

JUDGMENT OF THE COURT

4 October 1991

In Case C-159/90,

REFERENCE to the Court under [Article 267 TFEU] by the High Court of Ireland for a preliminary ruling in the action pending before that Court

between

The Society for the Protection of Unborn Children Ireland Ltd

and

Stephen Grogan and Others

on the interpretation of [Articles 56 and 62 TFEU],

THE COURT (Sixth Chamber),

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliét, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,

Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Society for the Protection of Unborn Children Ireland Ltd, by James O'Reilly, SC, and Anthony M. Collins, Barrister-at-law, instructed by Collins, Crowley & Co., Solicitors,

— the defendants in the main proceedings, represented by Mary Robinson, SC, and Seamus Woulfe, Barrister-at-law, instructed by Taylor & Buchalter, Solicitors,

— the Irish Government, by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by Dermot Gleeson, SC, and Aindrias O'Caoimh, Barrister-at-law,

— the Commission of the European [Union], by Karen Banks, a member of its Legal Service, acting as Agent,

after hearing oral argument on behalf of the Society for the Protection of Unborn Children Ireland Ltd, represented by James O'Reilly, SC, and Shane Murphy, Barrister-at-law, and the defendants in the main proceedings, represented by John Rogers, SC, and Seamus Woulfe, Barrister-at-law, the Irish Government and the Commission at the hearing on 6 March 1991,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1991,

gives the following

Judgment

- 1 By order dated 5 March 1990, which was received at the Court on 23 May 1990, the High Court of Ireland referred to the Court for a preliminary ruling under [Article 267 TFEU] three questions on the interpretation of [Union] law, in particular [Article 57 TFEU].
- 2 The questions arose in proceedings brought by the Society for the Protection of Unborn Children Ireland Ltd ('SPUC') against Stephen Grogan and fourteen other officers of students associations in connection with the distribution in Ireland of specific information relating to the identity and location of clinics in another Member State where medical termination of pregnancy is carried out.
- 3 Abortion has always been prohibited in Ireland, first of all at common law, then by statute. The relevant provisions at present in force are Sections 58 and 59 of the Offences Against the Person Act 1861, as reaffirmed in the Health (Family Planning) Act 1979.
- 4 In 1983 a constitutional amendment approved by referendum inserted in Article 40, Section 3, of the Irish Constitution a third subsection worded as follows: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

- 5 According to the Irish courts (High Court, judgment of 19 December 1986, and Supreme Court, judgment of 16 March 1988, *The Attorney General (at the relation of the Society for the Protection of Unborn Children Ireland Ltd) v Open Door Counselling Ltd and Dublin Wellwoman Centre Ltd* [1988] Irish Reports 593), to assist pregnant women in Ireland to travel abroad to obtain abortions, *inter alia* by informing them of the identity and location of a specific clinic or clinics where abortions are performed and how to contact such clinics, is prohibited under Article 40.3.3 of the Irish Constitution.
- 6 SPUC, the plaintiff in the main proceedings, is a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and to affirm, defend and promote human life from the moment of conception. In 1989/90 Stephen Grogan and the other defendants in the main proceedings were officers of students associations which issued certain publications for students. Those publications contained information about the availability of legal abortion in the United Kingdom, the identity and location of a number of abortion clinics in that country and how to contact them. It is undisputed that the students associations had no links with clinics in another Member State.
- 7 In September 1989 SPUC requested the defendants, in their capacity as officers of their respective associations, to undertake not to publish information of the kind described above during the academic year 1989/90. The defendants did not reply, and SPUC then brought proceedings in the High Court for a declaration that the distribution of such information was unlawful and for an injunction restraining its distribution.
- 8 By a judgment of 11 October 1989 the High Court decided to refer certain questions to the Court of Justice for a preliminary ruling under [Article 267 TFEU] before ruling on the injunction applied for by the plaintiff. An appeal was brought against that judgment and, on 19 December 1989, the Supreme Court granted the injunction applied for but did not overturn the High Court's decision to refer questions to the Court of Justice for a preliminary ruling. Moreover, each of the parties was given leave to apply to the High Court in order to vary the decision of the Supreme Court in the light of the preliminary ruling to be given by the Court of Justice.
- 9 As it had already indicated in its judgment of 11 October 1989, the High Court considered that the case raised problems of interpretation of [Union] law; it therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of "services" provided for in [Article 57 Treaty on the Functioning of the European Union]?

2. In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

3. Is there a right at [Union] law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?'
- 10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of 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.

Jurisdiction of the Court

- 11 In its written observations, the Commission states that it is not clear whether the order referring the questions for a preliminary ruling was delivered in the context of the main action or in that of the proceedings for the grant of the injunction.
- 12 As the Court held in the judgment in *Pardini* (Case 338/85 *Pardini v Ministero del commercio con l'estero* [1988] ECR 2041, paragraph 11), a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling under [Article 267 TFEU] unless a dispute is pending before it in the context of which it is called upon to give a decision which could take into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated.
- 13 As far as these proceedings are concerned, if the High Court made the reference to this Court in the context of the interlocutory proceedings, it should be observed that the Supreme Court expressly authorized it to vary the injunction granted in the light of the preliminary ruling to be given by the Court of Justice. If, on the other hand, the request for a preliminary ruling was made in the context of the main proceedings, the High Court will have to give a decision on the substance of the case. This means that in either case the court making the reference is called upon to give a decision which could take into account the preliminary ruling. Consequently, it is entitled to refer questions to the Court under [Article 267 TFEU] and the Court has jurisdiction to entertain them.
- 14 SPUC, for its part, argues that no question of [Union] law arises in these proceedings and that the Court should refuse to give a ruling on the questions referred. First, the defendants in the main proceedings did not distribute the information in question in the context of any economic activity, which precludes the application of the Treaty rules on the freedom to provide services whose interpretation is sought. Secondly, as the provision of information took place entirely in Ireland and involved no other Member State, those provisions of the Treaty cannot apply.
- 15 In this regard, it is sufficient to observe that the circumstances referred to by SPUC go to the substance of the national court's questions. Consequently, whilst they may be taken into account in answering those questions, they are not relevant in determining whether the Court has jurisdiction to rule on the request for a preliminary ruling (see the judgment in Case 180/83

Moser v Land Baden-Württemberg [1984] ECR 2539). As a result, it is necessary to proceed to examine the national court's questions.

First question

- 16 In its first question, the national court essentially seeks to establish whether medical termination of pregnancy, performed in accordance with the law of the State where it is carried out, constitutes a service within the meaning of [Article 57 TFEU].
- 17 According to the first paragraph of that provision, services are to be considered to be 'services' within the meaning of the 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 or persons. Indent (d) of the second paragraph of [Article 57 TFEU] expressly states that activities of the professions fall within the definition of services.
- 18 It must be held that termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. In any event, the Court has already held in the judgment in *Luisi and Carbone* (Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 16) that medical activities fall within the scope of [Article 57 TFEU].
- 19 SPUC, however, maintains that the provision of abortion cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.
- 20 Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.
- 21 Consequently, the answer to the national court's first question must be that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of [Article 57 TFEU].

Second and third questions

- 22 Having regard to the facts of the case, it must be considered that, in its second and third questions, the national court seeks essentially to establish whether it is contrary to [Union] law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where medical termination of pregnancy is lawfully carried out and the means of

communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

- 23 Although the national court's questions refer to [Union] law in general, the Court takes the view that its attention should be focused on the provisions of [Article 56] et seq. [TFEU], which deal with the freedom to provide services, and the argument concerning human rights, which has been treated extensively in the observations submitted to the Court.
- 24 As regards, first, the provisions of [Article 56 TFEU], which prohibit any restriction on the freedom to supply services, it is apparent from the facts of the case that the link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of [Article 56 TFEU].
- 25 The situation in which students associations distributing the information at issue in the main proceedings are not in cooperation with the clinics whose addresses they publish can be distinguished from the situation which gave rise to the judgment in *GB-INNO-BM* (Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] 1-667), in which the Court held that a prohibition on the distribution of advertising was capable of constituting a barrier to the free movement of goods and therefore had to be examined in the light of [Article 34 TFEU], Article 31 of the EEC Treaty [repealed] and Article 36 [TFEU].
- 26 The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State.
- 27 It follows that, in any event, a prohibition on the distribution of information in circumstances such as those which are the subject of the main proceedings cannot be regarded as a restriction within the meaning of [Article 56 TFEU].
- 28 Secondly, it is necessary to consider the argument of the defendants in the main proceedings to the effect that the prohibition in question, inasmuch as it is based on a constitutional amendment approved in 1983, is contrary to Article 62 of the EEC Treaty [repealed], which provides that Member States are not to introduce any new restrictions on the freedom to provide services in fact attained at the date when the Treaty entered into force.
- 29 It is sufficient to observe, as far as that argument is concerned, that Article 62 [repealed], which is complementary to [Article 56 TFEU], cannot prohibit restrictions which do not fall within the scope of [Article 56 TFEU].

30 Thirdly and lastly, the defendants in the main proceedings maintain that a prohibition such as the one at issue is in breach of fundamental rights, especially of freedom of expression and the freedom to receive and impart information, enshrined in particular in Article 10(1) of the European Convention on Human Rights.

31 According to, *inter alia*, the judgment of 18 June 1991 in *Elliniki Radiophonia Tileorasi* (Case C-260/89 *Elliniki Radiophonia Tileorasi v Dimotiki Etairia Pliroforissis* [1991] ECR I-2951, paragraph 42), where national legislation falls within the field of application of [Union] law the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the European Convention on Human Rights — the observance of which the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of [Union] law. In view of the facts of the case and of the conclusions which the Court has reached above with regard to the scope of [Article 56 TFEU] and Article 62 of the Treaty [repealed], that would appear to be true of the prohibition at issue before the national court.

32 The reply to the national court's second and third questions must therefore be that it is not contrary to [Union] law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

Costs

The costs incurred by Ireland and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the High Court of Ireland, by order of 5 March 1990, hereby rules:

1. Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of [Article 57 TFEU];

2. It is not contrary to [Union] law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

Due	Mancini	O'Higgins	Moitinho de
Almeida Rodriguez Iglesias	Diez de Velasco	Slynn	Kakouris
Joliét	Schockweiler	Grévisse	Zuleeg
Kapteyn			

Delivered in open court in Luxembourg on 4 October 1991.

J.-G. Giraud

O. Due

Registrar

President

Robert Schütze European Union Law Lisbonised Case