

Case C-41/90

Klaus Höfner and Fritz Elser

v

Macrotron GmbH

(Reference for a preliminary ruling
from the Oberlandesgericht)

(Freedom to provide services — Exercise of public authority —
Competition — Executive recruitment consultants)

Report for the Hearing	1981
Opinion of Mr Advocate General Jacobs delivered on 15 January 1991	1994
Judgment of the Court (Sixth Chamber), 23 April 1991	2010

Summary of the Judgment

1. *Competition — Community rules — To whom addressed — Undertakings — Concept — Public employment agency engaged in employment procurement — Included (EEC Treaty, Arts 85 and 86)*
2. *Competition — Dominant position — Abuse — Undertaking with a statutory monopoly — Public employment agency engaged in employment procurement — Criteria for assessment (EEC Treaty, Arts 86 and 90(1) and (2))*

3. *Freedom to provide services — Treaty provisions — Situations internal to a Member State — Not applicable*
 (EEC Treaty, Arts 7 and 59)

1. 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 since, in the context of competition law, that classification applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
 - 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. As an undertaking entrusted with the operation of services of general economic interest, a public employment agency engaged in employment procurement activities is, pursuant to Article 90(2) of the Treaty, 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 granted it an exclusive right to carry on that activity 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;
3. 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 therefore 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.