30, 48 and 86 of the Treaty have direct effect and give rise for individuals to rights which the national courts must protect.

5. Dock work is not, in principle, a service of general economic interest exhibiting special characteristics, as compared with the general economic interest of other economic activities, which might bring it within the field of application of Article 90(2) of the Treaty. In any case, the fact that the public authorities have entrusted an undertaking with the operation of services of general economic interest does not, by virtue of the aforesaid provision, absolve it from compliance with the rules of the Treaty unless the application of those rules may obstruct the performance of the particular tasks assigned to it and unless the interests of the Community are not affected.

REPORT FOR THE HEARING
in Case C-179/90 *

I — Facts and procedure

1. The Port of Genoa, like all Italian seaports, is administered by a public body, in this case the Conzorzio Autonomo del Porto (hereinafter referred to as 'the CAP'), which, under Article 202 of the Regolamento per la Navigazione Marittima, (Decree No 328 of the President of the Republic of 15 February 1952, hereinafter referred to as 'the Regulation') is the authority appointed to regulate work within the port.

2. Under Article 110 of the Codice della Navigazione (Royal Decree No 327 of 30 March 1942, hereinafter referred to as 'the Code'), the workers employed for dock work are formed into companies or groups having their own legal personality and subject to supervision by the authority appointed to regulate work within the port.

3. The work of loading, unloading, transhipment, storage and general movement of goods or material of any kind within the port is reserved, by the same Article 110, to the said companies or groups.

Article 1172 of the Code grants exclusive rights to carry out dock work and prescribes penalties for any user infringing the rules on the employment of workers.

4. Under Article 150 of the Regulation the dock workers are enrolled in registers. Enrolment and the right to remain

* Language of the case: Italian.

registered are subject, under Articles 152 and 156 of the Regulation, to a number of conditions, one of which is the possession of Italian nationality.

The same conditions apply, under Articles 194 and 194 ter, to enrolment on the register of temporary workers.

5. There is a concession granted by the port authority, under the first paragraph of Article 111 of the Code, to undertakings which are, as a rule, legal persons established under private law, to perform work in the port. Under the final paragraph of that article, such undertakings are required in all cases to use, for the performance of dock work, only the workforce employed by the companies.

In the Port of Genoa these operations by the undertakings were entrusted, as regards ordinary goods, to Merci Convenzionali Porto di Genova SpA (hereinafter referred to as 'Merci'), and as regards containers, to Terminal Contenitori Porto di Genova SpA, the CAP being the sole shareholder of both bodies.

6. Under Article 112 of the Code and Article 203 of the Regulation, the port authority determines the scale of charges and other rules for the services performed by the dock-work companies and groups.

7. Siderurgica Gabrielli SpA (hereinafter referred to as 'Siderurgica') whose registered office is in Padua (Italy), imported a consignment of steel from the Federal Republic of Germany through the Port of Genoa. Although the ship chartered by Siderurgica possessed the necessary equipment for the unloading of the materials, direct unloading was not authorized both because the use of foreign labour was prohibited and because the right to perform dock work was reserved exclusively to the company.

8. For the unloading Siderurgica therefore applied to Merci, which in turn called upon the company.

9. Following a delay in the delivery of the goods, due in particular to a series of strikes by the company's workforce, Siderurgica applied to the President of the Tribunale di Genova (District Court, Genoa) for an injunction, which was duly issued, ordering Merci to deliver the goods immediately.

10. In the adversary proceedings following Merci's application for a discharge of the injunction, Siderurgica requested that Merci be ordered to pay compensation for the damage arising from the delay in delivery and to reimburse the charges made for the compulsory but unsolicited use of labour on the ground that Siderurgica could have carried out the unloading direct.

11. The Tribunale di Genova, taking the view that the action raised a problem of the compatibility of the Italian system with Community law, stayed the proceedings by order of 6 April 1990 and referred to the Court of Justice for clarification the

following questions on the interpretation of the provisions of Articles 7, 30, 37, 52, 59, 85, 86 and 90 of the EEC Treaty:

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

12. The order of the Tribunale di Genova was lodged at the Court Registry on 7 June 1990.

13. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 26 September 1990 by Merci, represented by Sergio Medina and Giuseppe Ferraris of the Genoa Bar, by the Commission of the European Communities, represented by Enrico Traversa, a member of the Legal Service, acting as Agent, assisted by Renzo Maria Morresi of the Bologna Bar, and by Siderurgica, represented by Giuseppe Conte and Giuseppe Michele Giacomini of the Genoa Bar.

14. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. *Merci*, the appellant in the main proceedings, states that it is an undertaking carrying out dock work under a concession but that Article 110, which applies to the companies only, does not relate to it. In this respect it has to endure the monopoly estab-

lished by law in favour of the companies. As may be seen, moreover, from the order for reference, the problems in this case do not relate to any alleged, but non-existent, monopoly of the undertaking but to the monopoly of the company.

As regards the effects of a decision by the Court, which should be to the effect that Article 110 et seq. of the Code are inapplicable, in the main proceedings Merci contends that the claim for compensation for late delivery might in theory be accepted. On the other hand, as regards the claim for reimbursement of the sums paid, the charges for the unnecessary work, should not be attributed to Merci, which received no benefit, but at the most to the company. Merci points out that even if a possible decision by the Court were to prevent it from drawing any immediate advantage in the main proceedings, it shares the doubts of the court of reference as to the compatibility of Italian legislation with Community law, regard being had also to its more general interests.

(a) By way of contribution to answering the questions raised, Merci observes that the Court accepts that the rules of competition apply to dock work in general; that would be the case whether dock work were included in the very wide concept of maritime transport to which Council 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 (Official Journal 1986 L 378, p. 4) extended the rules of procedure for determining and prescribing penalties for breaches of the rules of competition, or whether such work were regarded as an independent activity, but complementary to transport.

The dock-work companies indisputably fall within the concept of 'undertaking' accepted in Community law; what is involved is more particularly undertakings to which special or exclusive rights are granted within the meaning of Article 90(1) of the Treaty. It is clear that Articles 7 and 30 of the Treaty have direct effect; the same is the case with Article 90(1), above all if it is read in conjunction with the substantive rules of Articles 85 and 86 which undeniably have direct effect.

(b) Merci, analysing the first question, reviews the rights which are impaired by the reservation of dock work to the companies.

The nationality condition laid down for the registration of workers is an infringement of Articles 7, 48, 52 and 221 of the Treaty.

The companies' exclusive right also restricts freedom of competition and is consequently contrary to the combined provisions of Articles 85 and 90(1). It is true that the sharing of the national market between the dock-work companies originates, not in an agreement between undertakings, but in statute; however, the Court's recent case-law accepts that Article 85, in conjunction with subparagraph (f) of Article 3 and Article 5 of the Treaty, is applicable in the event of Member States' adopting legislative provisions which, by excluding competition from a given economic sector, produce the same effects as agreements or concerted practices between undertakings.

The companies' exclusive rights, in conjunction with the rules relating to the determination and approval of the scale of charges and the measures by which these charges are in practice fixed also lead to the abuse of a dominant position within the meaning of Article 86 of the Treaty. In particular, the Italian system leads to unfair prices and conditions within the meaning of subparagraph (a) of the second paragraph of Article 86, in so far as the public authorities allow an arbitrary increase in the numbers of workers of which the gangs are made up, which leads to disproportionate costs as compared with output, the imposition of flat-rate charges covering services not performed and a requirement for users to pay for idle gangs or work not carried out. The system also leads to the application of dissimilar conditions to equivalent transactions, within the meaning of subparagraph (c) of the aforesaid provision, by the imposition of supplements and surcharges, in particular for certain operations carried out mechanically or by the varied application of different headings leading to discrimination between users; in that respect Merci cites a number of examples of such abuse common in the Port of Genoa. These practices lead to changes in the means of transport used or of the ports selected, which amount to an obstruction of trade. The port of Genoa, regard being had to its importance at national level and to the volume of traffic, certainly constitutes a relevant market to which Article 86 of the Treaty applies.

As regards Article 30, Merci observes that the users of dock services must bear an unjustified economic charge which, in the Port of Genoa, affects 75% of goods from abroad; these charges may therefore certainly be regarded as measures restricting imports.

(c) As to the second question concerning Article 90(2) of the Treaty, Merci points out that the dock-work companies cannot be regarded as 'undertakings entrusted with the operation of services of general economic interest'. That is clear from the Codice della Navigazione itself, which expressly provides, in relation precisely to the economic interest, for derogations to the reservation and lays down no precise condition with regard to the performance of the service.

The concept of general economic interest relates typically to services for which it is necessary or advisable for prices to be fixed by the public authorities, not on the basis of the laws of supply and demand but in terms of other criteria. The economic interest referred to in Article 90 must be general or public and is contrary to the concept of the special interest of private persons, whether an individual or a group. The companies' monopoly is explained by the protection of the exclusive interest of their worker members. A historical analysis of Italian legislation also makes it clear that the legislature at that time was not concerned with the operation of services of general interest but with the protection of a corporative interest.

By way of conclusion Merci observes that the dock-work companies do not operate a service of general economic interest, are not entrusted with any particular task and are required to comply fully with Articles 85, 86 and 90 of the Treaty.

2. *Siderurgica*, the respondent in the main proceedings, observes in the first place that

it is for the Court of Justice to extract from the questions formulated by the national court the features relating to the interpretation of the Treaty which may be helpful in resolving the dispute. As regards the proceedings before the national court, the actual situation in the Port of Genoa and the Italian legislation, Siderurgica observes in particular that Merci, whose capital is entirely controlled by the CAP, enjoys the exclusive right to carry out dock work relating to ordinary goods. To carry out such work, Merci is bound to use the company's workforce and the charges for such services are laid down and approved by administrative measures of the CAP. Merci may therefore be regarded as an instrument set up by the public administration to safeguard the privileges of a corporative minority.

(a) The scale of charges applied in the Port of Genoa is very complicated, it is anything but transparent and the final cost is impossible to determine in advance. The application of the scale leads to charges which are out of proportion to the services and discriminatory as between users. To illustrate abuses contrary to subparagraphs (a) and (c) of the second paragraph of Article 86 of the Treaty, Siderurgica also cites the examples mentioned by Merci. As regards practices contrary to subparagraph (b) of that provision it refers in addition to the deliberate failure to use improved mechanical equipment. In view of the preponderance of international and intra-Community traffic in the Port of Genoa, all these practices cause a serious obstruction to trade between Member States. With regard both to the volume of traffic and to its nature, the port constitutes a substantial part of the common market. The charges applied, which are approved and made enforceable by the CAP result, for the Port of Genoa, in the highest costs in the whole Community in proportion to the services offered. These costs have an unfavourable effect on the prices of goods passing through the port and have led to considerable reductions in traffic.

(b) As regards the first question referred to the Court, Siderurgica points out that Article 90(1) gives rise to rights for individuals which the Member States must protect whenever it is invoked in conjunction with other rules of law having direct effect.

Article 7 of the Treaty undeniably has such a direct effect and the nationality requirement for workers performing dock work infringes that provision. The same conclusion is inescapable if reference is made to Article 48 on freedom of movement for workers and Article 59 on freedom to provide services, to Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (Official Journal 1986 L 378, p. 1), to Articles 52 and 58 on the right of establishment for companies and to Article 221 on the prohibition of discrimination as regards participation by nationals of the other Member States in the capital of companies.

The Italian system leads to a share-out of the national market in dock-work services which, even though it originates in statute and not in an agreement between undertakings, is none the less contrary to Article 85 of the Treaty.

The Court has consistently held (see the judgment in Case 155/73 *Sacchi* [1974] ECR 409) that, even within the framework of Article 90, the prohibitions contained in Article 86 have direct effect. The Court has also held that a monopoly guaranteed by statute constitutes a case of a dominant position (see, in particular, the judgment in Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261). The services performed in the Port of Genoa are sufficiently important for the port to be regarded as a substantial part of the common market within the meaning of Article 86. Moreover, the services performed, and not only the goods, form part of the trade referred to in that article (see the judgment in Case 155/73 *Sacchi*, previously cited). Abuse of a dominant position, according to the Court, occurs in all cases in which the abuse appears in relation to consumers, users or competitors, actual or potential, as well as in cases in which practices are engaged in which, whilst not directly involving the conduct of the undertaking, but its internal operations, equally cause damage to the consumer because they change the channels of supply (judgments in Case 127/73 *BRT* v *SADAM* [1974] ECR 51; Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1973] ECR 223; Case 26/75 *General Motors* [1975] ECR 1367). The documents in the main proceedings make it clear that unfair and exorbitant conditions are imposed on users, that the highly technical and discretionary nature and the lack of transparency of the scales of charges make it possible for dissimilar conditions to be applied to equivalent transactions, and that the charges made in the Port of Genoa are unfair and the most exorbitant in comparison with those of other ports.

The imposition of unfair and disproportionate charges — mainly to the international traffic accounting for 75% of the volume of traffic in the Port of Genoa — may also be regarded as a measure having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty.

The Italian dock-work scheme further infringes Article 37 of the Treaty in so far as it may be accepted that the few undertakings controlling the market for the services in question, which are not in competition with each other, enjoy a collective monopoly involving possibilities of discrimination against imported goods as against national goods.

(c) As regards the second question referred to the Court, Siderurgica points out that what is involved is not an undertaking entrusted with the operation of services of general economic interest, within the meaning of Article 90(2) of the Treaty. Siderurgica refers in that respect to a decision of the Tribunale Amministrativo Regionale (Regional Administrative Court) which categorically precludes the dock-work companies from being entrusted with the duty of performing a service of economic interest. That position is unanimously accepted by Italian academic legal opinion and is also at the basis of a draft law designed to delete the final paragraph of Article 110 of the Code.

Even on the supposition that the undertaking or the company, or both, are operating a service of general economic interest, it is not shown that the practices prohibited by Article 86 are necessary for the performance of their tasks.

Siderurgica therefore proposes that the answer to the questions raised should be:

' (1) The provisions of Article 90 of the Treaty establishing the EEC and the prohibitions contained in Articles 7, 30, 85 and 86 of the Treaty confer on persons subject to Community law rights which the Member States are required to observe.

(2) Articles 48, 52 and 59 of the Treaty are incompatible with a national measure . . . prohibiting undertakings authorized to carry on operations within the ports from using, for the operations of their undertaking, workers directly employed by that undertaking, with a corresponding requirement to have recourse exclusively to workers organized into companies or working groups in accordance with Italian legislation.

(3) The provisions of Article 90 of the Treaty, in conjunction with the freedom guaranteed by Articles 48, 52 and 59 of that Treaty, are incompatible with national rules which, in the case of the importation by sea into the territory of a Member State of goods from another Member State, exclusively reserve to given dock-work undertakings or companies, or both, the right to load or unload goods in national ports, even when it is possible to execute the work with the equipment and crew of the vessel.

(4) Article 90(1) of the Treaty makes it impossible to retain in force national rules which:

(a) grant dock-work companies or groups of workers the exclusive right to work in a port;

(b) prohibit an undertaking authorized to work in the ports from using, for its operations, workers employed in that undertaking;

(c) require such undertakings, by imposing penalties for any other course of action, to use for their operations and subject to compulsory charges, solely workers formed into companies or working groups in accordance with domestic legislation and, furthermore, having exclusively Italian nationality.

(5) Article 90(1) of the Treaty precludes the maintaining in force of national rules which, by granting to local dock-work companies (or to groups of workers located in the port) the exclusive right to work in the port, prohibits, by imposing penalties for failure to comply with the prohibition:

(a) the pursuit of these activities by way of provision of services by ships from other Member States with the equipment and crew of the vessel;

(b) the pursuit of these same activities by way of establishment by undertakings from other Member States with a stable workforce and equipment within the port.

(6) Article 7 of the Treaty is not compatible with national rules which deny to nationals of the Member States and undertakings established according to the legislation of those States the opportunity to provide services occasionally or permanently, or both, within the national ports or to carry out the operations of the undertaking, or both, in loading and unloading goods imported from and exported to other Member States.

(7) A national measure which authorizes the application of unfair and disproportionate charges for the unloading of goods in a national port is such as to obstruct trade between Member States and is, as such, prohibited by Articles 9 and 30 of the Treaty if, by reason of the greater quantities of goods from abroad as compared with those from other national ports, such charges have a proportionately greater effect on the foreign goods by thus making imports more onerous and more difficult.

(8) Article 85 of the Treaty is not compatible with national rules which share out geographically the national market in dock-work services between the companies established in accordance with domestic law in the geographical framework of the various ports.

(9) Article 86 of the Treaty must be interpreted as meaning that a national company, being the concessionnaire of the right to provide dock work and having a dominant position within a substantial part of the common market:

(a) is imposing unfair trading conditions if the charges applied to users are significantly higher than those normal in other ports for equivalent services;

(b) is applying dissimilar conditions to equivalent transactions with other trading parties if the scale of charges, by reason of the technicalities which allow of discretionary application, creates discrimination between users.

(10) Article 90(2) of the Treaty establishing the EEC must be interpreted as meaning that:

(a) the movement of goods in transit in national ports does not represent the operation of an undertaking of general economic interest;

(b) undertakings entrusted with the performance of dock work are required to observe the rules of the Treaty, and in particular the rules of competition, since the application of such rules does not obstruct loading and unloading in national ports of goods intended for or coming from other Member States of the Community;

(c) intra-Community trade is jeopardized, contrary to the principles on which the Community is founded, by a scheme of derogation from the observance of the rules of the Treaty, where such a scheme is applied to undertakings entrusted with the performance of services within the ports.'

3. The *Commission* states that the two questions from the Tribunale di Genova must be interpreted as follows:

'(1) In the present state of Community law, is it possible to reserve to nationals the performance of dock work in Italian ports . . . ? If such a "reservation" is not authorized by Community law, does Community law give rise direct, for persons subject to such law, to rights which the Member States must respect?

(2) Whether, in the present state of Community law, the performance of dock work may be reserved by a monopoly scheme . . . to dock-work companies or groups subject to the public port authority and on the basis of rules laid down and charges determined by the public authority and consequently made compulsory, where loading and unloading operations capable of being carried out by the equipment and crew of the vessel are concerned; in the event of such a "reservation" not being authorized by Community law, does Community law give rise direct, for persons subject to such law, to rights which the Member States must respect?'

(a) According to the Commission, Articles 30 and 37 of the Treaty are not relevant in this case. At first sight it is not clear that the national rules in question are such as to obstruct the marketing in Italy of imported products as against national products. Article 37 of the Treaty, according to the judgment in Case 155/73 *Sacchi*, previously cited, relates to trade in goods and not a monopoly over the provision of services. In a judgment in Case 271/81 *Amélioration de l'Elevage* v *Mialocq* [1983] ECR 2057, the Court held that Article 37 cannot relate to a monopoly over the provision of services when it does not contravene the principle of the free movement of goods by discriminating against imported products as opposed to products of domestic origin.

(b) With regard to the first question, as reformulated, the Commission thinks that, whilst it is not necessary to settle the question whether the activity of the workforce in the undertakings or in the

dock-work company, or both, is to be regarded as gainful employment, or as an activity as a self-employed person or that of an undertaking, or both, it must be acknowledged that the Italian rules are a breach of the prohibition of all discrimination on grounds of nationality embodied in Articles 7, 48 and 52 of the Treaty. The Court has consistently held that those provisions have direct effect. However, the Commission doubts whether the first question is relevant for resolving the dispute before the national court; in fact, the impossibility of unloading the goods direct is due less to the conditions of nationality laid down by the Italian legislation than to the reservation of dock work to the companies. If the national court were to find that Articles 7 and 48 or 7 and 52 were relevant it would have to recognize that the national rules were incompatible with those provisions and give the latter precedence over national law.

Irrespective of the possible application of Article 59 in the light of Article 90, the Commission thinks that the Italian rules, which prohibit a person providing services, established in another Member State, from carrying out dock work, are contrary to Article 59 of the Treaty. Dock work falls within the services governed by Article 60 of the Treaty and Article 59 requires the abolition of restrictions on freedom to provide them. That freedom can be restricted only on grounds of public policy, public security or public health or by objective requirements inherent in the nature of the services, conditions which are not satisfied in this case. Nor can it be accepted, by reference to the combined provisions of Articles 66 and 55 of the Treaty, that the services in question represent the exercise of official authority.

(c) In the context of the second question the Commission considers successively Article 90(1) and (2) in the present state of Community legislation and case-law, the powers of the national court in the application of that article and its applicability to the undertakings or the company, or both, operating in the Port of Genoa.

— Article 90(1) allows States to grant special or exclusive rights to undertakings on condition that the undertakings operate without infringing the prohibitions specifically laid down by the Treaty. The fact that Article 90(1) refers to the Member States does not prevent all undertakings operating within the framework of the Community, including public undertakings and those operating under a statutory monopoly from being fully subject to the rules of the Treaty, irrespective of whether they are public or private undertakings. Article 86 also applies to them, subject only to the reservation that the undertaking is not to be penalized on the basis of the rules of Community law where it is undeniable that it has only complied with a mandatory measure adopted by the Member State in contravention of Article 90(1).

— Without denying national authorities the right to impose scales of charges on an undertaking enjoying a special or exclusive right (see the judgment in Case 66/86 *Ahmed Saeed* [1989] ECR 803), the Court has held that the imposition, by the undertaking on the user, of unfair charges constitutes an abuse, within the meaning of Article 86, in the framework

of Article 90 (judgments in Case 155/83 *Sacchi*, previously cited; and Case 30/87 *Bodson* [1988] ECR 2479).

According the the Commission, an undertaking which enjoys exclusive rights and thereby has a dominant position and which applies unfair charges infringes subparagraph (a) of the second paragraph of Article 86 of the Treaty: if the scale of charges has been imposed by the public authority and if the undertaking has had no margin of discretion with regard to their application, it will be liable for the illegal action together with the State, in accordance with Article 90(1), even though that action does not involve it in penalties; if the undertaking applies charges higher than those determined by the public authority it would be all the more liable and would incur penalties under Article 86, irrespective of the State's liability.

— As regards Article 90(2) of the Treaty, the Commission states that that provision applies to both public and private undertakings to which the State has entrusted a service of general interest. That concept, which justifies derogations from the Treaty, has always been restrictively interpreted by the Court (see the judgments in Case 10/71 *Luxembourg* v *Muller* [1971] ECR 723; in Case 127/73 *BRT*, previously cited; and in Case 66/86 *Ahmed Saeed*, previously cited).

— As regards the powers of the national court in the application of Article 90, the Commission points out that the Court has consistently held that Articles 85 and 86 have direct effect, even in the case of undertakings coming under Article 90 (see the judgments in Case 155/73 *Sacchi*, previously cited; and in Case 90/76 *van Ameyde* v *UCI* [1977] ECR 1091). On the other hand the Court held, in the judgments in Case 10/71 *Luxembourg* v *Muller*, previously cited, in Case 172/82 *Inter-Huiles* [1983] ECR 555 and in Case 41/83 *Italy* v *Commission* [1985] ECR 873, that Article 90(2) was not capable of giving rise for individuals to rights which the national courts must protect. However, the Court stated, in the judgments in Case 127/73 *BRT* and in Case 66/86 *Ahmed Saeed*, previously cited, that it is for the national court to establish whether an undertaking which avails itself of Article 90(2) has actually been entrusted by the Member State with the operation of a service of general economic interest and whether the undertaking's conduct is necessary for the performance of its task of general interest.

— Applying the principles thus elucidated to the situation existing in the Port of Genoa, the Commission observes that the dock-work undertaking or the dock-work company, or both, are undertakings to which the Italian State has granted special or exclusive rights within the meaning of Article 90(1).

A breach of Article 85 of the Treaty, in conjunction with Article 90, arises only if the undertaking and the company have concluded an agreement relating in particular to the criteria for calculating the charges applicable to users of the port.

Article 59, in conjunction with Article 90, is infringed when, as in this case, the undertaking or undertakings enjoying special or exclusive rights prevent the free provision of services, in this case the loading and unloading of goods, by persons providing services who are established in other Member States.

There is also a breach of Article 86, in conjunction with Article 90, when the undertaking or dock-work company abuses its dominant position so as to obtain advantages which it could not have obtained in conditions of normal competition. Applying these principles to this case, the Commission emphasizes that the product in question is constituted by the dock-work services, that the Port of Genoa, in view of its size, may be regarded as the geographical market concerned and that the undertaking, in this case Merci, the exclusive concessionnaire of dock work relating to a certain category of goods, has a dominant position. The national court may find that Merci has infringed Article 86 if it is established that Merci was imposing upon the user unsolicited services, thus going beyond the exclusive powers conferred by law, or unnecessary services, or that it was imposing charges in excess of the legal limits, or was imposing unfair charges, regard being had to the services actually performed. There would also be an abuse if the charges made included labour charges unrelated to the actual need for labour or the actual cost of the work.

As regards the applicability of Article 90(2), the Commission points out that the undertaking or dock-work company is certainly performing a service of public interest, but one which cannot automatically be described as a service of general economic interest. Moreover the exclusive rights conferred on the undertakings are concerned with the interests of the dock workers. Even on the supposition that the undertaking and the company are operating a service of general economic interest their conduct is contrary to Article 86 as long as it is not shown that the prohibitions contained therein are incompatible with the performance of their task.

The Commission therefore proposes that the answer to the questions referred to the Court should be as follows:

'(1) National rules reserving to nationals the performance of dock work in national ports as regards in particular the loading and unloading of goods is contrary to Article 48(2) or Article 52 of the EEC Treaty; those articles give rise for individuals to rights which the national courts must protect.

(2) National rules which, without justification based on a general interest, reserve solely to dock-work companies established under national law dock work in national ports, in particular the loading and unloading of goods, by making it impossible for such work to be performed by the ships of other Member States using the equipment and crew of the vessel are incompatible

with Article 59 of the EEC Treaty; that article gives rise for individuals to rights which the national courts must protect.

(3) Where an undertaking which holds an exclusive concession for the performance of dock work in a port which forms a substantial part of the common market (a) imposes unfair and non-transparent charges, and (b) makes compulsory the use of the workforce of dock work companies established in the port, even when such dock work, in particular the loading and unloading of goods, could be performed direct by the ships of other Member States using the equipment and crew of the vessel, its conduct constitutes the abuse of a dominant position within the meaning of Article 86 of the EEC Treaty if and so far as the undertaking enjoying the special or exclusive right is not in a position to satisfy in their entirety the requirements of users of the dock-work services; Article 86 gives rise for individuals to rights which the national courts must protect.

(4) Article 90(1) of the EEC Treaty prohibits the authorities of a Member State from requiring an undertaking on which they have already conferred special or exclusive rights such as those inherent in the performance of dock work in a port forming a substantial part of the common market (a) to reserve such activities solely to nationals in contravention of Articles 48 and 52 of the Treaty; (b) to prevent the performance of such activities, by way of the provision of services, by ships of other Member States using the equipment and crew of the vessel in contravention of Article 59 of the Treaty; (c) to apply unfair charges and to require users of the port in all circumstances to use the workforce of the established dock-work companies of that port in contravention of Article 86 of the Treaty; Article 90(1) of the Treaty, in conjunction with Articles 48, 52, 59 and 86, gives rise for individuals to rights which they may assert against the public authorities of a Member State and which the national courts must protect.

(5) Irrespective of the description of an undertaking holding a concession or a dock-work company to which the right to perform dock work, such as in particular the loading and unloading of goods in a port, is exclusively reserved, as an undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty, the special rights conferred upon it and the charges which it applies do not appear to be justified by any requirement related to the performance of the particular task entrusted to it, and such a requirement may obstruct the application of the rules of the Treaty, in particular the rules on competition.'

F. A. Schockweiler

Judge-Rapporteur