Reference for a preliminary ruling by the Tribunale di Milano, Sezione IV Penale by order of that Court of 29 October 2002 in the criminal proceedings against Marcello Dell'Utri, Romano Luzi and Romano Comincioli

(Case C-403/02)

(2003/C 19/24)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale di Milano, Sezione IV Penale (Milan District Court, Fourth Criminal Chamber) of 29 October 2002, received at the Court Registry on 12 November 2002, for a preliminary ruling in the criminal proceedings against Marcello Dell'Utri, Romano Luzi and Romano Comincioli on the following questions:

— May Article 6 of Directive 68/151/EEC [1] (first directive) be understood as requiring the Member States to establish appropriate penalties not only for non-disclosure by commercial companies of balance sheets and profit and loss accounts but also for false disclosure of such documents, of other company documents addressed to members or to the public, or of any information on a company's assets and liabilities, and economic and financial situation which the company is required to provide in relation to itself or to the group of which it forms a part?

— Must the concept of the 'appropriateness' of the penalty, for the purposes also of Article 5 of the EC Treaty, be understood in terms to be specifically assessed within the legislative scope (both criminal and procedural) of the Member States as requiring a penalty which is 'efficacious, effective and genuinely dissuasive'?

— Do the combined provisions of new Articles 2621 and 2622 of the Civil Code, as amended by Legislative Decree No 61 of 11 April 2002, satisfy those criteria: in particular can Article 2621 of the Civil Code, which summarily punishes by a term of imprisonment of one year and six months offences in connection with non-disclosure of balance sheets not occasioning financial loss or occasioning loss but in respect of which no prosecution may be brought under Article 2622 of the Civil Code owing to the absence of a complaint, be described as 'effectively dissuasive' and 'genuinely appropriate'? Finally, is it appropriate, in terms not least of the specific protection of the collective interest in the 'transparency' of the corporate market, and the possibility that that interest may assume a Community dimension, to provide in respect of offences under Article 2622(1) of the Civil Code (those committed in regard to companies not listed on the stock exchange) that proceedings may only be brought upon a complaint by members of the company concerned or by its creditors?

[1] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (English Special Edition...: Series-I I Chapter 1968(I), p. 41).

Action brought on 15 November 2002 by the Commission of the European Communities against the Hellenic Republic

(Case C-407/02)

(2003/C 19/25)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 15 November 2002 by the Commission of the European Communities, represented by Michel Nolin and Minas Konstantinidis, of its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

a) declare that, as a result of the direct award by the municipality of Serres of the contract 'Renewal of the town of Serres: framework of investigative study models and pilot realisation programme' without tenders first being invited, the Hellenic Republic has failed to fulfil its obligations under the provisions of Directive 92/50/EEC [1] (Article 8 et seq.) which require a tender procedure to be carried out and lay down the tender procedure for the award of public service contracts;

b) order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The provisions of Directive 92/50 govern the choice of procedures for the award of public service contracts and lay down common rules in the field of design contests and in the technical field. Those provisions apply to contracts whose estimated value is equal to or exceeds a specified threshold.

According to the Commission, the contract 'Renewal of the town of Serres: framework of investigative study models and pilot realisation programme' is a public service contract falling within the directive given its subject-matter and value. Nevertheless, the contract was not put out to tender but was awarded directly by the municipality of Serres to the Aristotle University of Thessaloniki.

The Commission further maintains that in the present case neither the exception in Article 6 of the directive (contract with an entity which is itself a contracting authority within the meaning of the directive) nor the exception in Article 1(a)(ix) is applicable.

(1) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

Appeal by Jan Pflugradt against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 22 October 2002 in Joined Cases T-178/00 and T-341/00, Jan Pflugradt v European Central Bank, lodged on 18 November 2002

(Case C-409/02 P)

(2003/C 19/26)

An appeal against the judgment delivered on 22 October 2002 by the Fifth Chamber of the Court of First Instance of the European Communities in Joined Cases T-178/00 and T-341/99, Jan Pflugradt v the European Central Bank, was brought before the Court of First Instance of the European Communities on 18 November 2002 by Jan Pflugradt, represented by Dr Norbert Pflüger, 44 Kaiserstraße, D-60329 Frankfurt am Main, with an address for service in Luxembourg.

The appellant claims that the Court should, on setting aside the judgment appealed against (1)

1. annul the appellant's performance appraisal report for 1999 dated 23 November 1999;

2. annul the decision of the respondent (ECB) in its letter of 28 June 2000 altering the responsibilities assigned to the appellant;

3. order the ECB to pay the costs.

Pleas in law and main arguments

— The judgment appealed against mistakes the scope and structure of the EBC's functional autonomy under the contractual system established by Article 36.1 of the ESCB Statute and the first sentence of Article 9(a) of the Conditions of Employment. Owing to that error of law that judgment was based on the supposition that under the contractual system the ECB had the same wide discretion as is available to employers in the use of staff under the law governing officials of the European Communities. That discretion relating to the use of staff is, however, to be distinguished from discretion in terms of operational organisation. The Court of First Instance was wrong to consider the ECB entitled to disregard the applicant's job description which had become a part of the contract and to withdraw contractually agreed responsibilities from him. In accordance with principles governing the law concerning officials, the Court of First Instance should not have had regard to whether the tasks withdrawn constituted 'essential elements' of the contractually agreed area of activity. It should have inquired into whether those tasks were contractually laid down.

  In the event that the contractually agreed employment cannot be continued because of cessation of employment, Article 11(a)(ii) provides for the possibility of dismissal for organisational reasons. That provision therefore makes it clear that it is not permissible unilaterally to alter the terms of the contract in order to enable employment relations to be 'developed further' in disregard of contractual agreements. It is not permissible to leave to the ECB as the employer from the point of view of employment law the decision on the application of two different arrangements which in the end are contradictory. If that were the case, the ECB could — in certain cases even arbitrarily — choose between termination of contract under Article 11(a)(ii) of the Conditions of Employment and continuation of the contract in disregard of contractual agreements.

  The Court of First Instance described the appellant's responsibility for appraisal of the members of the UNIX team as not an essential element of the contract of employment, although in the job description it is termed a 'key responsibility'. The Court of First Instance also misconstrued the job description by assuming it to constitute merely a provisional assignment of responsibilities.

— Infringement of the rules concerning evidence.

(1) Not yet published in the Official Journal of the European Communities.