JUDGMENT OF THE COURT
10 December 1991 *

In Case C-179/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by theTribunale di Genova (District Court, Genoa) Italy, for a preliminary ruling in the proceedings pending before that court between

Merci Convenzionali Porto di Genova SpA

and

Siderurgica Gabrielli SpA

on the interpretation of Articles 7, 30, 85, 86 and 90 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Merci Convenzionali Porto di Genova SpA, by Sergio Medina and Giuseppe Ferraris, of the Genoa Bar,

* Language of the case: Italian

— Siderurgica Gabrielli SpA, by Giuseppe Conte and Giuseppe Michele Giacomini, of the Genoa Bar,

— the Commission of the European Communities, by Enrico Traversa, a member of the Legal Service, acting as Agent, assisted by Renzo Maria Morresi, of the Bologna Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Merci Convenzionali Porto di Genova SpA, Siderurgica Gabrielli SpA and the Commision at the hearing on 30 May 1991,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1991,

gives the following

Judgment

1 By order dated 6 April 1990, which was received at the Court on 7 June 1990, the Tribunale di Genova (District Court, Genoa) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 7, 30, 85, 86 and 90 of the Treaty.

2 The questions 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 the unloading of goods in the port of Genoa.

3 It appears from the documents sent to the Court that in Italy the loading, unloading, transhipment, storage and general movement of goods or material of

any kind within the port are reserved, under Article 110 of the Codice della Navigazione (Navigation Code), to dock-work companies whose workers, who are also members of these companies, must, under Articles 152 and 156 of the Regolamento per la Navigazione Marittima (Regulation on Maritime Navigation), be of Italian nationality. Any failure to respect the exclusive rights vested in the dock-work companies results in the imposition of the penalties laid down by Article 1172 of the Codice della Navigazione.

4 Article 111 of the Codice della Navigazione grants to dock-work undertakings the right to organize dock work on behalf of third parties. For the performance of dock work such undertakings, which are, as a general rule, companies established under private law, must rely exclusively on the dock-work companies.

5 Siderurgica, under the Italian rules, applied to Merci, an undertaking enjoying the exclusive right to organize dock work in the Port of Genoa for ordinary goods, for the unloading of a consignment of steel imported from the Federal Republic of Germany, although the ship's crew could have peformed the unloading direct. For the unloading Merci in turn called upon the Genoa dock-work company.

6 As a result of a delay in the unloading of the goods, due in particular to strikes by the dock-work company's workforce, a dispute arose between Siderurgica and Merci in the course of which Siderurgica demanded compensation for the damage it had suffered as a result of the delay, and the reimbursement of the charges it had paid, which it regarded as unfair having regard to the services performed. The Tribunale di Genova, before which the dispute was brought, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the course of the procedure and the written observations submitted to the Court, which are hereinafter mentioned only in so far as is necessary for the reasoning of the Court.

The first question

8 By its first question the national court is essentially asking whether Article 90(1) of the Treaty, in conjunction with Articles 7, 30 and 86 thereof, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organize dock work and require it, for the performance of such work, to have recourse to a dock-work company formed exclusively of nationals, and whether those articles give rise to rights for individuals which the national courts must protect.

9 To answer this question, as it has been reformulated, it should be noted *in limine* that a dock-work undertaking enjoying the exclusive right to organize dock work for third parties, as well as a dock-work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State within the meaning of Article 90(1) of the Treaty.

10 That article provides that in the case of such undertakings Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those provided for in Article 7 and the articles relating to competition.

11 As regards, in the first place, the nationality condition imposed on the workers of the dock-work company, it should be recalled, to begin with, that according to the case-law of the Court, the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination (see for example Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraph 12).

12 As regards workers, that principle has been specifically applied by Article 48 of the Treaty.

13 In this respect it should be recalled that Article 48 of the Treaty precludes, first and foremost, rules of a Member State which reserve to nationals of that State the right to work in an undertaking of that State, such as the Port of Genoa company which is at issue before the national court. As the Court has already declared (see, for example, the judgment in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17) the concept of 'worker' within the meaning of Article 48 of the Treaty pre-supposes that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. That description is not affected by the fact that

the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association.

14 In the second place, as to the existence of exclusive rights, it should be stated first that with regard to the interpretation of Article 86 of the Treaty the Court has consistently held that an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgments in Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 28; Case C-260/89 *ERT* v *DEP* [1991] ECR I-2925, paragraph 31).

15 As regards the definition of the market in question, it may be seen from the order for reference that it is that of the organization on behalf of third persons of dock work relating to ordinary freight in the Port of Genoa and the performance of such work. Regard being had in particular to the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the Member State concerned, that market may be regarded as constituting a substantial part of the common market.

16 It should next be stated that the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86.

17 However, the Court has had occasion to state, in this respect, that a Member State is in breach of the prohibitions contained in those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position (see the judgment in Case C-41/90 *Höfner*, cited above, paragraph 29) or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses (see the judgment in Case C-260/89 *ERT*, cited above, paragraph 37).

18 According to subparagraphs (a), (b) and (c) of the second paragraph of Article 86 of the Treaty, such abuse may in particular consist in imposing on the persons requiring the services in question unfair purchase prices or other unfair trading conditions, in limiting technical development, to the prejudice of consumers, or in the application of dissimilar conditions to equivalent transactions with other trading parties.

19 In that respect it appears from the circumstances described by the national court and discussed before the Court of Justice that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question are, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involves an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers.

20 In these circumstances it must be held that a Member State creates a situation contrary to Article 86 of the Treaty where it adopts rules of such a kind as those at issue before the national court, which are capable of affecting trade between Member States as in the case of the main proceedings, regard being had to the factors mentioned in paragraph 15 of this judgment relating to the importance of traffic in the Port of Genoa.

21 As regards the interpretation of Article 30 of the Treaty requested by the national court, it is sufficient to recall that a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with that article, which prohibits quantitative restrictions on imports and all measures having equivalent effect (see the judgment in Case 13/77 *GB-INNO-BM* v *ATAB* [1977] ECR 2115, paragraph 35) in so far as such a measure has the effect of making more difficult and hence of impeding imports of goods from other Member States.

22 In the main proceedings it may be seen from the national court's findings that the unloading of the goods could have been effected at a lesser cost by the ship's crew, so that compulsory recourse to the services of the two undertakings enjoying exclusive rights involved extra expense and was therefore capable, by reason of its effect on the prices of the goods, of affecting imports.

23 It should be emphasized in the third place that even within the framework of Article 90, the provisions of Articles 30, 48 and 86 of the Treaty have direct effect and give rise for interested parties to rights which the national courts must protect (see in particular, as regards Article 86 of the Treaty, the judgment in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 18).

24 The answer to the first question, as reformulated, should therefore be that:

Article 90(1) of the EEC Treaty, in conjunction with Articles 30, 48 and 86 of the Treaty, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organize dock work and require it for that purpose to have recourse to a dock-work company formed exclusively of national workers;

Articles 30, 48 and 86 of the Treaty, in conjunction with Article 90, give rise to rights for individuals which the national courts must protect.

The second question

25 In its second question the national court is in essence asking whether Article 90(2) of the Treaty must be interpreted as meaning that a dock-work undertaking and/or company in the situation described in the first question must be regarded as being entrusted with the operation of services of general economic interest within the meaning of that provision.

26 For the purpose of answering that question it should be borne in mind that in order that the derogation to the application of the rules of the Treaty set out in Article 90(2) thereof may take effect, it is not sufficient for the undertaking in question merely to have been entrusted by the public authorities with the operation of a service of general economic interest, but it must be shown in addition that the application of the rules of the Treaty obstructs the performance of the particular tasks assigned to the undertaking and that the interests of the Community are not affected (see the judgments in Case 311/84 *CBEM* v *Compagnie Luxembourgeoise* [1985] ECR 3261, paragraph 17, and in Case C-41/90 *Höfner*, cited above, paragraph 24).

27 In that respect it must be held that it does not appear either from the documents supplied by the national court or from the observations submitted to the Court of Justice that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such a task.

28 The answer to the second question should therefore be that Article 90(2) of the Treaty must be interpreted as meaning that a dock-work undertaking and/or company in the position described in the first question may not be regarded, on the basis only of the factors set out in that description, as being entrusted with the operation of services of general economic interest within the meaning of that provision.

Costs

29 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale di Genova by order of 6 April 1990, hereby rules:

1. **Article 90(1) of the EEC Treaty, in conjunction with Articles 30, 48 and 86 of the Treaty, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organize dock work and require it for that purpose to have recourse to a dock-work company formed exclusively of national workers;**

2. **Articles 30, 48 and 86 of the Treaty, in conjunction with Article 90, give rise to rights for individuals which the national courts must protect;**

3. **Article 90(2) of the Treaty must be interpreted as meaning that a dock-work undertaking and/or company in the position described in the first question may not be regarded, on the basis only of the factors set out in that description, as being entrusted with the operation of services of general economic interest within the meaning of that provision.**

Due Slynn Joliet Schockweiler

Grévisse Kapteyn Mancini Kakouris

Moitinho de Almeida Rodríguez Iglesisas Díez de Velasco

Delivered in open court in Luxembourg on 10 December 1991.

J.-G. Giraud
Registrar

O. Due
President