JUDGMENT OF THE COURT (Sixth Chamber)
23 April 1991 *

In Case C-41/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht München, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

Klaus Höfner and Fritz Elser

and

Macrotron GmbH

on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, T. F. O'Higgins, C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs,
Registrar: V. Di Bucci, Administrator,

after considering the written observations submitted on behalf of

— Klaus Höfner and Fritz Elser, by Joachim Müller, Rechtsanwalt, Munich, and by Volker Emmerich, Professor of Law at the University of Bayreuth,

* Language of the case: German.

— Macrotron GmbH, represented by Holm Tipper, Rechtsanwalt, Munich,

— the German Government, represented by Ernst Röder, Regierungsdirektor, Federal Ministry of the Economy, acting as Agent,

— the Commission of the European Communities, represented by Étienne Lasnet, Legal Adviser, and by Bernhard Jansen, a member of the Commission's Legal Department, acting as Agents;

having regard to the Report for the Hearing,

after hearing oral argument presented by Messrs Höfner and Elser, Macrotron GmbH, the German Government and the Commission of the European Communities at the hearing on 13 November 1990,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1991,

gives the following

Judgment

1 By order of 31 January 1990, which was received at the Court Registry on 14 February 1990, the Oberlandesgericht München (Higher Regional Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty,

2 The questions were raised in proceedings brought by Messrs Höfner and Elser, recruitment consultants, against Macrotron GmbH, a company governed by German law, established in Munich. The dispute concerns fees claimed from that company by Messrs Höfner and Elser pursuant to a contract under which the latter were to assist in the recruitment of a sales director.

3 Employment in Germany is governed by the Arbeitsförderungsgesetz (Law on the promotion of employment, hereinafter referred to as 'the AFG'). According to Paragraph 1, measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth. Paragraph 3 entrusts the attainment of the general aim described in Paragraph 2 to the Bundesanstalt für Arbeit (Federal Office for Employment, hereinafter referred to as 'the Bundesanstalt'), whose activity consists essentially in bringing prospective employees into contact with employers and administering unemployment benefits.

4 The first of the abovementioned activities, defined in Paragraph 13 of the AFG, is carried out by the Bundesanstalt by virtue of the exclusive right granted to it for that purpose by Paragraph 4 of the AFG (hereinafter referred to as the 'exclusive right of employment procurement').

5 However, Paragraph 23 of the AFG provides for the possibility of a derogation from the exclusive right of employment procurement. The Bundesanstalt may, in exceptional cases and after consulting the workers' and employers' associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations. However, their activities remain subject to the supervision of the Bundesanstalt.

6 The Bundesanstalt must, by virtue of Paragraphs 20 and 21 of the AFG, exercise its exclusive right of employment procurement impartially and without charging a fee. Paragraph 167 of the AFG, contained in the sixth title thereof, which deals with the financial resources enabling the Bundesanstalt to carry out its activities on that basis, allows the Bundesanstalt to collect contributions from employers and workers.

7 The eighth title of the AFG contains provisions concerning penalties and fines. Paragraph 228 provides that fines may be imposed for the conduct of any employment procurement activity in breach of the AFG.

8 Notwithstanding the Bundesanstalt's exclusive right to undertake employment procurement, specific recruitment and employment procurement activity has

developed in Germany for business executives. That activity is carried on by recruitment consultants who assist undertakings regarding personnel policy.

9 The Bundesanstalt reacted to that development in two ways. First, in 1954 it decided to set up a special agency for the placement of highly qualified executives in management posts in undertakings. Secondly, it published circulars in which it declared that it was prepared, under an agreement between the Bundesanstalt, the Federal Ministry of Employment and several professional associations, to tolerate certain activities on the part of recruitment consultants concerning business executives. That tolerant attitude is also apparent in the fact that the Bundesanstalt has not systematically invoked Paragraph 228 of the AFG and prosecuted recruitment consultants for activities undertaken by them.

10 Whilst the activities of recruitment consultants are thus to some extent tolerated by the Bundesanstalt, the fact remains that any legal act which infringes a statutory prohibition is void under Paragraph 134 of the German Civil Code and, according to German case-law, that prohibition applies to employment procurement activities carried out in breach of the AFG.

11 The dispute in the main proceedings concerns the compatibility of the recruitment contract concluded between Messrs Höfner and Elser, on the one hand, and Macrotron, on the other, with the AFG. As required by the contract, Messrs Höfner and Elser presented Macrotron with a candidate for the post of sales director. He was a German national who, according to the recruitment consultants, was perfectly suitable for the post in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.

12 Messrs Höfner and Elser then commenced proceedings against Macrotron before the Landgericht (Regional Court) Munich I in order to obtain payment of the agreed fees. The Landgericht dismissed their claim by judgment of 27 October 1987. The plaintiffs appealed to the Oberlandesgericht, Munich, which considered that the contract at issue was void by virtue of Paragraph 134 of the German Civil

Code (Bundesgesetzbuch), since it was in breach of Paragraph 13 of the AFG. That court nevertheless considered that the outcome of the dispute ultimately depended on an interpretation of Community law and it therefore submitted the following questions for a preliminary ruling:

'1. 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?

2. Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down in 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)?

3. 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?

4. 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?'

13 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

14 In its first three questions and the part of its fourth question concerning Article 59 of the Treaty, the national court seeks essentially to determine whether the Treaty provisions on the free movement of services preclude a statutory prohibition of the procurement of employment for business executives by private recruitment consultancy companies. The fourth question is concerned essentially with the inter-

pretation of Articles 86 and 90 of the Treaty, having regard to the competitive relationship existing between those companies and a public employment agency enjoying exclusive rights in respect of employment procurement.

15 The latter question raises the problem of the scope of that exclusive right and, therefore, of the statutory prohibition of employment procurement by private companies of the kind at issue in the main proceedings. It is therefore appropriate to consider that question first.

The interpretation of Articles 86 and 90 of the EEC Treaty

16 In its fourth question, the national court asks more specifically whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constitutes an abuse of a dominant position within the meaning of Article 86, having regard to Article 90(2). In order to answer that question, it is necessary to examine that exclusive right also in the light of Article 90(1), which is concerned with the conditions that the Member States must observe when they grant special or exclusive rights. Moreover, the observations submitted to the Court relate to both Article 90(1) and Article 90(2) of the Treaty.

17 According to the appellants in the main proceedings, an agency such as the Bundesanstalt is both 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) of the Treaty. The Bundesanstalt is therefore, they maintain, subject to the competition rules to the extent to which the application thereof does not obstruct the performance of the particular task assigned to it, and it does not in the present case. The appellants also claim that the action taken by the Bundesanstalt, which extended its statutory monopoly over employment procurement to activities for which the establishment of a monopoly is not in the public interest, constitutes an abuse within the meaning of Article 86 of the Treaty. They also consider that any Member State which makes such an abuse possible is in breach of Article 90(1) and of the general principle whereby the Member States must refrain from taking any measure which could destroy the effectiveness of the Community competition rules.

18 The Commission takes a somewhat different view. The maintenance of a monopoly on executive recruitment constitutes, in its view, an infringement of Article 90(1) read in conjunction with Article 86 of the Treaty where the grantee of the monopoly is not willing or able to carry out that task fully, according to the demand existing on the market, and provided that such conduct is liable to affect trade between Member States.

19 The respondent in the main proceedings and the German Government consider on the other hand that the activities of an employment agency do not fall within the scope of the competition rules if they are carried out by a public undertaking. The German Government states in that regard that a public employment agency cannot be classified as an undertaking within the meaning of Article 86 of the Treaty, in so far as the employment procurement services are provided free of charge. The fact that those activities are financed mainly by contributions from employers and employees does not, in its view, mean that they are not free, since those contributions are general and have no link with each specific service provided.

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

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

22 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.

23 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.

24 It must be pointed out that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest, such as those envisaged in Article 3 of the AFG, remains subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties (see judgment in Case 155/73 *Sacchi* [1974] ECR 409).

25 As regards the manner in which a public employment agency enjoying an exclusive right of employment procurement conducts itself in relation to executive recruitment undertaken by private recruitment consultancy companies, it must be stated that the application of Article 86 of the Treaty cannot obstruct the performance of the particular task assigned to that agency in so far as the latter is manifestly not in a position to satisfy demand in that area of the market and in fact allows its exclusive rights to be encroached on by those companies.

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

27 Consequently, any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing Article 86 is incompatible with the rules of the Treaty.

28 It must be remembered, first, 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 (see judgment in Case 311/84 *CBEM* [1985] ECR 3261) and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market (judgment in Case 322/81 *Michelin* [1983] ECR 3461, paragraph 28).

29 Secondly, 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 as such incompatible with Article 86 of the Treaty (see Case 311/84 *CBEM*, above, paragraph 17). A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.

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

31 A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind 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 and non-observance of that prohibition renders the contracts concerned void.

32 It must be observed, thirdly, that the responsibility imposed on a Member State by virtue of Articles 86 and 90(1) of the Treaty is engaged only if the abusive conduct on the part of the agency concerned is liable to affect trade between Member States. That does not mean that the abusive conduct in question must actually have affected such trade. It is sufficient to establish that that conduct is capable of having such an effect (see Case 322/81 *Michelin*, above, paragraph 104).

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

34 In view of the foregoing considerations, it must be stated in reply to the fourth question that a public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

— the exclusive right extends to executive recruitment activities;

— the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

— the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

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

The interpretation of Article 59 of the EEC Treaty

35 In its third question, the national court seeks essentially to determine whether a recruitment consultancy company in a Member State may rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

36 It must be recalled, in the first place, that Article 59 of the EEC Treaty guarantees, as regards the freedom to provide services, the application of the principle laid down in Article 7 of that Treaty. It follows that where rules are compatible with Article 59 they are also compatible with Article 7 (judgment in Case 90/76 *Van Ameyde* [1977] ECR 1091, paragraph 27).

37 It must then be pointed out that the Court has consistently held that the provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member State and that the question whether that is the case depends on findings of fact which are for the national court to make (see, in particular, the judgment in Case 52/79 *Debauve* [1980] ECR 833, paragraph 9).

38 The facts, as established by the national court in its order for reference, show that in the present case the dispute is between German recruitment consultants and a German undertaking concerning the recruitment of a German national.

39 Such a situation displays no link with any of the situations envisaged by Community law. That finding cannot be invalidated by the fact that a contract concluded between the recruitment consultants and the undertaking concerned includes the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States.

40 It must therefore be stated in reply to the third question that a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

41 In view of the above answer, it is unnecessary to consider the first two questions and the part of the fourth question concerned with the question whether Article 59 of the Treaty precludes a statutory prohibition of the pursuit, by private recruitment consultancy companies in a Member State, of the business of executive recruitment.

Costs

42 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, so far as the parties to the main proceedings are concerned, in the nature of 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 (Sixth Chamber),

in reply to the questions referred to it by the Oberlandesgericht München by order of 31 January 1990, hereby rules:

(1) A public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

— the exclusive right extends to executive recruitment activities;

— the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

— the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

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

(2) A recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

Mancini O'Higgins

Kakouris Schockweiler Kapteyn

Delivered in open court in Luxembourg on 23 April 1991.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber