Opinion of Advocate General Elmer delivered on 24 October 1996

Unità Socio-Sanitaria Locale nº 47 di Biella (USSL) v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)

Reference for a preliminary ruling: Pretura circondariale di Biella - Italy

Workers - Labour procurement service - Statutory monopoly

Case C-134/95

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Opinion of the Advocate-General

1 In this case the Pretura Circondariale (District Magistrate's Court), Biella, Italy (`the Pretura') has referred questions to the Court for a preliminary ruling on the interpretation of various provisions in the EC Treaty in relation to national legislation prohibiting private labour procurement services and the hiring of temporary labour.

The relevant national rules

2 Under Article 11(1) of Law No 264 of 29 April 1949 (`the 1949 Law'), the procurement of labour and any other activity as an intermediary in the demand for and supply of workers, apart from public labour procurement services, are prohibited, even if the activity is carried on free of charge.

3 Article 1(1) and (2) of Law No 1369 of 23 October 1960 (`the 1960 Law') is worded as follows:

`Employers shall not entrust to an intermediary or subcontractor, or any other type of body including a cooperative society, the mere provision of labour using workers taken on and paid by the intermediary or subcontractor, whatever the nature of the work or service to which the provision of labour relates.

Nor shall employers entrust to an intermediary, whether employees, third persons or companies, including a cooperative society, piece-work that has to be performed by workers who are taken on and paid by such an intermediary.'

Under Article 1(3) those provisions are also applicable to public authorities and undertakings and under Article 1(4) a person hiring labour is treated in law in all respects as the employer.

Facts of the case

4 By decision No 1762 of 30 December 1986, the plaintiff in the main proceedings, USSL No 47 - Unità Socio-Sanitaria Locale (the local social services and health authority) - entered into a contract with the cooperative `La Famiglia' (hereinafter `the Cooperative') for the provision of health and welfare services in the areas covered by USSL No 47.

5 On 18 February 1988 the defendant in the main proceedings, INAIL - Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (National Insurance Fund for Accidents at Work) - conducted an investigation into the said contract. INAIL decided that what it in fact involved was temporary hiring of labour contrary to Article 1 of the 1960 Law, since there was a mere provision of labour performed to order. INAIL based that view on the fact that the members of the Cooperative took instructions from USSL No 47, used worksheets corresponding fully to those used by the staff of USSL No 47, attended refresher courses arranged by USSL No 47 and used cars belonging to USSL No 47 or, if they used their own cars, received a travel allowance from USSL No 47.

6 In a formal notice of 21 December 1993, INAIL demanded that USSL No 47 pay LIT 9 200 105 (approximately ECU 4 810) as accident insurance contributions, based on the remuneration paid to the members of the Cooperative.

7 USSL No 47 disputed the allegation that it had unlawfully hired labour and on 21 April 1994 brought proceedings against INAIL before the Pretura, claiming that the demand for accident insurance contributions was contrary to Community law.

Questions referred to the Court

8 By order of 30 March 1995 the Pretura referred to the Court of Justice for a preliminary ruling the following questions:

`1. Is Article 1(1) of Law No 1369 of 23 October 1960, read in conjunction with Article 11(1) of Law No 264 of 29 October 1949, compatible with the Community principles laid down in Articles 48, 49, 54 and 90 of the EEC Treaty?

2. Do those principles have direct effect, with the result that the Italian legislation has to be set aside?'

9 The national court refers inter alia to Articles 49 and 54 of the Treaty which empower the Community legislature to adopt acts to ensure freedom of movement for workers and freedom of establishment. The reference to `the Community law principles' in the provisions mentioned must be understood in fact as meaning Articles 48 and 52. As will become clear, Article 59 of the Treaty on freedom to provide services would appear to be very relevant to the case. In order to give the national court a useful reply I have therefore found it necessary to discuss that provision as well.

10 The questions referred to the Court concern two separate sets of rules, first the prohibition in the 1949 Law that anyone other than a public authority should operate as an intermediary in the labour market and, secondly, the prohibition in the 1960 Law against the hiring of labour. I therefore consider it appropriate to treat those sets of rules separately.

The 1949 Law

11 INAIL, the Italian Government and the Commission argue that Article 11 of the 1949 Law which prohibits anyone other than a particular public authority from procuring labour is irrelevant to the present case, which concerns solely the question of infringement of Article 1 of the 1960 Law.

12 Under the settled case-law of the Court of Justice, the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose. (1)

13 As was emphasized in the observations submitted to the Court, the main proceedings concern solely breach of the prohibition contained in the 1960 Law on the hiring of labour. Thus the main proceedings do not concern the question whether the Cooperative operated as a labour procurement agency in relation to USSL No 47, but rather whether USSL No 47 acted in breach of the prohibition against the hiring of labour, and was therefore properly treated as the real employer from whom accident insurance contributions could be demanded by INAIL.

14 In the light of the foregoing I consider that the Court should not reply to the question whether a prohibition against private labour procurement services such as that contained in Article 11 of the 1949 Law is compatible with Community law.

The 1960 Law

15 In its order the national court stated that cooperatives constitute the form of association best suited to procuring the mere provision of labour. The 1960 Law, in conjunction with the 1949 Law, prevents such cooperatives from carrying on their activities and thus leads to a restriction of the labour market. The national court considers that legislation to be contrary to the basic principles of Community law on freedom in relation to work, business enterprise, establishment, the interplay between the demand and supply of labour, and competition, considering that the Italian State is in any event unable to satisfy demand on the labour market.

16 USSL No 47 claims that the prohibition against the hiring of labour is contrary to basic principles of Community law that are directly applicable.

17 INAIL contends that the 1960 Law is compatible with Community law. The objective of the Law is to protect workers, which is clear inter alia from the fact that, when the Law has been infringed, they are regarded as employed by the body which has hired the labour. That objective corresponds to that pursued in the Treaty. The 1960 Law does not prohibit the Cooperative from offering and providing services. It is the mere hiring of labour that is prohibited.

18 The Italian Government has stated that this is an internal situation bearing no relation to any of the situations dealt with in Community law. There is a relationship between a public body (USSL No 47) and a cooperative consisting of Italian workers which operates exclusively as a middleman for Italian workers. Articles 48 and 52 of the Treaty are not therefore applicable. Furthermore, the Italian rules are not contrary to Article 90 or Article 86 of the Treaty, since there is no economic activity and there is no procurement of managerial staff.

19 The German Government also takes the view that this is an internal situation. The exercise of the activities covered by the Italian rules may be made conditional on prior authorization. It is for the Member States to lay down the necessary conditions in that connection. As regards Article 90 of the Treaty, it is for the national court to assess whether it is an activity of general interest covered by Article 90(2).

20 The Commission has stated that the relevant Community law provision is Article 59 of the Treaty, since what is involved is the provision of services by the Cooperative in relation to USSL No 47. Article 59 cannot, however, be applied to this case since this is a purely internal situation. Article 48 is irrelevant, since it has not been clarified whether the workers are treated as employed by USSL No 47. Nor is Article 90 of the Treaty relevant, since the 1960 Law does not confer special rights on particular undertakings, but rather prohibits generally a particular activity.

The rules on free movement

21 As stated, the questions referred to the Court must be understood to the effect that the national court seeks clarification as to whether the provisions on freedom of movement for workers and services in Articles 48 and 59 and freedom of establishment in Article 52 of the Treaty have direct effect and whether those provisions preclude a national rule such as that contained in Article 1 of the 1960 Law, according to which the hiring of labour is prohibited.

22 The Court has consistently held that the fundamental rights contained in Articles 48, 52 and 59 of the Treaty are sufficiently clear and unconditional and therefore have direct effect; hence individuals can rely on those rights before national courts, which must ensure their protection. (2) If Article 1 of the 1960 Law is contrary to one or more of the said provisions, therefore, the national courts must not apply that provision.

23 The facts described in the order for reference relate to a contractual relationship between USSL No 47 and the Cooperative for the performance of certain services. As the Commission states, Article 59 on freedom to provide services must be regarded first and foremost as the relevant provision. It cannot, however, be excluded that a prohibition against the hiring of labour could, under certain circumstances, impede the free movement of workers and freedom of establishment. It is hard to see how Articles 48 and 52 could be relevant to the present case, which concerns neither the question of workers' access to the Italian labour market nor the right to establish an undertaking in Italy. In any event, it is apparent from the Court's settled case-law that Articles 48, 52 and 59 of the Treaty cannot be applied to activities which are confined in all respects within a single Member State. (3)

24 In the present case, a contractual relationship has been established between an Italian public authority and an Italian cooperative concerning the provision of certain services in Italy. No evidence has been produced in the case to indicate that those services have been performed by workers from other Member States or that that was envisaged, or that the Cooperative might otherwise be linked to undertakings or persons in other Member States.

25 Accordingly it is my view that that aspect of the questions referred to the Court should be answered to the effect that Articles 48, 52 and 59 cannot be applied to activities which are confined in all respects within a single Member State, which is the case where an Italian public authority enters into an agreement with an Italian cooperative for the performance of certain services using Italian workers.

Article 90 of the Treaty

26 Under Article 90(1) of the Treaty the Member States are to refrain, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.

27 Article 1 of the 1960 Law does not lay down rules for public undertakings and undertakings to which the Member State has granted special or exclusive rights which could cause such undertakings to use their rights in a manner contrary to the Treaty. (4) Article 1 of the 1960 Law contains, however, a general prohibition against a particular activity, namely the hiring of labour, whether by private or public undertakings or authorities. As is apparent from Case C-275/92 Schindler, (5) such a prohibition against a particular activity must be assessed on the basis of the Treaty provisions on free movement. It is neither necessary nor justifiable to apply at the same time the special provision in Article 90 of the Treaty. It is therefore my view that Article 90 is irrelevant in the present case.

Conclusion

28 In the light of the foregoing I would suggest that the Court reply to the questions referred to it by the Pretura Circondariale di Biella as follows:

Articles 48, 52 and 59 of the Treaty cannot be applied to activities confined in all respects within a single Member State, which is the case where an Italian public authority enters into an agreement with an Italian cooperative for the performance of certain services using Italian workers.

(1) - See, for example, Case C-415/93 Bosman and Others [1995] ECR I-4921, paragraph 61, and Case C-143/94 Furlanis [1995] ECR I-3633, paragraph 12.

(2) - See, for example, Case 41/74 Van Duyn [1974] ECR 1337, paragraphs 6 and 7; Case 2/74 Reyners [1974] ECR 631, paragraph 26; and Case 33/74 Van Binsbergen [1974] ECR 1299, paragraph 27.

(3) - See, for example, Case C-332/90 Steen [1992] ECR I-341, paragraph 9; Joined Cases C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 and C-35/94 Aubertin and Others [1995] ECR I-301, paragraph 9; and Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 37.

(4) - See, for example, Case C-387/93 Banchero [1995] ECR I-4663, paragraph 51, and Case C-41/90 Höfner and Elser, cited in footnote 3, paragraph 31.

(5) - [1994] ECR I-1039.