

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 21 October 1999 *

1. Must Article 90 of the EC Treaty (now Article 86 EC), in conjunction with Articles 34 (now, after amendment, Article 29 EC) and 86 (now Article 82 EC) thereof, be construed as precluding national legislation which grants, mainly to one undertaking, the exclusive right to collect and recover non-hazardous waste produced in one part of the national territory but does not prohibit the export of such waste for purposes of recovery? That, in essence, is the tenor of the questions referred to the Court for a preliminary ruling.

undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94'. However, Article 90(2) of the Treaty states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly may derogate from such rules, where such rules obstruct the performance, in law or in fact, of the particular tasks assigned to them.

I — The legal framework

A — *Community law*

The Treaty

2. Article 90(1) of the Treaty provides that: '[I]n the case of public undertakings and

3. Under Article 34 of the Treaty, quantitative restrictions on exports, and all measures having equivalent effect, are prohibited between Member States.

4. However, under Article 36 of the EC Treaty (now, after amendment, Article 30 EC), Member States are authorised, for reasons, in particular, of public morality, public policy, public security and the protection of health and life of humans, animals or plants, to adopt measures prohibiting or restricting trade between Member States.

* Original language: French.

5. Article 86 of the Treaty states that undertakings are required to observe, in effect, a code of conduct. They are prohibited, in so far as trade between Member States may be affected, from abusing a dominant position within the common market or in a substantial part of it. Under the second paragraph of that provision, such abuse may consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions [subparagraph (a)]; limiting production, markets or technical development to the prejudice of consumers [subparagraph (b)]; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage [subparagraph (c)]; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts [subparagraph (d)].

6. Article 130r of the EC Treaty (now, after amendment, Article 174 EC) sets out the criteria, principles and objectives to be observed by the Community in preparing its environmental policy.

7. Article 130r(2) states, in particular, that Community policy on the environment is to be based on the principle that environmental damage should as a priority be rectified at source.

8. The second subparagraph of Article 130r(2) of the Treaty lays down the requirement that Member States be allowed to derogate, for exclusively environmental reasons, from the rules in the Treaty, and in particular the competition rules.

9. Article 130s of the EC Treaty (now, after amendment, Article 175 EC) identifies the institutions competent to decide the Community's policy on the environment and lays down the relevant legislative procedure to be followed.

10. Article 130t of the EC Treaty (now Article 176 EC) provides that the protective measures adopted by the Community on the basis of Article 130s must not prevent any Member State from maintaining or introducing more stringent protective measures.

Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community¹ (hereinafter the 'regulation')

11. This regulation, which replaces Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier

¹ — OJ 1993 L 30, p. 1.

shipment of hazardous waste,² is based on Article 130s of the Treaty. It seeks to organise the supervision and control of transfrontier shipments of waste³ and to establish minimum common rules for the supervision and control of shipments of waste within a Member State.⁴

12. Article 1 states that 'This Regulation shall apply to shipments of waste within, into and out of the Community'.

13. Article 2 defines the concepts relevant to the application of the regulation. In particular, subparagraph (j) states that 'authorised centre' means 'any establishment or undertaking authorised or licensed pursuant to ... Articles 9, 10 [of Directive 91/156] ...'.⁵

14. Article 13(1) of the regulation provides that the Community system of shipments of waste between Member States does not apply to shipments taking place within a Member State. However, paragraph 2 states that 'Member States shall ... establish an appropriate system for the supervision and control of shipments of waste within their jurisdiction [which] should take account of the need for coherence with

the Community system established by this Regulation'. Under paragraph 3, 'Member States shall inform the Commission of their system for the supervision and control of shipments of waste'. Pursuant to paragraph 4, Member States may apply the system of shipments of waste between Member States established by the regulation within their jurisdiction.

Council Directive 91/156/EEC of 18 March 1991⁶ amending Directive 75/442/EEC on waste⁷ (hereinafter 'Directive 91/156' or 'the Waste Directive')

15. Directive 91/156, based on Article 130s of the Treaty, seeks to guarantee a high level of environmental protection.⁸ To that end, the Member States must ensure 'the responsible removal and recovery of waste ... [and] restrict the production of waste',⁹ promote the recycling and reuse of waste,¹⁰ reduce movements of waste¹¹ and 'provide for authorisation and inspection of undertakings which carry out waste disposal and recovery'.¹²

16. Article 1 of the Waste Directive, which defines the concepts relevant to its applica-

2 — OJ 1984 L 326, p. 31.

3 — Sixth recital.

4 — Fifth recital.

5 — See point 18 of this Opinion.

6 — OJ 1991 L 78, p. 32.

7 — Council Directive of 15 July 1975 (OJ 1975 L 194, p. 39).

8 — First and fourth recitals.

9 — Fourth recital.

10 — Sixth recital.

11 — Ninth recital.

12 — Tenth recital.

tion, makes it clear that collection is the first operation in waste management [sub-paragraph (d)] and that 'collection' means 'the gathering, sorting and/or mixing of waste for the purpose of transport' [sub-paragraph (g)].

17. Directive 91/156 confers broad discretion on the Member States to determine both the content and the system of the instruments necessary to achieve the objectives pursued by it.

18. Article 5(1) provides that Member States are to introduce appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. That provision is intended to enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account the specific circumstances encountered in the region concerned and the nature of the waste. Article 5(2) of Directive 91/156 further specifies that the network 'must ... enable waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health'. That provision is a particular application of the principle, laid down in Article 130r(2) of the Treaty, that environmental damage should as a priority be rectified at source.

19. Similarly, Article 6 requires Member States to establish or designate the competent authority or authorities to be responsible for the implementation of the Waste Directive.

20. The Member States' discretion is limited by the obligation imposed on them to comply with certain requirements.

21. Thus, as provided in Article 7(1), Member States must draw up one or more waste management plans relating to the type, quantity and origin of waste to be recovered or disposed of, general technical requirements, special arrangements for particular wastes and suitable disposal sites or installations. Article 7(3) authorises Member States to take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans, after informing the Commission and the Member States of any such measures.

22. Under Articles 9 and 10 of the Waste Directive, undertakings which carry out waste disposal or recovery operations must obtain permits from the competent national authorities.

B — *National provisions*

The legal system established for the management of building waste in the Copenhagen region

23. In accordance with Article 7 of the Waste Directive, following a request made in 1988 by the Danish Ministry of the Environment, the Hovedstadsråd (Copenhagen City Council) drew up a waste management plan for the Copenhagen region. The ministry had found that approximately one third of building waste, which accounts for 20% of all Denmark's waste, was produced in the Copenhagen region and that the few mobile crushing plants operating in that region had the capacity to handle only a relatively small proportion of that waste.

24. In 1988, according to the calculations of the Municipality of Copenhagen (otherwise referred to hereinafter as the 'defendant in the main proceedings'), only some 16% of the estimated annual quantity of 382 000 tonnes of waste was recycled, while the remaining 84% was disposed of.

25. The Hovedstadsråd explored the possibilities and preconditions for recycling building waste in the Copenhagen region. It concluded that optimal reusability could be achieved only through the use of appro-

priately large treatment plants; on grounds of investment and profitability, it was recommended that only a limited number of such plants be built.

26. A definitive plan was adopted in mid-June 1994.

27. Like all municipalities in Denmark, the Municipality of Copenhagen is responsible for waste produced in its area.

28. As part of that responsibility, and while the studies were being carried out by the Hovedstadsråd, the competent authorities of that municipality considered setting up a company to operate a regional stationary treatment plant. In June 1989, a working group made up of representatives of the Miljøstyrelsen (National Agency for the Protection of the Environment) and the Hovedstadsråd published a press notice inviting expressions of interest from all public or private parties wishing to become involved in the project.

29. Only three undertakings (Entrepreneurbilerne A/S, Nymølle Stenindustri A/S and Renholdningsselskabet af 1898 (hereinafter 'R98')) expressed a wish to take part in the share subscription when the company to be responsible for operating the regional treat-

ment plant sited at Grøften, known as Råstof og Genanvendelse Selskabet af 1990 A/S (hereinafter 'RGS'), was set up.

30. Only R98 and *Entreprenørbilerne* now remain shareholders of RGS.

31. In 1992 and 1998, following the adoption of the Copenhagen regional waste management plan and the setting up of RGS, the Municipality of Copenhagen adopted two regulations (hereinafter the 'municipal regulation of 1992' and the 'municipal regulation of 1998') establishing a collection system exclusively for the management of building waste. Under that system, the municipality can enter into contracts for the collection and recovery of building waste produced within its area only with a limited number of undertakings. Other reception plants are, by the same token, excluded from the market except in cases where the law and the municipal regulations provide for exemptions designed to preserve recycling agreements already concluded by waste producers.

32. Those municipal regulations implement a different collection system from that applicable, in principle, to other types of waste. The usual system takes the form of contracts concluded between the Municipality of Copenhagen and all private undertakings transporting and receiving waste which satisfy environmental requirements.

33. The municipal regulation of 1992 contains no specific provisions on exports and imports of building waste. However, the municipal regulation of 1998 expressly provides that exports and imports of such waste are not covered by the communal system. They are therefore, in principle, unrestricted.

34. In accordance with those municipal regulations, the Municipality of Copenhagen concluded agreements for the receipt and treatment of building waste with three undertakings, including principally RGS. Other undertakings, although technically qualified to treat building waste, are therefore excluded from the market in the collection and recovery of building waste produced within the area under the Municipality of Copenhagen.

35. The draft waste management plan prepared by the Municipality of Copenhagen for 2000 provides that the quasi-exclusive right conferred on RGS must be reviewed at the end of a normal depreciation period for plant and equipment.

II — Facts and procedure

36. *Sydhavnens Sten & Grus ApS* (hereinafter: '*Sydhavnens Sten & Grus*' or the 'plaintiff in the main proceedings') is a company whose business has consisted, since 1983, in buying and selling materials

extracted from the marine environment or from gravel pits on the one hand, and in recycling environmentally non-hazardous building waste in the form of soil, concrete, bricks and asphalt on the other.

37. In July 1994, the Municipality of Copenhagen granted Sydhavnens Sten & Grus an authorisation pursuant to Paragraph 33 of the Miljøbeskyttelseslov (Law on the Protection of the Environment). That undertaking then entered into a leasing agreement with Københavns Havn (Copenhagen Port Authority) with a view to constructing grading and crushing plants for building waste at Prøvestenen, in the Municipality of Copenhagen.

38. That authorisation recognises that the plaintiff in the main proceedings has the qualifications required from an environmental point of view to carry out the operations involved in the treatment of building waste. It also allows it to recover building waste received from neighbouring municipalities of the Municipality of Copenhagen, but not to recover such waste produced within the area of the Municipality of Copenhagen itself.

39. In August 1994 Sydhavnens Sten & Grus applied for authorisation to collect and recover building waste produced within the area of the Municipality of Copenhagen.

40. In December 1994 the Municipality of Copenhagen turned down that application, pointing out that the treatment of such waste was to be based primarily at Grøften, the site specifically designated for that purpose.

41. Sydhavnens Sten & Grus renewed its application in January 1995 but was notified that it had been definitively rejected. It was therefore entitled to collect and treat only building waste from neighbouring municipalities, and in principle had no access to building waste produced within the area of the Municipality of Copenhagen, even though its plants were situated there.

42. In November 1995 Sydhavnens Sten & Grus brought an action against the Municipality of Copenhagen before the Østre Landsret (Eastern Regional Court). It sought primarily an order prohibiting the Municipality of Copenhagen from preventing the transfer and treatment, by the reception plant operated by the plaintiff, of building waste produced within the area of that municipality. In the alternative, it claimed that the Municipality of Copenhagen should be ordered to grant it the authorisation applied for in August 1994.

43. The national court was unsure whether the Municipality of Copenhagen was entitled, by means of municipal regulations, to exclude technically qualified reception plants from the market in the treatment of non-hazardous building waste by relying mainly on the concern to ensure the profit-

ability of the newly built treatment centre. Consequently, by order of 27 May 1998, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Treaty, in conjunction with Articles 34 and 86 thereof, if the communal provision forming the basis of that system provides that waste which is exported or imported is not covered by the communal system mentioned in Question 1(a)?

‘1. (a) Disregarding possible application of Article 36 of the Treaty or any other valid considerations (see Question 1(c)), must Article 90 of the Treaty, in conjunction with Articles 34 and 86 thereof, be construed as precluding the establishment of a communal system which — with a view to ensuring that specially selected undertakings will have sufficiently large access to environmentally non-hazardous building waste destined for recovery from private builders to enable those undertakings to exploit that waste on an economically justifiable and rational basis — excludes other undertakings from collecting and receiving the same type of waste from building work within the area of the commune in question, even though these other undertakings have obtained a permit to treat the type of waste in question in accordance with Article 10 of Directive 75/442/EEC, as amended by Directive 91/156?

(c) (If Question 1(a) is answered in the affirmative):

Does Article 36 of the Treaty or any other valid considerations, such as the concern that environmental damage should be rectified at source and the establishment of any necessary treatment and disposal facilities (see Article 130r(2) of the Treaty), allow a communal system as described in Question 1(a) to be established, where that system and the obligation for waste producers to use the system are based on the interest in promoting recovery of the waste covered by the system, including the interest in ensuring necessary treatment capacity?

(b) (If Question 1(a) is answered in the affirmative):

2. Must Article 10 of Directive 75/442, as amended by Directive 91/156 (see Articles 13 and 2(j) of Regulation No 259/93), be construed as meaning that public authorities are under an obligation to treat equally undertakings which have obtained a permit as described in that provision in relation to the conclusion of agreements con-

Would a system such as that described in Question 1(a) be contrary to Article 90 of the EC

cerning the receipt and recovery of environmentally non-hazardous building waste?

III — The answers to the questions

A — *The first question*

3. (a) Must Article 7(3) of Directive 75/442, as amended by Directive 91/156, be construed as meaning that that provision and the power it grants to prevent movements of waste allow a communal system such as that described in Question 1(a) and thereby allow the commune to prevent the movement of environmentally non-hazardous building waste destined for recovery, if such movement is contrary to the waste plan drawn up by the commune?

(b) Must Article 7(3) of Directive 75/442, as amended by Directive 91/156, be construed as meaning that measures which a Member State or a competent authority in that Member State has adopted, and which are necessary to prevent movements of waste not in accordance with the waste plans of the authority, are valid and enforceable against individuals or undertakings to which the measures are relevant only if the EC Commission has been notified of those measures?'

44. By its first question, which is subdivided into three subquestions, the national court is asking the Court to determine whether:

(a) Article 90 in conjunction with Article 86 precludes national provisions such as the municipal regulations of 1992 and 1998 which, for reasons connected with the profitability of the undertakings selected, reserves the collection and recovery of environmentally non-hazardous building waste within the area of the Municipality of Copenhagen principally for one particular undertaking which has been specially authorised or licensed, even though other undertakings hold authorisations to treat waste of the same type in accordance with Directive 91/156;

(b) Article 90 in conjunction with Article 34 precludes legislation such as the municipal regulations of 1992 and 1998 which contains no specific provisions relating to exports and imports of building waste or which expressly provides that exports and imports of such waste are not covered by the communal system in question;

(c) Article 36 and Article 130r(2), which lays down the principle that environmental damage should as a priority be rectified at source, can reasonably justify restrictions on the competition rules and on the principle of the free movement of goods in the case of non-hazardous waste destined for recovery, in so far as the Member State concerned justifies the measures adopted on grounds connected with the profitability of the undertakings selected.

1. Application of Articles 90 and 86 of the Treaty

45. Article 90(1) of the Treaty provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty and in particular those relating to competition. That provision sets out to govern relations between the Member States and any private or public undertakings to which they grant special or exclusive rights. It also defines the obligations to be complied with by the State.

46. The answer to the first part of the first question presupposes that a situation such as that described by the national court falls within the personal and material scope of Article 90(1) of the Treaty. That presupposition must therefore be verified.

47. Only ‘undertakings’ which are granted ‘exclusive rights’ by a ‘Member State’ fall within the personal scope of Article 90(1) of the Treaty. I shall therefore examine whether that is the case.

48. The Court has always held that, ‘in the context of competition law’, the concept of 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’.¹³

49. There is little doubt that the entities in question in the main proceedings, and in particular RGS, are engaged in an economic activity¹⁴ and that they provide a service for payment. Moreover, this point has not given rise to any discussion. It must therefore be concluded that they are to be regarded as undertakings within the meaning of Article 90(1) of the Treaty.

50. With regard to the addressee of the obligations provided for in Article 90(1) of the Treaty, the Court has consistently held that the concept of ‘Member States’ ‘includes, in this context, the public authorities at the regional, provincial or communal level — [which have obligations]

¹³ — See one of the Court’s most recent judgments, delivered on 21 September 1999, in Case C-67/96 *Albany International* [1999] ECR I-5751, paragraph 77, and the judgments cited under that reference.

¹⁴ — By analogy, see the judgment in Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075 and point 34 of this Opinion.

towards undertakings “to which [the Member States] grant special or exclusive rights”.¹⁵

51. It is not at all disputed that the regulations at issue were adopted by the Municipality of Copenhagen. It has been made clear that the Danish law on the environment delegates responsibility for enacting legislation on waste treatment to the communes. The Municipality of Copenhagen must therefore be regarded as the public authority required to comply with the obligations laid down in Article 90(1) of the Treaty.

52. It remains to be ascertained whether the undertakings in question are granted exclusive rights. The Danish Government,¹⁶ the Commission and the plaintiff in the main proceedings take the view that the municipal regulations of 1992 and 1998 do grant them such rights. According to them, those exclusive rights consist in receiving and treating building waste from waste producers operating within the area of the Municipality of Copenhagen. The Municipality of Copenhagen disputes that and points to contracts concluded by it with other undertakings, which relate both to the receipt and to the treatment of building waste produced within its area. In particular, it cites a contract concluded on 17 March 1992 with Farum Sten & Gruskompagni A/S.¹⁷

15 — See, in particular, the judgment in Case 30/87 *Bodson* [1988] ECR 2479, paragraph 33.

16 — See point 2.1.1, at the end, of the French translation of its written observations.

17 — See p. 44, second paragraph, of the French translation of its observations.

53. The Treaty gives no definition of ‘exclusive rights’. However, it is clear from the Court’s case-law that, for the purposes of Article 90(1) of the Treaty, they are to be understood as rights granted in an exclusive manner by a measure adopted by a State to a limited number of undertakings in all or part of the national territory.

54. Thus, in the judgment in *Inter-Huiles and Others*,¹⁸ the Court held that a national measure such as that enacted by the French legislation, which expressly provided that only undertakings holding an approval granted by the competent national authorities could carry out the activities of collection and disposal of waste oils, had to be regarded as granting the undertaking concerned an exclusive right within the meaning of Article 90(1) of the Treaty.

55. Similarly, in the judgment in *Merci Convenzionali Porto di Genova*,¹⁹ the Court ruled that ‘a dock-work undertaking enjoying the exclusive right to organise dock work for third parties, as well as a dock-work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State within the meaning of Article 90(1) of the Treaty’. The exclusive right in that case derived from a provision of the Italian Navigation Code.

18 — Case 172/82 [1983] ECR 555, paragraph 15.

19 — Case C-179/90 [1991] ECR I-5889, paragraph 9.

56. The Court has also held, in its judgment in *Corbeau*,²⁰ that ‘a body such as the Régie des Postes, which has been granted exclusive rights as regards the collection, carriage and distribution of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of Article 90(1) of the Treaty’. That exclusive right stemmed from the Belgian legislation.

57. Likewise, in its judgment in *Centre d’Insémination de la Crespelle*, known as ‘*La Crespelle*’,²¹ the Court took the view that ‘by making the operation of the insemination centres subject to authorisation and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights’.

58. In the present case, as we have seen, the municipal regulations of 1992 and 1998 establish a system for the collection of building waste destined for recovery which involves the conclusion, by the defendant in the main proceedings, of agreements with a limited number of undertakings for the collection, receipt and treatment of waste produced within its area. Through the operation of those regulations, other undertakings, including Sydhavnens Sten & Grus, are excluded from that market. It is also apparent from the documents submitted to the Court that those regulations provide for only one exception aimed at preserving recycling agreements already

concluded by the waste producers. It is therefore clear that, since the regulations at issue entered into force, only three undertakings selected by the competent municipal authority, principally RGS, have been authorised to collect, receive and recover non-hazardous building waste produced within the area of the Municipality of Copenhagen.

59. The argument expounded by the Municipality of Copenhagen, that the documents in the main proceedings show that, during the period at issue, it concluded contracts relating to similar services with undertakings other than those specially and exclusively selected,²² cannot cast doubt on that fact. The existence of exclusive rights is to be assessed in the light of the content of the national law in force or of any mandatory national provision of general application, and not in the light of specific practices of a competent authority, which can be challenged at any time and without notice.

60. I am therefore bound to conclude, at this stage of my consideration of the case, that, in a situation such as that described in the order for reference, undertakings enjoying the right to collect and recover non-hazardous building waste in a particular area are holders of exclusive rights within the meaning of Article 90(1) of the Treaty.

20 — Case C-320/91 [1993] ECR I-2533, paragraph 8.

21 — Case C-323/93 [1994] ECR I-5077, paragraph 17.

22 — Paragraphs 2 and 3 on p. 44 (under point 2.1.1) of the French translation of the observations of the defendant in the main proceedings.

61. It follows from the foregoing that circumstances such as those described by the national court fall within the personal scope of Article 90(1) of the Treaty.

62. I shall now examine whether such a situation falls within the material scope of Article 90(1) in conjunction with Article 86 of the Treaty.

63. It will be recalled that Article 90(1) deals both with relations between the Member States and undertakings and with the obligations of those States, which it prohibits from enacting or maintaining in force certain measures which would be contrary to the provisions of the Treaty. Article 86 'applies only to anti-competitive conduct engaged in by undertakings on their own initiative, not to measures adopted by States'.²³ The Court has consistently held that the aim of Article 90(1), in conjunction with Article 86, is to specify the conditions for the application of the competition rules laid down by Article 86 to undertakings granted special or exclusive rights by the Member States and to undertakings entrusted with the operation of services in the general interest.²⁴

64. In order to examine this question, it is first necessary to ascertain that Article 86 is applicable.

65. The conditions for the application of Article 86 presuppose that the undertaking in question has a dominant position within the common market or in a substantial part of it; that it engages in abuses and, finally, that such activities are liable to hinder intra-Community trade. Let us look at these three conditions again.

66. Firstly, the application of Article 86 of the Treaty presupposes that the undertaking in question has a dominant position within the common market or in a substantial part of it.²⁵

67. The Danish Government and the Municipality of Copenhagen maintain that it is solely for the national court to determine whether the undertakings in question enjoy a dominant position in a substantial part of the common market and that, in any event, the order for reference does not contain sufficient information to enable the Court to take a view on such a possibility. They also point out that this condition is not fulfilled, since, in particular, the exclusive right granted to the undertakings in question on the market in the receipt and treatment of non-hazardous building waste affects the area of the Municipality of Copenhagen and not Denmark as a whole. In their view, that market is far from

23 — See, in particular, the judgment in *Corbeau*, cited above, paragraph 10.

24 — See, for example, the judgment in *Bodson*, cited above, paragraph 16.

25 — See, in particular, the judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 28, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31, *Merci Convenzionali Porto di Genova*, cited above, paragraph 14, *Corbeau*, cited above, paragraph 9, Case C-163/96 *Raso and Others* [1998] ECR I-333, paragraph 25, and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 39.

representing a significant part of the Danish market.

68. Reproducing the facts set out by the national court which notes that approximately one third of building waste, which accounts for approximately 20% of all Denmark's waste, is produced in the Copenhagen region, the plaintiff in the main proceedings points out that the Municipality of Copenhagen has itself delimited the market by creating exclusive rights for three undertakings. Those undertakings are the only ones operating on a specific market in which they have a collective dominant position. As regards the relevant market, the plaintiff states that it is the market in the receipt and treatment of building waste produced within the area of the Municipality of Copenhagen. It concludes that, in view of the size of the Copenhagen region, that market must be regarded as forming a substantial part of the common market.

69. According to the Court, a dominant position within the meaning of Article 86 'is characterised ... by a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the market by allowing it to behave to an appreciable extent independently of its competitors and its customers'.²⁶ It is also clear from the Court's case-law that 'the application of

Article 86 is not precluded by the fact that the absence or restriction of competition is facilitated by laws or regulations'.²⁷

70. However, the Court stated in its judgment in *Dusseldorp and Others* that the grant of exclusive rights in a substantial part of the common market must be regarded as conferring on the undertaking concerned a dominant position within the meaning of Article 86.²⁸ In that case, the national court had doubts about the compatibility with Article 90(1) in conjunction with Article 86 of the Treaty of Netherlands legislation granting to a single undertaking the right to incinerate dangerous waste on the territory of the Member State as a whole.

71. It follows from the foregoing that, where exclusive rights are granted to an undertaking, the task of the court responsible for establishing the existence of a dominant position consists solely in satisfying itself that those rights operate over the market as a whole or in a substantial part of it.

72. I have stated earlier that, in a situation such as that described by the national court, in which undertakings are granted the right to collect, receive and recover, on an exclusive basis, non-hazardous building

²⁷ — Judgment in *Bodson*, cited above, paragraph 26.

²⁸ — Judgment in *Dusseldorp and Others*, cited above, paragraph 60; see also the judgments in *Corbeau*, cited above, paragraph 9, and *Raso and Others*, cited above, paragraph 25, as well as the judgments cited under the latter reference.

²⁶ — See, in particular, the judgments in Case 322/81 *Michelin v Commission* [1983] ECR 3461, and in *Bodson*, cited above, paragraph 26.

waste produced within the area of the Municipality of Copenhagen, the only conclusion to be drawn was that those undertakings were granted exclusive rights.

73. In order to determine whether those undertakings are in a dominant position, it therefore only remains to be ascertained, after defining the nature of the product or service to which the exclusive rights apply, whether the area of the Municipality of Copenhagen corresponds to a substantial part of the common market.²⁹

74. The Court has always held that the definition of the relevant market must be made 'in the context of [a] market comprising the totality of the products [or services] which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products [or other services]'.³⁰ In the present case, it appears that, under the municipal regulations of 1992 and 1998, RGS is granted exclusive rights for the collection and recovery of non-hazardous building waste produced within the area of the Municipality of Copenhagen. It must be concluded that the relevant market is that of the collection and recovery of this type of waste produced within the area of the Municipality of Copenhagen.

75. The Danish Government and the Municipality of Copenhagen contend that the share of the market to which the exclusive rights granted to RGS apply does not correspond to a substantial part of the common market by putting forward three arguments. The first is that a substantial part of the market cannot be represented by a single municipality. That does not seem to me to be relevant. The Court has already held that the definition of the common market or of a substantial part of that market does not depend on the number of municipalities covered by the exclusive rights, but on the size of the population to which the exclusive rights apply and therefore on the share of the market held by the undertaking or group of undertakings by virtue of the exclusive rights granted to it.³¹

76. The second argument put forward by the Danish Government and the Municipality of Copenhagen — that it is a matter for the national court to assess the facts — does not seem to me to be any more valid.

77. Although the Court has always held that 'the existence of such a dominant position is a question of factual assessment for the national court',³² it has also, just as consistently, held that Article 177 of the EC Treaty (now Article 234 EC) establishes a genuine cooperation between two separate legal orders and that, within the framework of that cooperation, its duty is to provide the national court with all the information necessary to enable it to resolve the dispute

29 — See, in particular, the judgment in Case C-242/95 *GT-Lmk* [1997] ECR I-4449, paragraph 36.

30 — Judgment in *Michelin v Commission*, cited above, paragraph 37.

31 — Judgment in *Bodson*, cited above, paragraph 28.

32 — *Ibid.*, paragraph 29.

before it.³³ That is the case when a national court dealing with a restrictive practices dispute by applying national law makes reference to the Court on the interpretation of Article 86 of the Treaty because it considers that a conflict between Community law and national law is capable of arising.³⁴ The facts described by the national court are decisive in competition matters. They enable the Court to determine not only whether it has jurisdiction,³⁵ but also to define concepts contained in the Treaties and other Community legislation which entail legal effects specifically defined thereby so that the national court responsible for applying and enforcing Community law is able to fulfil its task.³⁶ Moreover, if those principles were not observed, the Court's role, which consists in guaranteeing the uniform application of Community law and ensuring its primacy, would become an empty one.

78. It is common ground that the national court is asking the Court to interpret concepts of Community law and especially to help it to identify a situation of abuse of a dominant position within the meaning of Article 90(1) in conjunction with Article 86 of the Treaty, and not to resolve the dispute in the main proceedings.

33 — See, for example, the judgments in Case 94/79 *Vriend* [1980] ECR 327, paragraph 3, and in Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 16.

34 — See the judgment in Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 20.

35 — *Ibid.*, paragraph 21.

36 — See, for example, the judgment in Case C-295/97 *Piaggio* [1999] ECR I-3735, in which the national court, having doubts about the classification of a special administration procedure as State aid, requested the Court to give a preliminary ruling on the interpretation of that concept so that it could resolve the dispute before it.

79. Finally, the Danish Government and the Municipality of Copenhagen contend that the order for reference does not contain sufficient information to enable the Court to say whether, in a situation such as that described, the share of the market enjoyed by the undertakings holding exclusive rights corresponds to a substantial part of the common market. That objection seems to me to be more valid.

80. It must be observed that the order for reference reports that only approximately one third of building waste, which accounts for 20% of all Denmark's waste, is produced in the Copenhagen region.

81. However, according to the Danish Government and the Municipality of Copenhagen, the area of the latter, to which the exclusive rights granted by the municipal regulations of 1992 and 1998 apply, is not identical with the Copenhagen region. Moreover, the figures given by the national court were disputed at the hearing, notably by the Municipality of Copenhagen.

82. Since, at that hearing, the various parties provided the Court with contradictory information, it seems to me that it is difficult to determine whether, in a situation such as that described by the national court, RGS must essentially be regarded as having a dominant position in a substantial part of the common market. I am of the opinion that the national court must make

that assessment; in order to assist it in that task, the Court may provide it with the criteria relevant to the definition of that concept.³⁷

83. First of all, it should be pointed out that the fact that the exclusive rights concern only a municipality is immaterial if that municipality represents a substantial part of the market in the collection, receipt and recovery of non-hazardous building waste.

84. In order to determine whether the municipality represents a substantial part of the common market, it is for the national court to satisfy itself that the area of the Municipality of Copenhagen is identical with that of the Copenhagen region. If that is not the case, it will have to assess whether the volume of non-hazardous building waste collected and recovered within the area of that municipality to which the exclusive rights apply represents a substantial proportion of the volume of that type of waste collected and recovered in Denmark.

85. If the national court finds that this condition is fulfilled, it must establish the existence of the second condition, namely, abuse by the undertaking concerned of its dominant position.

86. The thorny issue thus arises of the link between the national measures granting exclusive rights and the abusive nature of the exploitation of its dominant position by the undertaking enjoying those rights.³⁸

87. It was reasonable to question whether, in the context of the application of Article 90 in conjunction with Article 86 of the Treaty, the mere finding that exclusive rights were conferred by a national measure *automatically* made it possible to establish the existence of abuse within the meaning of Article 86. It may have been believed that the Court had opted to apply the 'automatic abuse theory',³⁹ in particular in the light of the judgments in *GB-Inno-BM*,⁴⁰ *Corbeau*⁴¹ and *Almelo and Others*.⁴² According to the Court, 'A system of undistorted competition, as laid down in the Treaty, [could] be guaranteed only if equality of opportunity [was] secured as between the various economic operators'.⁴³ To quote Advocate General Tesouro, it was all too obvious 'that a

38 — See Blum/Logue, *State Monopolies under EC Law* (with regard to Article 90), Wiley, 1998; Bredsgaard, 'Article 90 of the EC Treaty as a legal basis for liberalisation', *Justicia*, 1997, d. II, p. 1; Blum, 'De Sacchi à Franzen en passant par La Crespelle: La Jurisprudence récente de l'article 90', *G P eur.* No 20, 11-13 July 1999, p. 12; Charbit, 'L'article 90 du traité CE: I Développement des années 1994-1995, II Revirement sur la doctrine de l'abus automatique', *Rev. dr. des aff. int.*, 1995, pp. 853 and 988; Chavrier, 'La jurisprudence de la Cour de justice sur l'application de l'article 90 du traité de Rome', *CJEG*, 1995, p. 125; Chérot, 'L'article 90 § 2 du traité CE après les arrêts de la CJCE du 23 octobre 1997 sur les monopoles d'importation d'électricité', *Rev. fr. dr. adm.*, 1998, p. 135; Edward/Hoskins, 'Article 90: deregulation and EC laws: reflections arising from the XVI FIDE Conference', *Common Market Law Review*, No 1/1995, p. 157, and Gardner, 'The velvet revolution: Article 90 and the triumph of the free market in Europe's regulated sectors', *European Competition Law Review*, No 2/1995, p. 78.

39 — See, in particular, Chavrier, 'Commentaire de l'article 86 du traité CE', cited above.

40 — C-18/88 [1991] ECR I-5941.

41 — Judgment cited above, paragraph 11.

42 — C-393/92 [1994] ECR I-1477, paragraph 44.

43 — Judgment in *GB-Inno-BM*, cited above, paragraph 25.

37 — See, in particular, the judgment in *Bodson*, cited above, paragraph 26; see also the judgments in *Merci Convenzionali Porto di Genova*, cited above, paragraph 15, *Raso and Others*, cited above, paragraph 26, and *Corsica Ferries France*, cited above, paragraph 38.

monopoly or a system of exclusive or special rights may not be in complete harmony with a system based on free competition ...'.⁴⁴

88. However, in more recent judgments, the Court seems to have adopted a less liberal interpretation, from an economic point of view, of Article 90 in conjunction with Article 86, which may be explained by a concern to reconcile the requirements of competition law and the willingness of the authors of the Treaty to 'tolerate' State monopolies.

89. Thus, in its recent case-law, the Court has held that 'merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State is in breach of the prohibitions contained in those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to *abuse* its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such *abuses*'.⁴⁵ It sometimes adds that 'any measure adopted by a Member State which

maintains in force a statutory provision that creates a situation in which a public undertaking *cannot avoid* infringing Article 86 of the Treaty is incompatible with the rules of the Treaty'.⁴⁶

90. Assessing such situations is not always easy.⁴⁷ However, the Court has pointed out that abuse of a dominant position is an objective concept.⁴⁸ In other words, 'abuse may ... exist independently of any element of fault on the part of the dominant undertaking'.⁴⁹ The Court has also pointed out that if the undertaking acts entirely on its initiative, without State intervention, the abuse of its dominant position will be attributable to that undertaking alone and its conduct examined in the light of Article 86. If, on the other hand, the State intervenes, the undertaking's conduct will be examined in the light of Articles 90 and 86.⁵⁰

91. It should also be pointed out that, as the Court has consistently held,⁵¹ it is immaterial that the national court did not identify any particular case of abuse. In that regard, the Court has held that any

44 — Point 24 of his Opinion in Case C-202/88 *France v Commission* [1991] ECR I-1223.

45 — See the judgments delivered on 21 September 1999 in *Albany International*, cited above, paragraph 93, emphasis added, Joined Cases C-115/97 to C-117/97 *Brentjens Handelsonderneming* [1999] ECR I-6025, paragraph 93, Case C-219/97 *Maatschappij Drijvende Bokken* [1999] ECR I-6121, paragraph 83, as well as the judgments cited under those references, and the judgment in *Dusseldorp and Others*, cited above, paragraph 61.

46 — Judgment in *GT-Link*, cited above, paragraph 33, emphasis added.

47 — See, for example, the judgment in *Albany International*, cited above, paragraphs 96 and 97, where it seems to me that the Court held that abuse derived from the mere finding of the existence of a monopolistic position.

48 — Judgment in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, especially 541.

49 — See the Opinion of Advocate General Jacobs, especially point 126, in the *GT-Link* case, cited above.

50 — See, in particular, the judgments in *Bodson*, cited above, paragraphs 32 and 33, *La Crespelle*, cited above, paragraphs 20 and 21, and *GT-Link*, cited above, paragraph 46.

51 — See, in particular, the judgments in *GB-Inno-BM*, cited above, paragraphs 23 and 24, and *Raso and Others*, cited above, paragraph 31.

undertaking holding exclusive rights, which is able to distort in its favour the equal conditions of competition between the various operators merely by exercising its monopoly, falls within the scope of the measures prohibited by Articles 90(1) and 86 of the Treaty.⁵²

92. The plaintiff in the main proceedings claims that, by granting the three undertakings in question exclusive rights with respect not only to the market in the recovery of building waste, but also to the market in the collection of such waste, the municipal regulations of 1992 and 1998 deprive it of any access to the Community market in the collection of such waste, thereby unlawfully circumventing the competition rules on that market and putting it at a competitive disadvantage.

93. Those arguments seem to me to be relevant if that interpretation of the national legislation is confirmed by the national court. If it is indeed established that the municipal regulations grant to three undertakings only, including principally RGS, exclusive rights for the collection of waste, while at the same time leaving the waste producers a choice of dealing either with that centre or with third parties based abroad for the purpose of recovering the waste, it seems to me that such a measure would give rise to a situation in which RGS could not avoid infringing Article 86 of the Treaty.

52 — See, in particular, the judgment in *Raso and Others*, cited above, paragraph 29.

94. 'Collection', for the purpose of the Waste Directive, means the waste management operation immediately following the production of waste⁵³ and consists of the operations of gathering, sorting and mixing of waste for the purpose of transport. If the municipal regulations in question reserve exclusive rights as regards the collection of building waste produced within the area of the Municipality of Copenhagen for three undertakings only,⁵⁴ the effect is to deprive waste producers of a choice of partners with whom they can conclude contracts for the recovery, *outside the national frontiers*, of waste generated by their activities. Those producers are inevitably forced to split the various stages of the operation among different partners. They are obliged to contract with RGS for the gathering, sorting and mixing of the waste after the waste production stage, then with a transporter and then, finally, with the waste recycling operator based abroad. Only the two latter partners can be freely chosen. The provision in question thus necessarily has the effect of unreasonably restricting the competition rules within the common market in the treatment of waste and of restricting the commercial opportunities available to competitors operating on that market.

95. That is why I conclude that national legislation which imposes on waste produ-

53 — See my Opinion delivered on 16 September 1999 in the *Lirussi and Bizzaro* case (judgment in Joined Cases C-175/98 and C-177/98 [1999] ECR I-6881).

54 — Which seems to be the case according to the explanations given by the national court, but which was disputed by the Danish Government and the defendant in the main proceedings in a note following the notification of the Report for the Hearing and at the hearing.

cers the choice of commercial partners in connection with operations to recover waste outside the national frontiers infringes Article 90(1) in conjunction with Article 86 of the Treaty.

way that their effect is to partition the Common Market and thereby to restrict the freedom to provide services which constitutes one of the objectives of the Treaty'.⁵⁸

96. Finally, it remains to be examined whether the abuse of a dominant position thus established may affect intra-Community trade.⁵⁵ It is worth noting, however, that the Court does not always reiterate the need for this third condition to be fulfilled.⁵⁶ Moreover, for that to be the case, the Court has held that 'That does not mean that the abuse must actually have affected such trade ... [but that] it is sufficient to establish that the conduct is capable of having such an effect ...'.⁵⁷

97. According to the Court, 'in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position, within the meaning of Article 86, account must be taken of the consequences for the effective competitive structure in the Common Market. In the case of services, those consequences may, in particular, ... consist in the activities of an undertaking or group of undertakings being conducted in such a

98. That factual assessment is also the task of the national court, which alone is able to ascertain whether the activities of undertakings enjoying a monopoly over a substantial part of the territory of the Member State in question affect, actually or potentially, intra-Community trade and in particular the competition rules. According to the Court, that task consists in 'consider[ing] whether, in the case before it, the activities of the group of undertakings [holding exclusive rights through the operation of statutory provisions], and the monopoly they enjoy over a large part of the territory of a Member State, affect the importation of goods from other Member States or the possibility for competing undertakings established in other Member States to provide services in the first-mentioned Member State'.⁵⁹

99. It stands to reason that a system which reserves exclusively, principally for one undertaking, the collection of building

55 — See, in particular, the judgments in *Bodson*, cited above, paragraph 22, *GB-Inmo-BM*, cited above, paragraph 27, and *GT-Link*, cited above, paragraph 44.

56 — See, in particular, the judgments in *Corbeau*, *La Crespelle*, *Corsica Ferries France*, *Raso and Others* and *Dusseldorp and Others*, all cited above.

57 — See, in particular, the judgment in *GT-Link*, cited above, paragraph 44.

58 — Judgment in *Bodson*, cited above, paragraph 24.

59 — *Ibid.*, paragraph 25.

waste for export, in a substantial part of the common market, deprives undertakings established in other Member States of the possibility of providing that type of service within that area and may therefore affect trade between Member States within the meaning of Article 86 of the Treaty.

100. It follows that national legislation such as that described above must be regarded as contrary to Article 90(1) in conjunction with Article 86 of the Treaty.

101. In the alternative, the Danish Government argues that the system established by the municipal regulations of 1992 and 1998 is justified by reference to Article 90(2) of the Treaty.

102. According to the Court's case-law, 'that provision may be relied upon to justify a measure contrary to Article 86 of the Treaty adopted in favour of an undertaking to which the State has granted exclusive rights if that measure is necessary to enable the undertaking to perform the particular task assigned to it and if it does not affect the development of trade in a

manner contrary to the interest of the Community'.⁶⁰

103. However, the Court has held that application of Article 90(2) of the Treaty presupposes that the Member State concerned defines precisely the content of the obligations and constraints imposed in connection with the particular task entrusted to the undertaking to which it grants special rights; that those obligations are specific to that undertaking and to its business; that they are linked to the subject-matter of the service of general economic interest in question and that they are designed to make a direct contribution to satisfying that interest.⁶¹

104. That is for the national court to determine. However, it is clear that, in the context of the present reference for a preliminary ruling, the Danish Government and the Municipality of Copenhagen have neither defined the content of the obligations and constraints imposed on RGS in connection with the particular task entrusted to it nor clarified the specific nature of those tasks or how they are linked to the subject-matter of the particular service in question.

105. Finally, even assuming that the task entrusted to that undertaking can indeed be

⁶⁰ — See the judgment in *Dusseldorp and Others*, cited above, paragraph 65, and the judgments cited under that reference.

⁶¹ — See the judgment in Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraphs 65 to 69.

regarded as a task of general economic interest, the Court has also held that it is for the national government in question to show to the satisfaction of the national court that the granting of exclusive rights is necessary for the performance of the particular task assigned to the undertaking and that, without the contested measure, the undertaking would be unable to carry out the task assigned to it.⁶²

2. Application of Articles 90 and 34 of the Treaty

107. In Question 1(b), the national court asks the Court to say whether Article 90 in conjunction with Article 34 of the Treaty must be construed as precluding legislation such as the municipal regulations of 1992 and 1998.

106. Again, it is for the national court to assess whether this requirement is satisfied. In order to assist it in that task, however, it should be noted that it was pointed out during the hearing that, in relation to the waste recovery operations, RGS's task did not include any special features or specific aspects which were such that another undertaking not granted exclusive rights would have been unable to take it on. In other words, the exclusive rights granted were not designed to enable RGS to perform a special task assigned to it, but to make it possible to show a profit on the investments involved in building that large-scale treatment centre. The Municipality of Copenhagen also maintained that it had concluded contracts for similar services, during the period at issue, with undertakings other than those authorised under the contested regulations.⁶³ Those various factors could be such as to cast doubt on the need for the national measures adopted.

108. As we have seen, Article 90 defines the Member States' obligations and expressly provides that, in the case of undertakings to which they grant exclusive rights, Member States must comply with the rules contained in the Treaty. The Court has on numerous occasions been called upon to apply Article 90 in the light of the principle of the free movement of goods.

109. The plaintiff in the main proceedings maintains that a system such as the regulations in question infringes Article 90 in conjunction with Article 34 of the Treaty. It claims that by reserving the exclusive right to collect building waste produced within the area of the Municipality of Copenhagen for authorised undertakings only, that system has the effect of making it more difficult to export those goods.

62 — *Ibid.*, paragraph 101, and judgment in *Dusseldorp and Others*, cited above, paragraph 67.

63 — Point 59 of this Opinion.

110. There is little doubt that waste is 'goods' the movement of which, in accordance with Article 30 of the EC Treaty (now, after amendment, Article 28 EC),⁶⁴ must in principle not be prevented and that the system in question does not apply directly to trade in goods, but establishes a monopoly as regards the performance of services.

treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national products or for the domestic market of the State in question'.⁶⁷

111. Although, according to the Court's consistent case-law, Article 34 concerns trade in goods and does not apply to a monopoly over the provision of services,⁶⁵

113. In the judgment in *Inter-Huiles and Others*, cited above, the Court found that the French legislation in question prohibited, by implication, the export of waste oils collected within the national territory to foreign countries, in so far as the approved collectors were required to deliver the oils to approved disposal undertakings only and the latter were required to treat the oils in their own facilities. The Court concluded that such legislation was contrary to Article 90 in conjunction with Article 34 of the Treaty.

the Court has nevertheless stated that '... the possibility cannot be ruled out that a monopoly over the provision of services may have an indirect influence on trade in goods between Member States, in particular where the monopoly over the provision of services established by an undertaking or by a group of undertakings leads to discrimination against imported goods as opposed to products of domestic origin'.⁶⁶

114. Admittedly, the municipal regulations of 1992 and 1998 do not contain any provisions prohibiting the export of waste and their object is not to govern trade in goods with the other Member States.

112. A measure having an effect equivalent to quantitative restrictions on exports, as prohibited by Article 34 of the Treaty, is defined by the Court as a national measure 'which [has] as [its] specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in

115. However, if those regulations institute a monopoly over waste collection in the manner complained of by the plaintiff in the main proceedings — which is in any case for the national court to determine —,

64 — See, in particular, the judgment in Case C-2/90 *Commission v Belgium* [1992] ECR I-4431, paragraph 28.

65 — See, in particular, the judgment in Case 271/81 *Société Coopérative d'Amélioration de l'Élevage et d'Insémination Artificielle du Béarn* [1983] ECR 2057.

66 — See the judgment in *Bodson*, cited above, paragraph 10.

67 — See, in particular, the judgments in *Inter-Huiles and Others*, cited above, paragraph 12, and *Dusseldorp and Others*, cited above, paragraph 40.

it seems to me that they could be such as to restrict patterns of exports and establish a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for the domestic market of the State in question.

116. A waste producer wishing to export his waste for the purpose of recovering it is obliged to contract with a larger number of intermediaries than if he decided to recover his waste in Copenhagen since, in the latter case, he would contract only with RGS and a transporter of his choice. The fact that he is obliged to split the different stages of the operation among several contractors is liable to entail additional costs for him and thereby deter him from trading abroad.

117. I therefore conclude that legislation such as that criticised by the plaintiff in the main proceedings may infringe Article 90 in conjunction with Article 34 of the Treaty.

3. Application of Articles 36 and 130r(2) of the Treaty

118. Finally, the national court asks the Court to say whether Articles 36 and 130r(2) of the Treaty may legitimately be relied on by a Member State which enacts national measures with the object, for purely economic reasons, of conferring on undertakings exclusive rights for the collection and recovery of non-hazardous waste.

119. It is true that the Court has consistently held that the protection of the environment may justify certain restrictions, or even exclusions, of the application of the competition rules⁶⁸ as well as certain restrictions of the principle of the free movement of goods.⁶⁹

120. However, in its judgment in *Dusseldorp and Others*, cited above, the Court held that the principle of rectification at source as a priority laid down by Article 130r(2) of the Treaty may not legitimately be relied on in order to restrict the movement of hazardous waste for recovery.⁷⁰ That conclusion must apply *a fortiori* to the recovery of non-hazardous waste, as is the case here.

68 — See, in particular, the judgments in *Corbeau and Almelo and Others*, both cited above, and in Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547.

69 — See, in particular, the judgments in Case 240/83 *ADBHU* [1985] ECR 531, Case 302/86 *Commission v Denmark* [1988] ECR 4607 and Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947.

70 — Paragraph 49.

121. It should be noted that Article 130t of the Treaty also allows Member States to maintain or introduce more stringent protective measures, provided that such measures are justified primarily or even exclusively by the concern to protect the environment effectively.

122. However, the arguments put forward by the defendant in the main proceedings and by the Danish Government clearly relate to the profitability of the undertakings enjoying exclusive rights and to the costs which they have to cover.

123. The Court has held that aims of a purely economic nature cannot justify a barrier either to the fundamental principle of the free movement of goods⁷¹ or to the competition rules.⁷²

124. It must therefore be concluded that, in circumstances such as those of this case, Articles 36, 130r and 130t of the Treaty do not provide justification either for a barrier to the fundamental principle of free movement or for a restriction of the competition rules.

B — *The second question*

125. By its second question, the national court asks the Court to say whether the provisions of the Waste Directive, in particular Article 10, must be construed as obliging Member States to conclude agreements for the receipt and recovery of environmentally non-hazardous building waste with all undertakings complying with the requirements of the Waste Directive.

126. All the parties, except the plaintiff in the main proceedings, submit that such interpretation does not follow either from the wording of the provisions of the Waste Directive or from its objective.

127. The Waste Directive does not contain any rule requiring the removal of distortions of competition. Its objective is clearly to protect the environment and human health.⁷³ Moreover, it follows from Article 4 read in conjunction with Article 10 of the Waste Directive that Member States are obliged to ensure that undertakings carrying out waste recovery operations comply with the environmental protection require-

71 — See, in particular, the judgments in Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39, and in *Dusseldorp and Others*, cited above, paragraph 50.

72 — See the judgment in *Dusseldorp and Others*, cited above.

73 — See, in particular, the first, second and third recitals in the preamble to the Waste Directive.

ments laid down in that provision. To that end, an authorisation must be issued by the competent authority specifically designated by the State concerned (Articles 6 and 10 of the Waste Directive).

C — *The third question*

128. The Court has thus held that '[t]he harmonisation provided for in Article 1 of the directive has as its main object to ensure, with a view to protecting the environment, the effective management of waste in the Community, regardless of its origin, and has only ancillary effects on the conditions of competition and trade'.⁷⁴

130. The third question, which is subdivided into two subquestions, also concerns the interpretation of the Waste Directive. The Court is asked to say whether Article 7 must be construed as allowing national legislation to prohibit movements of non-hazardous waste destined for recovery, if such movements are contrary to the waste management plan laid down by that legislation. The Court is further asked to determine whether, in order for such legislation to be capable of producing legal effects as against individuals, the Member State which adopted that legislation must first have informed the Commission thereof.

129. Since the aim of the directive is not to harmonise the conditions of domestic competition between undertakings, but merely to establish a harmonised system of procedures by which movement of waste can be restricted on grounds of environmental protection and to oblige undertakings carrying out certain waste-related activities to comply with specific rules taking account of mandatory environmental requirements, Article 10 thereof cannot therefore be construed as obliging Member States to conclude agreements for the receipt and recovery of non-hazardous building waste with all undertakings complying with the requirements of the Waste Directive.

131. It must be borne in mind that 'movements of waste' for the purposes of the Waste Directive means exports or imports of waste within, into and out of the Community, and not movements of waste within a Member State.

132. That is the reason why Article 13(1) of the regulation provides that the Community system of waste shipments between Member States established by the regulation does not apply to shipments of waste within a Member State. It is also why Article 7(3) of the Waste Directive requires Member States to inform the Commission and the other Member States when they adopt measures designed to restrict move-

⁷⁴ — Judgment in Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraph 20.

ments of waste. It is difficult to see what purpose would be served by requiring Member States to comply with that obligation if measures they have adopted have no effect, whether direct, indirect, actual or potential, on a Member State's relations with the other Member States.

133. By the same token, where a Member State does not enact any measures the effect of which is to prohibit movements of waste within the Community, it does not seem to be either expedient or necessary to inform the Commission of that.

134. It follows from the foregoing that Article 7(3) of the Waste Directive must be construed as applying only to national legislation which may affect intra-Community trade.⁷⁵

135. Article 7(3) of the Waste Directive must be regarded as corresponding to the safeguard clause laid down by Article 130t of the Treaty which provides that: 'The protective measures adopted pursuant to

Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission'.

136. Exercise of the power provided for in Article 130t presupposes the application of provisions based on Articles 130r and 130s of the Treaty, namely, the implementation of specific measures to protect the environment, and does not arise where measures are adopted on another legal basis, even if the reasons given for such measures are of an environmental nature.

137. The Waste Directive is in fact based on Article 130s of the Treaty⁷⁶ and the Court has already held that its object is to ensure, with a view to protecting the environment, the effective management of waste in the Community.⁷⁷ Article 130t must therefore be capable of being applied by Member States in order to adopt or maintain national measures affording a higher level of protection for the environment than those laid down by the Waste Directive or by Regulation No 259/93. The interests of environmental protection must still be sufficiently established, however. In its judgment in *Dusseldorp and Others*, cited above, the Court held that, in princi-

⁷⁶ — See point 15 of this Opinion.

⁷⁷ — See the judgment in *Commission v Council*, cited above, paragraph 20.

⁷⁵ — See points 113 and 114 of this Opinion.

ple, movements of waste for recovery may not be restricted or prohibited by Member States. However, to qualify that case-law, I think that exceptions should be allowed in exceptional and sufficiently established cases. Thus a Member State which can show that movements of waste in a specially protected area would give rise to serious or irreversible environmental consequences should be able to obtain authorisation to restrict or prohibit movements of waste contrary to that interest.

138. It must therefore be concluded, in answer to the first part of the third question, that a Member State has the power to maintain or adopt national measures aimed at protecting the higher-ranking interests of the environment.

139. The national court also asks the Court to say whether an individual is entitled to rely directly on the provisions of Article 7(3) of the Waste Directive in order to prevent the application of a national measure which infringes the requirements of that article. In other words, it is asking the Court whether Article 7(3) of the Waste Directive has direct effect.

140. The Court has invariably held that only 'the provisions of a directive [which] appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise ... may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State'.⁷⁸

141. Article 7(3) of the Waste Directive provides that more stringent national protective measures adopted by a State must be sent to the Commission for information. It is patently obvious that that provision allows the State very broad discretion, leaving it free to decide not only to adopt a protective measure, but also the content of such a clause. That is why Article 7(3) of the Waste Directive cannot be given direct effect.

142. The answer must therefore be that Article 7(3) of the directive cannot confer directly on individuals rights which they would be able to assert against the State.

⁷⁸ — Judgment in Case 8/81 *Becker* [1982] ECR 53, paragraph 25; see also the judgment in Case C-131/97 *Carbonari and Others* [1999] ECR I-1103.

Conclusion

143. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Østre Landsret (Denmark) as follows:

- (1) (a) Article 90 of the EC Treaty (now Article 86 EC) in conjunction with Article 86 of the EC Treaty (now Article 82 EC) must be construed as precluding national legislation which, on strictly economic grounds, reserves the collection and recovery of environmentally non-hazardous building waste in a substantial part of the common market for specially authorised or approved undertakings even though other undertakings hold permits to treat the type of waste in question in accordance with Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste.
- (b) Article 90 of the Treaty in conjunction with Article 34 of the EC Treaty (now, after amendment, Article 29 EC) must be construed as precluding national legislation as described above which has the effect of restricting patterns of exports and of establishing a difference in treatment as between a Member State's domestic trade and its export trade, so as to provide a particular advantage for the domestic market of the State in question.
- (c) Article 36 of the EC Treaty (now, after amendment, Article 30 EC) and Article 130r(2) of the EC Treaty (now, after amendment, Article 174(2) EC), which lays down the principle that environmental damage should as a priority be rectified at source, must be construed as not serving to justify restrictions of the competition rules and of the principle of the free movement of goods in the case of non-hazardous waste destined for recovery, in so far as the Member State concerned justifies the measures

adopted by the need to ensure the treatment capacity of the approved undertakings.

- (2) Directive 91/156 must be construed as not obliging Member States to conclude agreements for the receipt and recovery of non-hazardous building waste with all undertakings complying with the requirements which it lays down.

- (3) Article 7(3) of that directive must be construed as introducing a safeguard clause allowing Member States to adopt waste management plans more stringent than the requirements of that directive, with the sole aim of protecting the higher-ranking interests of the environment. Article 7 of the directive cannot confer directly on individuals rights which they would be able to assert against Member States.