt's monopoly to the field of executive recruitment and the maintenance in force of legislation invalidating contracts concluded by private recruitment agents are contrary to those rules.

33. Article 90 provides as follows:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be

subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. . . .'

34. It may be noted that Question IV refers expressly only to paragraph (2) of Article 90. Paragraph (1) is not mentioned in the order for reference. In the written observations and oral argument attention has been focused on paragraph (2), though paragraph (1) has been touched on. It is, I think, clear from the background to the case that the Oberlandesgericht seeks guidance on the implications, for the case before it, of the whole of Article 90. In any event, paragraphs (1) and (2) are so closely linked in the present case that we cannot consider one without the other.

35. As regards the effect of Article 90 in conjunction with Article 59, I do not think that much need be said. I have already reached the conclusion, when dealing with Question III, that Article 59 does not prevent a Member State from setting up a State monopoly in the provision of certain services and prohibiting undertakings established in that Member State from providing the services in question in that Member State. If Article 59 cannot have that effect on its own, it cannot do so in conjunction with Article 90(1), which simply requires Member States to abolish, in relation to public undertakings, measures contrary to the rules of the Treaty, or in conjunction with Article 90(2), which simply makes such undertakings subject to the rules of the Treaty.

36. The plaintiffs' argument based on the competition rules of the Treaty has more substance. It runs as follows: The Bundesanstalt is a 'public undertaking', within the meaning of Article 90(1), and an 'undertaking entrusted with the operation of services of general economic interest', within the meaning of Article 90(2). As such, it is subject to the rules of the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to it. The Bundesanstalt would not be obstructed in the performance of its tasks if it were forced to compete with private agents in the field of executive recruitment. The Bundesanstalt has a dominant position on the recruitment market since it enjoys a statutory monopoly. It has abused that dominant position, contrary to Article 86 of the Treaty. The abuse lies in the simple fact that the monopoly extends to activities over which the establishment of a monopoly is not justified by the public interest. In so far as the Federal Republic of Germany has made possible the aforesaid abuse by maintaining in force the relevant provisions of the AFG, it has infringed Article 90(1) and the general principle to the effect that Member States may not adopt measures that destroy the *effet utile* of the Community competition rules (see Case 13/77 *INNO* v *ATAB* [1977] ECR 2115, paragraphs 30 and 31).

37. A similar position is adopted by the Commission, with the difference that the Commission sees the abuse of the *Bundesanstalt's* dominant position in its failure to satisfy the demand for a type of service (namely, executive recruitment) over which it has a monopoly.

38. The other parties to the proceedings have said very little on the subject of Article 90. Macrotron, the defendant in the main proceedings, merely observes that there can be no breach of Articles 86 and 90 because the decision to confer a monopoly on the Bundesanstalt was based on overriding considerations pertaining to the public interest. The German Government contends that there is no room for the application of the competition rules in relation to employment procurement because the whole field has been removed from the sphere of competition law by the decision to create a State monopoly to be run in the public interest on a non-commercial basis.

39. If the argument advanced by the plaintiffs and the Commission is to succeed, a number of points will have to be established. None of those points gives rise to any great difficulty, in my view, except the key issue whether the Bundesanstalt has abused its dominant position.

40. Certainly, I have no difficulty in accepting that the Bundesanstalt, which is described by Paragraph 189 of the AFG as 'eine rechtsfähige Körperschaft des öffentlichen Rechts mit Selbstverwaltung', is a 'public undertaking', within the meaning of Article 90(1), and an 'undertaking entrusted with the operation of services of general economic interest', within the meaning of Article 90(2). As such, it is — contrary to the German Government's view — subject to the competition rules and to the other rules of the Treaty, unless it can be shown that the application of those rules would obstruct the performance of its tasks. The tasks of the Bundesanstalt are laid down in Paragraph 3 of the AFG; the most important, for the purposes of the present case, is employment procurement. It cannot be contended that the Bundesanstalt would be obstructed in the performance of that task, or any other of its tasks, if it were compelled to compete with private operators in the field of executive recruitment. That is demonstrated, as the Commission has pointed out, by the circular in which the Bundesanstalt expressed its willingness to allow private firms to engage in certain forms of employment procurement in the guise of personnel consultancy.

41. It is likewise beyond doubt that the Bundesanstalt holds a dominant position on the market for employment procurement services, since the AFG confers on it a statutory monopoly extending over that entire market. In the circumstances, it is not, I think, necessary to examine whether executive recruitment constitutes a separate market.

42. As to whether the Bundesanstalt has abused its dominant position and whether any such abuse is likely to affect trade between Member States, those are ultimately questions for the national court to be answered in the light of all the circumstances. All that this Court can do is to

furnish guidance about the relevant criteria in Community law.

43. The first point that must be made is that the mere possession of a dominant position does not itself constitute an abuse. Taken literally, therefore, the second part of Question IV, which asks whether the establishment of a monopoly in the provision of business executives constitutes an abuse of a dominant position, must be answered in the negative. Although the Court has held that an abuse may occur when an undertaking in a dominant position strengthens that position by acquiring control over a competitor (Case 6/72 *Europemballage and Continental Can* [1973] ECR 215), I do not see how Articles 86 and 90 can be interpreted as meaning that an abuse takes place when a Member State confers a monopoly on an undertaking or an organ of the State. The plaintiffs are, in my view, stretching the wording of Article 86 to breaking point when they assert that the mere fact that the monopoly extends further than is necessary in the public interest constitutes an abuse of a dominant position. If that view were accepted it would mean that Article 90, in conjunction with Article 86, imposes a general limitation on Member States' power to place certain sectors of the economy under public ownership; nationalization could take place only in so far as it were justified by the public interest. Similar limitations are of course imposed by certain national constitutions (e. g. Article 43 of the Italian Constitution and Article 128 of the Spanish Constitution). But there is no such provision in Community law; on the contrary, Article 222 of the Treaty makes it clear that it is for national law to determine the extent to which Member States may nationalize certain sectors of the economy.

44. According to the Commission, an abuse may occur if the public undertaking entrusted with a monopoly fails to satisfy the demand for the service covered by the monopoly. The Commission observes that the Bundesanstalt has for many years been unable to satisfy the demand for services connected with the recruitment of executives, as is evidenced by the fact that it provides candidates for only 28% of vacancies and by the terms of its own circular renouncing its monopoly in the field of executive recruitment. The combined effect of the German legislation prohibiting private recruitment agencies and of the Bundesanstalt's conduct in failing to satisfy a demand that clearly exists is to limit production, markets or technical development within the meaning of indent (b) of the second paragraph of Article 86. The Commission sees confirmation of its view in the Court's judgment in Case 238/87 *Volvo* v *Veng* [1988] ECR 6211. There the Court held that Article 86 might preclude the proprietor of a registered design for car parts from enforcing his exclusive right if he abused a dominant position by ceasing to produce spare parts for a model of which there were still many examples in circulation. It may be noted that the Court used the same formula in Case 53/87 *CICRA and another* v *Renault* [1988] ECR 6039, in which judgment was given on the same day.

45. There is much to commend the Commission's view. Admittedly, it may seem

harsh to describe the Bundesanstalt's conduct as abusive. There is nothing in the file to suggest that it has not endeavoured to the best of its ability to satisfy the demand for assistance in the recruitment of executives. Moreover, it has voluntarily relaxed its monopoly by expressing its willingness to tolerate competition from private operators (though, arguably, it could have made more liberal use of its powers under Paragraph 23 of the AFG, which has apparently been used only in relation to agencies for models and performing artists). None the less, the combined effect of the German legislation and the Bundesanstalt's failure to satisfy demand is that the consumer (i. e. the employer in search of executives or the executive in search of employment) is not receiving the sort of service which he is entitled to expect and which he almost certainly would receive if the sector in question were subject to the system of free competition envisaged by the Treaty. As a result the employer or executive who wishes to use the services of a recruitment agent is likely to find himself in the same situation as the Volvo owner who cannot obtain a new body panel for his car because the proprietor of the registered design for such parts does not manufacture them and refuses to allow anyone else to do so.

46. Although the connection between the present case and the *Volvo* and *Renault* cases seems remote at first sight, it might be possible to regard *Volvo* and *Renault* as illustrating a general principle to the effect that, where national law confers an exclusive right on someone — whether in the form of a patent, a registered design or a monopoly in the provision of certain services — and he fails to produce the goods or services covered by the exclusive right, that failure may amount to abuse of a dominant position, in which case the prohibition laid down in Article 86 will apply in so far as the abuse is capable of affecting trade between Member States. The effect of that prohibition is that the exclusive right can no longer be enforced.

47. It might be thought that a case such as the present one does not fall within Article 86 if there is no deliberate failure on the part of the dominant undertaking to make available the services in question. A distinction might be drawn between the present case and a deliberate refusal to provide services, the latter alone falling within the prohibition of Article 86. But the notion of abuse in Article 86 is not, in my view, so limited. As the Court has pointed out, the concept of abuse is an objective concept relating to the behaviour of a dominant undertaking and Article 86 will apply where, for example, the effect of that behaviour is to hinder the maintenance of the degree of competition still existing in the market or the growth of that competition: see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 at p. 541. As an objective notion, an abuse may exist independently of any element of fault on the part of the dominant undertaking. Article 86 is therefore, in my view, capable of being properly applied to a situation such as the present one. That interpretation is confirmed by the purposes of Article 86, which include the protection of the consumer against the adverse consequences which might otherwise follow from excessive market power; Article 86 seeks to ensure, so far as possible, that the behaviour of the dominant undertaking does not result

in the consumer being deprived of the benefits which could be expected to result from the normal play of market forces.

48. As to the criteria for determining whether the abuse may affect trade between Member States, the first point to be noted is that only a potential effect need be shown. It is not necessary, under Article 86, to prove that the abusive conduct has actually affected trade between Member States but that it is capable of having that effect: Case 322/81 *Michelin* v *Commission* [1983] ECR 3461. Thus Article 86 is not rendered inapplicable simply because the case in point arose out of a purely internal situation.

49. Secondly, there are a number of aspects of the monopoly at issue in the present case that might justify a finding that trade between Member States is capable of being affected. Suppose, for example, that a company established in France were to set up a sales network in Germany, for which purpose it required an executive familiar with the German market. The obvious course of action would be to charge a German personnel consultant with the task of identifying a suitable candidate. But it cannot do that if the Bundesanstalt's monopoly is enforced. Instead, it is compelled to rely on the Bundesanstalt's inadequate service or to fall back on its own devices and set about the awkward business of advertising in a foreign press and assessing foreign applicants about whose educational and other qualifications it may have little understanding. And if recourse were had to the Bundesanstalt, which must by definition have a national outlook, would that organization be in a position to satisfy the special needs of a client from another Member State? To take another example, suppose that a German company operating throughout the common market wished to recruit its senior executives on a Community-wide basis. It would naturally turn to a German recruitment agent with branches in other Member States. But such a firm will not exist if the Bundesanstalt's monopoly is enforced. And the Bundesanstalt itself is unlikely to be able to provide a service requiring a Community-wide perspective. In the circumstances, it would, I think, be difficult to avoid the conclusion that, if an abuse has taken place as a result of the Bundesanstalt's monopoly, that abuse is capable of affecting trade between Member States.

50. If the national court comes to the conclusion that there has been an abuse of a dominant position and that the abuse is capable of affecting trade between Member States, the consequences of that finding as regards the enforceability of the contract between the parties to the main proceedings must be examined in the light of Article 90(1). To the extent to which an abuse of a dominant position has been brought about by the provisions of German law conferring a monopoly on the Bundesanstalt, prohibiting other persons from engaging in employment procurement and rendering their contracts unenforceable, those provisions must be regarded as measures contrary to the rules contained in the Treaty and as such may no longer be maintained in force. Member States are, in any event, precluded from adopting or maintaining in force measures, even of a legislative nature,

that are capable of destroying the effectiveness (*effet utile*) of the competition rules applicable to undertakings: see, for example, Case 267/86 *Van Eycke* v *Aspa* [1988] ECR 4769, at p. 4791, paragraph 16.

51. It cannot be argued that Convention No 96 precludes the German authorities from modifying the measures in question. It is true that Article 234 of the Treaty seeks to preserve the effects of international agreements concluded before the entry into force of the Treaty. However, as the Commission points out, it is open to the German Government, in accordance with Article 5 of the Convention, referred to at paragraph 4 above, to introduce exceptions to the general prohibition in respect of certain categories of persons.

52. Finally, a few words must be said about the direct effect of Article 90. Paragraph (1) of that provision must, in my view, have direct effect in so far as it prohibits Member States from enacting or maintaining in force any measure contrary to a rule that itself has direct effect: see Wyatt and Dashwood, *The Substantive Law of the EEC*, 2nd edition, p. 524.

53. It has sometimes been stated by the Court that Article 90(2) cannot have direct effect, in part because the following paragraph confers a power of appraisal on the Commission with regard to the application of Article 90: see, in particular, Case 10/71 *Ministère Public* v *Hein, née Müller* [1971] ECR 723. However, it is clear from the Court's later case-law that what is really meant when Article 90(2) is denied direct effect is simply that the partial derogation that it makes from the ordinary rules of the Treaty in favour of certain undertakings does not have direct effect: see Case 155/73 *Sacchi* [1974] ECR 409, Case 172/82 *Fabricants raffineurs d'huile de graissage* v *Inter-huiles* [1983] ECR 555 and Case 66/86 *Ahmeed Saeed* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803. In so far as Article 90(2) confirms that the undertakings in question are in principle subject to rules such as Article 86, it plainly cannot preclude the national court from giving effect to those rules, especially in a case where it is abundantly clear that the application thereof would not obstruct the performance of the particular tasks assigned to the undertaking in question.

54. Accordingly, I am of the opinion that the questions referred to the Court by the Oberlandesgericht München should be answered as follows:

(1) The activities of an undertaking which introduces persons seeking employment to prospective employers constitute services within the meaning of the first paragraph of Article 60 of the EEC Treaty.

(2) A person entitled to invoke Articles 59 et seq. of the Treaty in order to provide such services cannot be prevented from doing so on the ground that the activities in question are connected with the exercise of official authority, within the meaning of Article 55 thereof.

(3) Where the law of a Member State establishes a State monopoly in the field of employment procurement and prohibits private undertakings from pursuing such activities, an undertaking established in that Member State cannot invoke Articles 7 and 59 of the Treaty in order to claim the freedom to place in employment, with an undertaking established in that Member State, persons who have the nationality of that Member State and are resident therein.

(4) Where the law of a Member State establishes such a monopoly and the body entrusted with its operation manifestly fails to satisfy the demand for the services in question, that failure may, having regard to Article 90(2) of the Treaty, constitute an abuse of a dominant position, within the meaning of Article 86 thereof, in so far as it is capable of affecting trade between Member States.

(5) In such circumstances, Article 90(1) of the Treaty precludes the application of provisions of national law which would have the effect of prohibiting other persons from providing such services and of rendering their contracts unenforceable.