

OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 19 September 1991 *

*Mr President,
Members of the Court,*

Italian ports is reserved to 'compagnie portuali' or corporate bodies of dock workers (hereinafter referred to as 'dock-work companies').

1. This case concerns a reference from the Tribunale di Genova (Italy) for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Articles 7, 30, 85, 86 and 90 of the Treaty. The questions put to the Court arose in the course of proceedings between Merci Convenzionali Porto di Genova SpA (hereinafter referred to as 'Merci') and Siderurgica Gabrielli SpA (hereinafter referred to as 'Siderurgica') concerning a claim for compensation for damage suffered owing to delay in the delivery of a consignment of steel and for the reimbursement of allegedly unfair amounts paid for services in the Port of Genoa. In those proceedings the court of reference is dealing essentially with the question whether the rules laid down by Italian legislation on dock work in Italian ports is compatible with the EEC Treaty and whether the relevant provisions of the Treaty have direct effect.

This monopoly is guaranteed by Article 1172 of the Code, which prescribes penalties for any person who uses for dock work any dock workers who are not affiliated to a dock-work company. Under Articles 152 and 156 of the Regolamento della Navigazione Marittima (hereinafter referred to as 'the Regulation') regarding enrolment in and deletion from the register of members of dock-work companies, dock workers must satisfy certain conditions, one of which is the possession of Italian nationality.²

Facts and legal background

2. Article 110 of the Italian Codice della Navigazione (hereinafter referred to as 'the Code') provides that all dock work¹ in

According to Article 111 of the Code, the right to organize dock work on behalf of third persons in Italian ports is granted to 'imprese portuali' (hereinafter referred to as 'dock-work undertakings'), which are as a rule companies established under private law

* Original language: Dutch.

1 — Under Article 1 of the Code this includes 'loading, unloading, transhipment, storage and general movement within the port of goods and all other material'.

2 — Articles 152(2) and 156(6). That requirement applies also to temporary dock workers; see Article 194 of the Regulation.

and are wholly or largely controlled by the port authorities. It is important to note that under the final paragraph of Article 111 of the Code and in accordance with the aforesaid provisions such undertakings may, for the dock work which they organize on behalf of third persons, call only upon the said dock-work companies and the dock workers affiliated to them.

Under Article 112 of the Code and Articles 202 and 203 of the Regulation, the scale of charges and other conditions relating both to the performance of dock work by the dock-work companies and to the organization of dock work on behalf of third persons by dock-work undertakings are laid down by the port authorities.

3. On 2 December 1988, Siderurgica, the respondent in the main proceedings, purchased a consignment of Brazilian steel in Hamburg to the value of roughly LIT 6 000 million and despatched it by sea to Genoa. On arrival in the Port of Genoa on 22 to 23 December 1988 the crew of the ship, in accordance with the Italian legislation already mentioned, were not authorized to unload the cargo themselves although the ship on which the steel had been sent was equipped for that purpose. Under the aforementioned Article 111 of the Code, Siderurgica was obliged to call upon Merci, the dock-work undertaking holding the concession to organize on behalf of third persons dock work involving ordinary freight in the Port of Genoa, and under the final paragraph of that article Merci, for the actual performance of the dock work, the unloading and subsequent transport within the port of the consignment

of steel concerned, called upon the dock-work company of the Port of Genoa, the *Compagnia Unica Lavoratori Merci Varie del Porto di Genova* (hereinafter referred to as 'Compagnia') and the dock workers affiliated to it.

However, for some months after the unloading of the steel, Merci failed to deliver the steel to Siderurgica and also prevented Siderurgica from collecting the steel itself.

4. On 10 April 1989 the President of the Tribunale di Genova, on the application of Siderurgica, ordered Merci to deliver forthwith the consignment of steel in question. On 28 April Merci appealed against the order to the Tribunale di Genova, the court of reference, and in the course of those proceedings Siderurgica lodged a claim for compensation for the damage it had suffered and for the reimbursement of the sums it alleged had been wrongfully charged for the dock workers' services which it had been required to use but had not requested.³ With regard to the damage, Siderurgica claimed that for lack of delivery of the consignment of steel it had had to stop production temporarily and had been unable to deliver to its customers the finished products they had ordered. Moreover it had made a considerable loss because funds equivalent to the purchase price of the steel had been tied up for months. As Merci has in the meantime delivered the steel to Siderurgica, the main proceedings now no longer relate to the

3 — In fact Siderurgica had been refused permission to unload the steel itself by using the equipment and crew of the vessel.

order for delivery but solely to Siderurgica's claim for compensation and reimbursement.

damage thereby caused and for reimbursement of the sums wrongfully charged for the dock work.

5. In its defence before the court of reference Merci argues that it does not operate with its own workforce but that under the Italian legislation it is obliged to rely on the labour supplied by Compagnia, which has sole authority for moving goods within the Port of Genoa. It further states, without being challenged, that it was unable to deliver the steel to Siderurgica by reason of a long series of strikes by the workforce of the said dock-work company. It was therefore temporarily prevented from complying with its commitments and was thus not liable for the damage resulting from the delay in delivery. Moreover, the defence continues, Merci cannot be liable either for the sums, considered unfair by Siderurgica, which were charged for the dock work carried out, because they had been calculated on the basis of the scale of charges laid down by the port authorities which, as a dock-work undertaking, it was required to apply in accordance with Article 112 of the Code and Article 203 of the Regulation.

On the other hand, Siderurgica states that the Italian legislation on which Merci relies to justify its conduct is contrary to Articles 90, 86, 85 and 37 of the EEC Treaty and that the national court is bound to refuse to apply provisions of national law which conflict with Community law. In this case that would lead to the conclusion that Merci is nevertheless liable for the delay in the delivery of the goods and for the

6. Although Merci relies on the relevant Italian legislation to justify its conduct, it nevertheless thinks, like Siderurgica, that, in so far as that legislation provides for a monopoly for the dock-work companies (Article 110 of the Code), it is incompatible with Community law.⁴ However, Merci maintains that in its opinion that incompatibility would (at least in theory) actually justify the claim for damages for the delay in delivery but *not* the claim for reimbursement of the sums paid by Siderurgica for the performance of unsolicited dock-work services which were imposed upon it, because Merci itself did not gain from the performance of such services.

The questions raised and the jurisdiction of the Court

7. In view of these proceedings the Tribunale di Genova is referring to the Court for a preliminary ruling the two following questions on the interpretation of Articles 7, 30, 85, 86 and 90 of the EEC Treaty:

'(1) In the present state of Community law, where goods from a Member State of

4 — However, it may be noted that, according to Merci, Article 111 of the Code, under which it was granted a concession for the organization of dock work on behalf of third parties, is not at issue in this case. See section 9 below

the Community are imported by sea into the territory of another Member State, does Article 90 of the EEC Treaty, together with the prohibitions contained in Articles 7, 30, 85 and 86 thereof, confer on persons subject to Community law rights which the Member States must respect, where a dock-work undertaking and/or company formed solely of national dock workers enjoys the exclusive right to carry out at compulsory standard rates the loading and unloading of goods in national ports, even when it is possible to perform those operations with the equipment and crew of the vessel?

- (2) Does a dock-work undertaking and/or company formed solely of national dock workers, which enjoys the exclusive right to carry out at compulsory standard rates the loading and unloading of goods in national ports constitute, for the purposes of Article 90(2) of the EEC Treaty, an undertaking entrusted with the operation of services of general economic interest and liable to be obstructed in the performance by the workforce of the particular tasks assigned to it by the application of Article 90(1) or the prohibitions under Articles 7, 30, 85 and 86 thereof?

8. Before dealing with these questions I should like to say, in passing, that although,

as has already been mentioned, the parties to the main action are to a considerable extent in agreement as to the incompatibility of the relevant Italian legislation with Community law,⁵ the Court nevertheless has jurisdiction under Article 177 of the EEC Treaty to answer the questions referred to it. In fact it is for the national court to assess the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.⁶ The Court could declare itself without jurisdiction only if there were no longer any dispute in the main action⁷ or if the questions raised bore no relation to the actual nature of the case or to the subject-matter of the main action.⁸ In this case there is indeed a dispute in the main action and the questions do bear a relation to the actual nature of the case and to the subject-matter of the action. The fact that the parties are agreed on the answer to be given to the questions raised does not mean that the court of reference cannot be in any doubt as to the correct interpretation of Community law and does not therefore need the interpretation of the Court of Justice.⁹

5 — The only disagreement concerns the consequences which this incompatibility involves for *Merci* as regards the reimbursement of the sums paid by *Siderurgica* for the dock-work services.

6 — Judgments in Case 244/81 *Faglia v Novello* [1981] ECR 3045 at paragraphs 14 and 15; and Case 338/85 *Pardini v Ministero del Commercio con l'Estero* [1988] ECR 2041 at paragraph 8; see also the Order of the Court in Case C-286/88 *Falciola* [1990] ECR I-191 at paragraph 7.

7 — See the judgment in Case 338/85 *Pardini*, previously cited, paragraph 9.

8 — Judgment in Case 126/80 *Salonia v Poidomani and Giglio* [1981] ECR 1563 at paragraph 6 and the Order in Case C-286/88 *Falciola*, previously cited in footnote 6, at paragraph 8.

9 — As may be seen from its observations submitted to the Court, the Commission too thinks that the Italian legislation in question is contrary to Community law. It is not clear, therefore, why the Commission did not bring this legislation before the Court under Article 169 of the EEC Treaty: as Mr Advocate General Darmon indicated in his Opinion in Case 229/83 *Leclerc v Au Blé Vert* [1985] ECR I, at page 16, proceedings under Article 169 would have made possible an examination of the legislation in question *in concreto* rather than an abstract review of compatibility with the Treaty in the context of proceedings under Article 177.

9. The court of reference asks for an interpretation of the combined provisions of Articles 7, 30, 85 and 86 of the EEC Treaty on the one hand and Article 90 on the other. In fact it cannot be denied that the Italian legislation¹⁰ confers exclusive rights, within the meaning of Article 90(1), on both the dock-work company Compagnia and the dock-work undertaking Mercı. In its observations submitted to the Court, Mercı points out that the monopoly in dock work provided for by the said Article 110 of the Code is granted to the dock-work companies and not to dock-work undertakings like itself. The dock-work undertakings, on the other hand, have to 'endure' that monopoly owing to the final paragraph of the said Article 111 of the Code.

I do not intend to contest the latter point. However, contrary to Mercı's statements¹¹ and to what the insufficiently precise wording of the questions from the national court might lead one to believe,¹² it must not be forgotten that it is not only the monopoly granted to Compagnia under Article 110 of the Code which is at issue here but also the concession granted under Article 111 of the Code to Mercı, and to it alone, to organize on behalf of third persons dock work concerning ordinary

freight.¹³ In other words there are two interrelated monopolies: a first granted to the dock-work company Compagnia relating to the actual *performance* of dock work, which, in so far as it concerns dock work for ordinary freight, Mercı alone has to 'endure', and a second monopoly granted to the dock-work undertaking Mercı, relating to the *organization on behalf of third persons* of the aforesaid dock work, performed by Compagnia, which applies to users of the Port of Genoa. In this case both monopolies must necessarily be considered.

10. It is already clear from the judgment in *Sacchi*¹⁴ and more recently from the judgments in *France v Commission*¹⁵ and *ERT*¹⁶ that a monopoly granted by a Member State to an undertaking within the meaning of Article 90(1) is compatible with the Treaty only if 'the manner in which such a monopoly is organized and exercised does not infringe the provisions of the Treaty'. I shall therefore presently discuss whether the organization and exercise of the monopolies granted to Compagnia and Mercı infringe the articles mentioned in the question referred to the Court (Articles 7, 30, 85 and 86) or, in conjunction therewith, other articles of the Treaty (Articles 48, 52 and 59). I shall now consider these articles: first of all Articles 7, 48, 52 and 59, with

10 — See Articles 110, 111, 112 and 1172 of the Code, previously described.

11 — See footnote 4.

12 — In fact the questions mention expressly only the monopoly in loading and unloading goods, that is, the monopoly granted to Compagnia. Nevertheless it may, in my opinion, be clearly seen from the remainder of the order for reference that in this case it is not solely the monopoly granted to Compagnia which is at issue

13 — Of course the position is that under Article 111 of the Code several undertakings enjoy the concession to organize dock work for third persons. However, it is not disputed that Mercı is the only undertaking which has received such a concession for ordinary freight in the Port of Genoa. In the case of containers, for example, there is another monopoly granted to the dock-work undertaking Terminal Contenitori di Genova.

14 — 155/73 [1974] ECR 409 at paragraph 14.

15 — Case C-202/88 [1991] ECR I-1223 at paragraph 22.

16 — Case C-260/89 [1991] ECR I-2925 at paragraph 12.

regard to possible discrimination based on nationality, then Articles 85 and 86 with regard to a possible infringement of the rules on competition, and finally Article 30 with regard to a possible restriction on intra-Community trade.

Infringement of the prohibition of non-discrimination on grounds of nationality

11. As has already been mentioned, Articles 152 and 156 of the Regulation, which concern dock-work companies such as Compagnia, prescribe the possession of Italian nationality as a condition for membership of these dock-work companies and, as regards dock-work undertakings such as Merci, the final paragraph of Article 111 of the Code provides that for the performance of dock work such undertakings may call only upon the members of the said dock-work companies. Is that condition of nationality compatible with the Treaty?

As the Commission rightly points out, it is not possible to establish, on the basis of the information contained in the documents before the Court, whether the performance of services by dock workers within the framework of a dock-work company must be regarded as employment or as work in a self-employed capacity.¹⁷ However, that point is of little relevance in this case because a condition of nationality such as that prescribed by the Italian legislation at issue is incompatible with Community law

whether the dock workers are workers within the meaning of Article 48 of the EEC Treaty or, as members of the dock-work company, are self-employed persons established in a Member State within the meaning of Article 52 or are providing services in a Member State within the meaning of Article 59 of the EEC Treaty. In fact Article 7 of the EEC Treaty prohibits any discrimination on grounds of nationality within the scope of application of the Treaty; that prohibition is specifically applied, for workers, in Article 48(2) of the Treaty and, for self-employed persons, in Articles 52 and 59, and is recognized as constituting one of the basic provisions of the Treaty. In this case the nationality requirement prevents nationals of other Member States from performing dock work in the Port of Genoa, whether as workers or self-employed persons.

As may be seen from the facts in the main proceedings, that condition also prevents persons providing services from other Member States, other than dock workers, from performing dock work in Italian ports. In this case the German shippers who had consigned the steel for Siderurgica from Hamburg to Genoa could not unload the consignment themselves although the ship was equipped to do so. That too is contrary to Article 59 of the EEC Treaty.

12. Under Articles 48(3) and 56(1) and the combined provisions of Articles 66 and 56(1) of the EEC Treaty, restrictions of a discriminatory nature applying to freedom of movement of workers, to the right of establishment and the freedom to provide services may be justified on grounds of

17 — Merci points out that the dock workers are not employees but members of the dock-work companies; however, Merci does not deny that the dock-work companies nevertheless also appoint employees.

public policy, public security or public health. In addition, Article 48(4), the first paragraph of Article 55 and the combined provisions of Article 66 and the first paragraph of Article 55 of the EEC Treaty provide that the provisions relating to freedom of movement of workers, the right of establishment and freedom to provide services are not applicable to employment in the public service or activities connected with the exercise of official authority.

The nationality requirement laid down by the legislation under consideration does not however relate to the protection of public policy, public security or public health. It is not aimed at the general interest but solely at promoting the individual interests of the Italian dock workers and cannot therefore be justified on the grounds referred to. Nor does this constitute employment in the public service within the meaning of Article 48(4)¹⁸ or activities connected with the exercise of official authority within the meaning of Article 55,¹⁹ regard being had to the strict interpretation given to these concepts in accordance with the case-law of the Court.

13. Finally, with regard to the infringement of the prohibition of discrimination, it

should be mentioned that the Court has consistently held that all the provisions to which I have referred have direct effect.²⁰ In conjunction with these provisions having direct effect, Article 90(1) of the EEC Treaty itself also has direct effect.²¹

Infringement of the Treaty provisions on competition

14. Although Articles 85 and 86 of the EEC Treaty concern the conduct of undertakings and not laws or regulations adopted by Member States, the Court has consistently held that, under the second paragraph of Article 5, the Treaty none the less requires them 'not to adopt or maintain in force any measure which could deprive those

20 — With regard to Article 7 of the EEC Treaty see, for example, the judgments in Case 1/78 *Kenny v Insurance Officer* [1978] ECR 1489 at paragraph 12, and in Case 24/86 *Blaizot v University of Liège and Others* [1988] ECR 379 at paragraph 35. With regard to Article 48 of the EEC Treaty see, for example, the judgments in Case 41/74 *van Duyn v Home Office* [1974] ECR 1337 at paragraphs 4 to 8, and in Case 168/85 *Commission v Italy* [1986] ECR 2945 at paragraph 7. With regard to Article 52 of the EEC Treaty see, for example, the judgments in Case 2/74 *Reyners v Belgium* [1974] ECR 631 at paragraphs 30 and 32 and in Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483 at paragraph 15. With regard to Article 59 of the EEC Treaty see, for example, the judgments in Case 33/74 *van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299 at paragraphs 18 to 27 and in Case C-49/89 *Corica Ferries France v Direction Générale des Douanes* [1989] ECR 4441 at paragraph 10.

21 — The Court expressly confirmed this in Case 155/73 *Sacchi*, already cited (see footnote 14), as regards Articles 90 and 86. There does not seem to be any reason why that should not also apply to other provisions having direct effect. See, *inter alia*, Wyatt, D and Dashwood, A. *The Substantive Law of the EEC*, London, 1987, p. 524. See also, earlier, Waelbroeck, M.: 'Le droit de la Communauté économique européenne', volume 4, *Concurrence*, Brussels, 1972, pp. 86 and 87.

18 — See, for example, as regards the concept of 'employment in the public service', the judgment in Case 149/79 *Commission v Belgium* [1980] ECR 3881, at paragraph 9 et seq., whence it may be seen that it affects a limited number of posts 'which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities' (paragraph 10).

19 — See, for example, as regards the concept of 'activities connected with the exercise of official authority', the judgment in Case 2/74 *Reyners v Belgium* [1974] ECR 631 at paragraph 42 et seq., according to which these must be activities 'which in themselves involve a direct and specific connection with the exercise of official authority' (paragraph 54).

provisions of their effectiveness'.²² In the case of undertakings to which Member States have granted a monopoly, Article 90(1) of the EEC Treaty represents a specific application of the aforesaid second paragraph of Article 5 of the Treaty.²³

Are we dealing in this case with national legislation which might undermine the effectiveness of Articles 85 and 86 of the EEC Treaty in contravention of Article 90(1)?

15. It may be seen from the case-law of the Court relating to the application to measures adopted by the public authorities of Article 90(1) in conjunction with Article 85 or 86, that Article 90 relates to any action taken by the public authorities with regard to the undertakings referred to in that article which either imposes on an undertaking a practice forbidden by Article 85 or 86,²⁴ or encourages such a practice,²⁵ or makes it inevitable,²⁶ or grants to under-

takings power to act in place of the public authorities for the purpose of controlling the markets.²⁷ That hinges particularly on the consideration that such action by the public authorities, in conjunction with any one the of the practices by undertakings (which are actually adopted by the undertakings concerned) referred to in Article 85 or 86, has the same effect on the structure of competition in the common market as a practice by an undertaking not dependent on action by the public authorities. In addition it may be seen from the case-law that conduct by an undertaking which is required as a 'starting factor' for the applicability of the combined provisions of Article 90(1) and either Article 85 or Article 86 applicable need not necessarily precede action by the public authorities but may follow it or be its consequence or inevitable effect.²⁸

16. I shall first consider, in the context of Article 86, whether the national legislation in question in this case imposes such a practice restricting competition, facilitates such a practice or makes it inevitable.²⁹ For this purpose two points must be considered: first, whether *Merci* or *Compagnia* or both committed acts which, irrespective of any action by the authorities, represent the abuse of a dominant position in a substantial part of the common market which may affect trade between Member States and, secondly, whether the national legislation in

22 — See, for example, the judgments in Case 13/77 *INNO v ATAB* [1977] ECR 2115 at paragraph 33, in Case 231/83 *Cullet v Leclerc* [1985] ECR 305 at paragraph 16, in Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769 at paragraph 16, in Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803 at paragraph 48, and in Case C-260/89 *ERT*, previously cited in footnote 16, at paragraph 35.

23 — See, for example, the judgments mentioned in the previous footnote, *INNO v ATAB*, at paragraph 32, *Ahmed Saeed*, at paragraph 50 and *ERT*, at paragraph 36.

24 — That is the case for example in the judgment in Case 30/87 *Bodson v Pompes Funèbres des Régions Libérées* [1988] ECR 2479, which rules that a communal authority which requires undertakings occupying a dominant position to charge especially high prices for the services they provide is acting in contravention of Article 90(1).

25 — That is the position for example in the judgment in *Ahmed Saeed* (see footnote 22), which rules that the approval by the public authority of agreements on tariffs contrary to Article 85(1) is contrary to Article 5 and in that case to Article 90.

26 — That is the case in the *ERT* judgment (already cited in footnote 16), which states that a Member State is infringing the combined provisions of Article 90 and 86 of the EEC Treaty when it grants an exclusive right to an undertaking and in so doing creates a situation in which that undertaking is led to infringe Article 86. The judgment in Case C-41/90 *Höfner and Elser* [1991] ECR 1979 also relates to that category of measure.

27 — See the judgment in *Van Eycke* (previously cited in footnote 22), in which the Court nevertheless found that that situation did not arise in that case.

28 — See, for example, the judgments cited in footnotes 24, 26 and 27. For further details, see my Opinion due to be delivered at the sitting on 16 October 1991 in Joined Cases C-48/90 and C-66/90 *Netherlands and Koninklijke PTT NV and PTT-Post BV v Commission*.

29 — I shall not consider further the special situation in which legislation delegates rule-making powers to undertakings.

question facilitates such abuse or makes it compulsory or inevitable.

As regards the first point, I should like to make it clear straight away that it is incontestable that both Mercı and Compagnia are undertakings within the meaning of Article 86 (and Article 85)³⁰ nor, in view of the actual situation described in the first question referred to the Court, can it be contested, either, that the practices engaged in by Mercı and Compagnia in the framework of the Italian legislation affect trade between Member States.

Nor is it open to doubt that both the organization on behalf of third parties and the performance of dock work described in Article 108 of the Code³¹ fall within the field of application of Article 86 (and of Article 85). In fact, as the Council has repeatedly stated,³² dock work must be distinguished from actual maritime transport properly so called (even though it may be complementary to it); however, even if it were to be classified as maritime transport, the general rules on competition laid down in Articles 85 and 86 were applicable in that sphere even before Regulation (EEC) No 4056/86 of 22 December 1986³³ came into force.³⁴

30 — The concept of 'undertaking' has always been widely interpreted, so that in the judgment in *Hofner and Elser*, previously cited in footnote 26, the German Bundesanstalt für Arbeit was itself regarded as an undertaking because, as a distinct entity, that public institution carried out the economic activity of employment procurement.

31 — See footnote 1.

32 — See the Communication of 19 March 1985 (OJ 1985 C 212) and the preamble to Regulations (EEC) No 4056/86 of 22 December 1986 (OJ 1986 L 378) and No 3975/87 of 14 December 1987 (OJ 1987 L 374).

33 — Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4).

34 — On the analogous situation of air transport, cf. the judgment in *Ahmed Saeed*, previously cited in footnote 22, at paragraphs 32 and 33.

17. Under Article 86 of the EEC Treaty, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States. In this case, as far as Mercı is concerned, the market in question is the market of organizing for third parties dock work with regard to ordinary freight in the Port of Genoa, whilst for Compagnia the market in question is that of the actual performance of such dock work.

Of course it is for the national court to decide whether these markets may be regarded as constituting a substantial part of the common market. However, it is clear from the documents before the Court that, in view of the *scale* of dock work with regard to ordinary freight organized on behalf of third parties and performed there, the Port of Genoa is amongst the most important in the Community and is the most important in Italy and that, in view of its situation and infrastructure, users of the port often have *no other choice* than to use the Port of Genoa. These are, in my view, serious indications that the two markets referred to, which are, moreover, closely linked together since they relate to the same dock work, are sufficiently important to be regarded as a substantial part of the common market.

It is indisputable that Mercı occupies on the market for dock work for third parties a dominant position, that is to say, a situation 'which enables it to hinder the maintenance of effective competition on the relevant

market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers'.³⁵

It is also incontestable that Compagnia occupies a dominant position on the market for the actual performance of dock work. The fact that, as in this case, the absence of competition on these markets is caused or facilitated by the provisions of laws or regulations by no means prevents the application of Article 86.³⁶ In the *ERT* judgment³⁷ the Court stated that an undertaking to which a statutory monopoly has been granted may be regarded as having a dominant position within the meaning of Article 86 of the Treaty.

18. Have *Merci* or *Compagnia* or both conducted themselves in a manner which amounts to abuse of a dominant position within the meaning of Article 86? As I have said, I shall first consider the actual conduct of *Merci* and *Compagnia*, irrespective of the national legislation concerned.

According to *subparagraph (a) of the second paragraph* of Article 86, abuse of a dominant

position may consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, and in this connection prices and conditions which are appreciably less favourable for the user than the prices and conditions which he might have negotiated if there had been normal and sufficiently effective competition must be regarded as unfair.³⁸

Once again, it is for the national court to judge whether *Compagnia* or *Merci*, or both, have imposed unfair prices or contractual conditions for the dock-work services concerned. However, it must be said that the Court has already repeatedly found that an undertaking having a factual or statutory monopoly has imposed unfair prices or conditions,³⁹ and there might be a question in this case of unfair prices or other contractual conditions in so far as a dock-work company charges a dock-work undertaking or a dock-work undertaking charges users of the port, or both, for services which have not been demanded⁴⁰ or even for services not provided, or in so far as the scale of charges on the basis of which the prices are calculated are quite out of proportion to the services actually

³⁵ — See, for example, the judgments in Case 322/81 *Michelin v Commission* [1983] ECR 3461 at paragraph 30 and in Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261 at paragraph 16.

³⁶ — See, for example, the judgment in Case 26/75 *General Motors v Commission* [1975] ECR 1367 at paragraph 9, and the judgments, previously cited, in *INNO v ATAB* at paragraph 34, and in *CBEM v CLT and IPB* at paragraph 16.

³⁷ — See footnote 22.

³⁸ — See the judgment in Case 27/75 *United Brands v Commission* [1978] ECR 207 at paragraph 249. It may be seen from the judgment in *General Motors*, previously cited, at paragraph 12, that the Court considers that prices are to be regarded as unfair when they are excessive in relation to the economic value of the service provided (see also paragraph 250 of the judgment in *United Brands*).

³⁹ — See the judgments in *Sacchi*, previously cited in footnote 14, at paragraph 17, in *General Motors*, previously cited in footnote 36, at paragraphs 11 and 12, and in Case 226/84 *British Leyland v Commission* [1986] ECR 3263 at paragraph 27, in which the Court refers to the judgment in *General Motors*.

⁴⁰ — As emerges from the facts previously mentioned (section 3 above), the dock work organized by *Merci* for *Siderurgica* and performed by *Compagnia* were in reality imposed on *Siderurgica*; in fact *Siderurgica* had wished to unload and organize transport for the consignment of steel itself.

performed.⁴¹ It appears from the data available that the dock-work services concerned not only can be but actually are performed in other European ports at a price much lower than that charged by Compagnia to Mercı and by Mercı to users of the port.⁴² However, the complicated nature of the scale of charges makes it practically impossible to determine the criteria used for calculating the price of an operation; that may be a further indication that the price invoiced bears no relation to the real cost of performing the service.⁴³

It should also be observed that, as appears from the judgment in *Bodson*, the imposition, by holders of concessions, of unfair prices is also contrary to Article 86 of the EEC Treaty even where the level of prices has been fixed by the public authorities in the context of the contract for the concession.⁴⁴ However, in such a case the

sanctions laid down by Community law may well not be applied to the undertaking concerned.

19. Under *subparagraph (b) of the second paragraph* of Article 86, abuse of a dominant position may also consist in limiting production, markets or technical development, to the prejudice of consumers. As the Commission and Siderurgica point out, there is certainly such an abuse where a dock-work company having a monopoly for the performance of dock work refuses — even for the purpose of protecting employment — to have recourse to modern technology, thus considerably increasing the cost of dock work for the dock-work undertaking and through that undertaking for users of the port and giving rise to long waiting periods before the work can be performed.⁴⁵

20. Finally it is appropriate to point out that, under *subparagraph (c) of the second paragraph* of Article 86, abuse of a dominant position may also consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.⁴⁶ It appears that that is the position

41 — In this connection Siderurgica refers to a study by Laura F.: 'Le Compagnie portuali nel diritto interno e comunitario', Edizione Giuffrè, Milan, 1981, and to a statement by the 'Comitato Sezione Lavoro' of the port authority for the Port of Genoa in a report of 23 July 1987, which runs as follows: '... taking the basic cost of labour at 100, the supplementary sums to be added to that cost to reach the final cost of the operation amount to 1 194.26% (sic!!!)' (quoted in Siderurgica's observations, page 12).

42 — On this subject the Commission refers to a study by Marconsult SpA of 1990 relating to the organization and cost of the transshipment of containers in the principal European ports. It emerges from that study, for example, that the cost of transshipment of one unit varied between LIT 110 000 and 116 000 in the Port of Antwerp, between LIT 180 000 and 200 000 in the Ports of Hamburg, Marseille and Naples and between LIT 230 000 and 250 000 in the Ports of Venice, Barcelona and Leghorn, whilst the cost of transshipment of one unit amounts to LIT 270 000 in the Port of Genoa.

43 — In the report of 23 July 1987, previously mentioned in footnote 41, the 'Comitato Sezione Lavoro' of the port authority for the Port of Genoa stated: 'The system of charges applied in the Port of Genoa for dock-work services has for years been notorious for its complexity and lack of transparency and for the fact that it is always impossible to determine in advance what the final cost of the services will be' (quoted in Siderurgica's observations at page 12).

44 — Judgment in Case 30/87, previously cited, footnote 24.

45 — See on this subject the Commission's observations, page 38, and Siderurgica's observations, page 15.

46 — See the judgment in *Michelin v Commission*, already cited in footnote 35, at paragraphs 87 to 91, in which the Court took the view that there had been no abuse within the meaning of subparagraph (c) of the second paragraph of Article 86, because it had not been established that the differences in treatment between various dealers were due to the application of unequal criteria or that they were not justified by legitimate commercial reasons (paragraph 90).

in this case since, after negotiations and in 'derogation' from the scale of charges, a preferential charge is made by Merci to certain port users by reducing the supplementary costs and setting that reduction off by an increase in the charges to other users without any objective consideration justifying such a step.⁴⁷ That practice is facilitated by the complexity and lack of transparency of the scale of charges applicable.

21. In my view the foregoing factors justify the deduction that there is compelling evidence for the national court to conclude that, by imposing unfair prices and trading conditions, both Merci and Compagnia abused the monopolies granted them by Italian legislation in a substantial part of the common market, that by refusing to use modern technology Compagnia abused its dominant position and that, by agreeing to dissimilar conditions to trading parties as compared with their competitors, Merci abused its dominant position.

22. In those circumstances we must now consider whether these abuses of a dominant position within the meaning of Article 86 — in so far as the national court regards them as established — are imposed, or facilitated, or made inevitable by the relevant national legislation. I think there

can be little doubt about this. In fact, the scale of charges and other, presumably unfair, contractual conditions applied by Merci and Compagnia are made possible, if not inevitable, by the national legislation applicable and are facilitated, if not made compulsory, by the port authorities under the powers conferred on them by national legislation.⁴⁸ The other abuses too are made possible by that legislation. But for the monopoly for the performance of dock work conferred on it by the Italian legislation, Compagnia could certainly not have afforded to abstain from using modern technology, and it is clear also that the dissimilar treatment of trading parties was possible only as a result of the monopoly granted to Merci and the complexity and lack of transparency of the scale of charges devised by the authority.

From the foregoing considerations it follows here too that there is serious evidence that the national legislation in question in the main proceedings enacts or maintains in force measures contrary to Article 90(1) in conjunction with Article 86 of the EEC Treaty. In view of the fact that Article 90(1), together with a provision of the Treaty having direct effect, such as Article 86, itself has direct effect,⁴⁹ this means that, in so far as the national court agrees with the arguments I have already put forward, individuals may, under those provisions, derive direct rights with regard to the Member State concerned, just as they may of course assert directly their rights against Merci and Compagnia by reason of the abuses which they have committed.

47 — That emerges from the report of 23 July 1987 by the 'Comitato Sezione Lavoro' of the port authority for the Port of Genoa previously referred to (Siderurgica's observations, page 13).

48 — See above, section 2.

49 — See the judgment in *Sacchi*, previously cited in footnote 14, at paragraph 18.

23. The next question asks whether the national legislation at issue is also contrary to the provisions of Article 90(1) in conjunction with Article 85.

Under *Article 85*, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market.

As I have already said (section 16), there can be no doubt that *Merci* and *Compagnia* are undertakings within the meaning of Article 85, that that article applies to the performance and organization of dock work and that in this case, as is made clear by the questions referred to the Court, trade between Member States may be affected by the legislation under review and by the measures based thereon. In the judgment in *ERT* however, the Court stressed that the application of Article 85 of the EEC Treaty pre-supposes that there is in fact an agreement restricting competition, or rather an agreement between undertakings.⁵⁰

24. From the information available to the Court it does not appear that agreements

were concluded between the dock-work undertaking *Merci* and the dock-work company *Compagnia*. On the other hand the possibility cannot be excluded — quite the contrary — that there are practices concerted between them which are caused, encouraged or made inevitable by the national legislation applicable. In fact the Court has defined a concerted practice as 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'. According to the Court, 'although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market'.⁵¹

Those cases related to undertakings which were in direct competition. However, it is established that vertical agreements, that is, agreements between undertakings which are not in direct competition, and hence also concerted practices by such undertakings, are also covered by Article 85 because they restrict competition as against third parties. In this respect it is for the national court to judge whether *Merci* and *Compagnia* knowingly adopted concerted practices which, as has previously been shown in the examination of the improper conduct of the undertakings considered separately, have the effect of restricting competition. The fact that these concerted practices may have

⁵⁰ — See paragraph 29 of the judgment in *ERT*, previously cited in footnote 16. See also the Opinion of Mr Advocate General Lenz, delivered on 23 January 1991 in that case [(1991] ECR I-2939 in section 32 of the Opinion).

⁵¹ — Judgment in Case 48/69 *ICI v Commission* [1972] ECR 619 at paragraphs 64 and 66, see also the judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 191.

been prompted or made inevitable by the national legislation in question does not provide an excuse here (although it is a factor which may be taken into account in respect of the imposition of fines). On the other hand that fact means that individuals may contest the national legislation under the combined provisions of Articles 90(1) and 85, since the provisions of Article 90(1), taken in conjunction with those of Article 85, do have direct effect.

Breach of the prohibition contained in Article 30 of the EEC Treaty

25. The Court has consistently held that all trade rules capable of hindering intra-Community trade, directly or indirectly, actually or potentially, are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty.⁵² Is that the case with the monopolies in dock work at issue in this case? According to the Commission, Article 30 is not relevant in this case since, at least in the light of the facts brought to its notice, the said monopolies do not have the effect of hindering the marketing in Italy of imported products as compared with domestic products. On the other hand, according to *Siderurgica*, the monopolies and the resulting unfair charges for dock work have repercussions above all on imported products so that the aforesaid monopolies must be regarded as trade rules within the meaning of Article 30.

It may appear from the facts put before the Court that the monopolies granted to *Merci* and *Compagnia* do in fact result in unfair prices and the unsatisfactory performance of services and that the importation of products from other Member States is thereby made dearer and more difficult, which is sufficient to bring Article 30 into play. Nevertheless, it seems to me that such an effect cannot be ascribed to the national legislation itself but to the actions taken by *Merci* and *Compagnia* under that legislation in pursuance of the monopolies granted to them. It follows, in my view, that, with regard to the national legislation in question, it is Article 90 in conjunction with Articles 85 and 86, rather than Article 30, which is the provision applicable.

Article 90(2) of the EEC Treaty

26. Article 90(2) of the EEC Treaty provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are to be subject to the rules contained in the Treaty, in particular to the rules on competition, *in so far as* the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. That derogation from the Treaty provisions in favour of certain undertakings does not apply, however, if the development of trade is affected to such an extent as would be contrary to the interests of the Community.

The court of reference asks, in its second question, whether *Merci* and *Compagnia* are undertakings entrusted with the

52 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837 at paragraph 5.

operation of services of general economic interest, and, if so, whether the application in particular of Articles 7, 85 and 86 of the EEC Treaty would obstruct the performance of the particular tasks assigned to them. If that is the case and if the other conditions of Article 90(2) are also met, it must, in my view, be accepted, as far as the points dealt with in the foregoing part of my Opinion are concerned, that national legislation requiring, encouraging or making inevitable such a practice on the part of undertakings, *which is authorized under Article 90(2)*, is nevertheless not contrary to the provisions of Article 90(1), in conjunction with other provisions of the Treaty.

27. It must be observed first of all that the concept of 'undertakings entrusted with the operation of services of general economic interest' has a special Community significance. According to the case-law of the Court, which has always insisted that that concept must be strictly interpreted,⁵³ it is essential for the public authorities to have entrusted the undertaking with the operation of the services which it performs,⁵⁴ and for such operations to be necessary for reasons of the general interest.⁵⁵ It appears from the national legislation in question that both the dock-work undertakings and the dock-work companies

are entrusted by the authorities with the activities they pursue. However, that fact does not, in itself, imply that these activities are of general economic interest within the meaning of Article 90(2). Although the organization of a port is undoubtedly, as such, an activity of general economic interest, the same cannot be said, in my view, of the activities of the dock-work companies and undertakings consisting in the performance of dock-work and in organizing it on behalf of third persons respectively. In fact dock work is taken to mean the loading, unloading, transshipment and storage of goods. If such operations also fall within the concept of services of general interest, then that concept can cover practically all economic activities.⁵⁶ In my view only activities of direct benefit to the public fall within the concept, as appears also from the judgments cited in footnote 55 below.

Even if it is accepted that the dock work referred to is to be considered a service of general economic interest, it still remains to be shown that observance of the aforesaid rules of the Treaty and in particular of Articles 7, 85 and 86 is incompatible with the performance of the public tasks, or in other words that in carrying out such tasks an infringement of the rules of the Treaty is unavoidable.⁵⁷ Further, it must still be shown that the application of the derogation from the rules of the Treaty is not contrary to the interests of the Community.

53 — See, for example, the judgment in Case 127/73 *BRT v SABAM and NV Fonior* [1974] ECR 313 at paragraph 19.

54 — See the judgments in *BRT v SABAM and NV Fonior*, cited in the previous footnote, at paragraph 20, in Case 7/82 *GVL v Commission* [1983] ECR 483, at paragraphs 29 to 32, and in *Ahmed Saeed*, previously cited in footnote 22, at paragraph 55.

55 — See the judgment in *Ahmed Saeed*, previously cited in footnote 22, at paragraph 55. Hitherto the Court has regarded as activities of general economic interest *inter alia*: maintenance of the navigability of an important waterway (judgment in Case 10/71 *Luxembourg v Muller* [1971] ECR 723); distribution of water (judgment in Case 96/82 *IAZ v Commission* [1983] ECR 3369); provision of services in the field of telecommunications (judgment in Case 41/83 *Italy v Commission* [1985] ECR 873); and television broadcasts (judgment in Case 155/73 *Sacchi* [1974] ECR 409).

56 — That seems to be the view also of the Tribunale Amministrativo Regionale which, in a judgment of 21 December 1988 relating to dock-work companies, stated: 'In fact it cannot be concluded that the object of the national rules in the field of dock-work companies was to entrust to them a service of general economic interest' (Foro It. 89, part 3, p. 98).

57 — See the judgments in *Hofner and Elber*, previously cited in footnote 26, at paragraph 24, and in *CBEM*, previously cited in footnote 35, at paragraph 17.

28. With regard to Article 90(2), the Court indicated in a judgment of 1971 that that provision did not have direct effect in view of the fact that 'its application involves an appraisal of the requirements, on the one hand, of the particular task entrusted to the undertaking concerned and, on the other hand, the protection of the interests of the Community'.⁵⁸ However, that did not prevent the Court from stating in subsequent judgments, in the context of the first criterion mentioned in that quotation, that it is for the national court to consider whether an undertaking which relies upon the provisions of Article 90(2) so as not to apply the provisions of the Treaty is actually entrusted with the operation of services of general economic interest,⁵⁹ which is unlikely in this case, as has already been mentioned. Even on the supposition that, in this case, the undertakings are entrusted with the operation of services of general economic interest, they can rely on the derogation in Article 90(2) only if they succeed in showing before the national court the exact nature of the needs of general economic interest in question and their impact on the conduct of the undertakings concerned.⁶⁰ That is not the case for example with tariffs, approved by the public authorities, the structure of which is not transparent — which, as I have already pointed out, seems also to apply in this case.⁶¹

This case-law therefore leads me to the inescapable conclusion that it is for the

national court to consider whether an undertaking which is relying on the derogation in Article 90(2) has actually been entrusted with a service of general economic interest within the meaning attached to that expression in Community law and, if so, whether and to what precise extent the needs of general interest require the said undertaking to act contrary to provisions of the Treaty such as Articles 7, 85 or 86. That implies that the burden of proof lies on the undertakings concerned and that they must show before the national court that the prior conditions of Article 90(2) are met.

If the national court comes to the conclusion that these prior conditions are indeed satisfied (which seems to me very improbable in this case) it still has the power, in relation to the second criterion mentioned in the quotation given at the beginning of this section (that is, the question whether the task assigned by the Member State and its performance does or does not affect the development of trade to such an extent as would be contrary to the interests of the Community), to contact the Commission, if it sees fit, with a view to the answer to be given to that question, by analogy with what the Court has accepted with regard to the application of Articles 85 and 86,⁶² so as to obtain the economic and legal information to enable it to answer that question.

58 — See the judgment in *Muller*, previously cited in footnote 55, at paragraphs 13 to 16.

59 — See the judgments in *Sacchi*, previously cited in footnote 14, at paragraph 18, in *BRT v SADAM*, previously cited in footnote 53, at paragraph 22, in *CBEM*, previously cited in footnote 35, at paragraph 17, and in *Ahmed Saeed*, previously cited in footnote 22, at paragraphs 55 to 57.

60 — See the judgment in *Ahmed Saeed*, previously cited in footnote 22, at paragraph 56.

61 — *Ibidem*, at paragraph 57.

62 — See the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935 at paragraph 53.

Conclusion

29. Having regard to the foregoing considerations, I suggest that the Court should give the following answer to the questions referred to it for a preliminary ruling:

- ‘(1) (a) National legislation which imposes on undertakings referred to in Article 90(1), which are entrusted with the performance or organization of dock work, the obligation to have recourse, for such work, to dock workers having the nationality of the Member State concerned is incompatible with Article 90(1) in conjunction with Article 7, and Article 48 or Articles 52 and 59 of the EEC Treaty and cannot be justified either on grounds of public policy or public security or as work in the public service or involving the exercise of official authority. Article 90(1) in conjunction with the abovementioned provisions of the Treaty has direct effect.
- (b) National legislation which encourages, requires or inevitably induces an undertaking referred to in Article 90(1) to abuse a dominant position held by it in a substantial part of the common market or to engage with another concern or undertaking in a concerted practice or abuse or a practice consisting, in the case of dock work which may or may not be solicited and on occasion may not even be carried out, in imposing unfair prices or other unfair conditions or limiting markets or technical development, to the prejudice of users, or in applying dissimilar conditions to equivalent transactions to the disadvantage of other trading parties is incompatible with Article 90(1) in conjunction with Article 86 or 85 of the EEC Treaty.

Article 90(1), in conjunction with Article 86 or 85 of the EEC Treaty, has direct effect.

- (2) Undertakings entrusted with the performance or organization of dock work, meaning the work of loading, unloading, transshipment and storage of goods in the port, cannot normally be regarded as undertakings entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the EEC Treaty, namely services which are of direct benefit to the public. It is for the national court to make specific findings in that regard. If that court reaches a different conclusion, it is for the undertakings

concerned to show to the national court, if they intend to rely on the derogation provided for in Article 90(2), the precise nature of the needs of general interest which require them to act in breach of Article 7, 85 or 86 of the EEC Treaty. It is only where the latter factor can also be shown to the national court and where it can also be proved, if necessary after contact with the Commission, that the condition referred to in the last sentence of Article 90(2) is also met, that it is appropriate to take the view that national legislation such as that described in the foregoing paragraph (1)(a) and (b) is nevertheless not contrary to Article 90(1) in conjunction with one of the Treaty provisions mentioned in the said paragraph (1)(a) and (b).'