# JUDGMENT OF THE COURT (Sixth Chamber)

16 September 1999 *

In Case C-22/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hof van Beroep, Ghent, Belgium, for a preliminary ruling in the criminal proceedings before that court against

**Jean Claude Becu,**

**Annie Verweire,**

**NV Smeg,**

**NV Adia Interim,**

on the interpretation of Article 90(1) and (2) of the EC Treaty (now Article 86(1) and (2) EC), read in conjunction with Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC),

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray and R. Schintgen (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— NV Smeg, by W. de Brabandere, of the Ghent Bar,

— the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by G. van Gerven and K. Coppenholle, of the Brussels Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, assisted by D. del Gaizo, Avvocato dello Stato,

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Service in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by W. Wils and B. Mongin, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, represented by K. Veranneman, of the Brussels Bar, and K. Coppenholle, of the Italian Government, represented by D. Del Gaizo, of the Netherlands Government, represented by J.S. van den Oosterkampf, Deputy Legal Adviser in the Ministry

of Foreign Affairs, acting as Agent, and the Commission, represented by W. Wils, at the hearing on 11 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

gives the following

## Judgment

1 By order of 15 January 1998, which was received at the Court on 28 January 1998, the Hof van Beroep (Court of Appeal), Ghent, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 90(1) and (2) of the EC Treaty (now Article 86(1) and (2) EC), read in conjunction with Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).

2 Those questions were raised in the course of criminal proceedings against Mr Becu and Mrs Verweire, and against the companies NV Smeg ('Smeg') and NV Adia Interim ('Adia Interim'), of which they are director and manager respectively, all of whom are accused of having caused dock work to be performed in the Ghent port area by non-recognised dockers, in breach of the provisions of the Law of 8 June 1972 organising dock work (*Staatsblad*, 10 August 1972, p. 8826, 'the 1972 Law').

## The national rules

3 Article 1 of the 1972 Law states: 'No one shall cause dock work in port areas to be performed by anyone other than recognised dockers'. Under Article 4 of that law, a fine is to be imposed on employers, or their employees or agents, who have caused or permitted dock work to be performed in breach of the provisions of that law or the decrees implementing it.

4 As regards the definition of 'port areas' and 'dock work', Article 2 of the 1972 Law refers to the royal decrees adopted pursuant to the Law of 5 December 1968 on collective labour agreements and joint committees (*Staatsblad*, 15 January 1969, p. 267, 'the 1968 Law'). Articles 35 and 37 of the 1968 Law provide that joint committees of employers and workers, and, at the joint committees' request, joint subcommittees, are to be established by the King. Those committees and subcommittees are composed of a chairman and a vice-chairman, an equal number of representatives of employers' and workers' organisations and two or more secretaries (Article 39). They have as their task, *inter alia*, to assist with the drawing-up of collective labour agreements by the organisations represented (Article 38).

5 Pursuant to Article 6 of the 1968 Law, collective agreements may be concluded within the joint committee or subcommittee itself. In that case, Articles 24 and 28 of that law provide that they must be concluded by all the organisations represented on the (sub)committee and may, at the request of one of the organisations or the body within which they have been concluded, be made mandatory by the King. According to Article 31 of the 1968 Law, an agreement which has been made mandatory is binding on all the employers and workers covered by the joint committee or subcommittee concerned, in so far as they fall within the scope of the agreement as defined therein.

6 Article 1 of the Royal Decree of 12 January 1973 establishing and determining the appointment and powers of the Joint Ports Committee (*Staatsblad*,

23 January 1973, p. 877), as amended, in particular, by the Royal Decree of 8 April 1989 (*Staatsblad*, 20 April 1989, p. 6599, 'the 1973 Royal Decree'), defines 'dock work' as follows:

'the handling in any form of goods transported by sea-going ship or inland waterway vessel, by railway goods wagon or lorry, and the ancillary services connected with those goods, whether such operations take place in docks, on navigable waterways, on quays or in establishments engaged in the importation, exportation and transit of goods, as well as the handling in any form of goods transported by sea-going ship or inland waterway vessel to or from the quays of industrial establishments'.

7 According to Article 1 of the 1973 Royal Decree, 'handling' means:

'loading, unloading, stowing, unstowing, restowing, unloading in bulk, unmooring, classifying, sorting, sizing, stacking, unstacking, and assembling and disassembling individual consignments'.

8 The 1973 Royal Decree also defines the geographical limits of various 'port areas', including that of Ghent.

9 The definitions of 'dock work' and 'port areas' are reproduced in Article 2 of the Royal Decree of 12 August 1974 establishing and determining the appointment and powers of joint ports subcommittees, (*Staatsblad*, 10 September 1974, p. 11020, 'the 1974 Royal Decree'). That decree, at the request of the Joint Ports Committee, set up several joint subcommittees, including one for the Port of Ghent. Those subcommittees are responsible for all workers and their employers

who, whether as a principal or an ancillary activity, perform dock work in the port areas concerned.

10 Article 3 of the 1972 Law states: 'the King shall determine the conditions and detailed rules for the recognition of dockers, on the advice of the Joint Committee responsible for the port area concerned'.

11 For the Port of Ghent, those conditions and detailed rules are determined by the Royal Decree of 21 April 1977 on the conditions and detailed rules for the recognition of dockers in the Ghent port area (*Staatsblad*, 10 June 1977, p. 7760, 'the 1977 Royal Decree'), which was adopted on the advice of the joint subcommittee responsible for that port.

12 Article 3(1) of the 1977 Royal Decree provides:

'A worker who satisfies the following conditions shall be eligible to seek recognition as a docker. He must:

1. be a person of good conduct and good moral character;

2. have been declared medically fit by the dock-work medical service;

3. be aged between 21 and 45 years inclusive;

4. have a sufficient knowledge of the language of the trade to be able to understand all orders and instructions regarding the work to be done;

5. have attended preparatory courses on safety at work;

6. have the technical competence necessary to be able to do the work;

7. not have been the subject of a measure withdrawing recognition as a docker...'

13 Article 3(2) of the 1977 Royal Decree provides that, 'in making its decision on recognition, the joint subcommittee shall have regard to labour requirements'.

**The dispute in the main proceedings**

14 Smeg is a company incorporated under Belgian law which operates a grain warehousing business in the Ghent port area, as defined in the Royal Decrees of 1973 and 1974. Its activities consist, on the one hand, in the loading and unloading of grain boats and, on the other hand, in the storage of grain on behalf of third parties. The goods are transported to its premises by boat, train or lorry.

15 For work carried out on the quays, that is to say 'dock work' *stricto sensu*, such as the loading and unloading of grain boats, Smeg uses recognised dockers. For the other work, which takes place when the grain is in the silos, namely loading and unloading in the warehouse, weighing, moving, maintenance of the facilities, operations in the silos and on the weighbridge, and the loading and unloading of trains and lorries, it uses not recognised dockers but workers whom it employs itself or temporary workers made available to it by Adia Interim, a temporary employment agency established under Belgian law.

16 The Openbaar Ministerie (Public Prosecutor's Department) brought proceedings against Smeg and its director, Mr Becu, and against Adia Interim and its manager, Mrs Verweire, before the Correctionele Rechtbank (Criminal Court), Ghent, on the ground that they had caused work to be carried out in the Ghent port area by non-recognised dockers, in breach of the provisions of the 1972 Law.

17 By judgment of 20 November 1995, the Correctionele Rechtbank, Ghent, acquitted the defendants after upholding their submission that the 1972 Law and the Royal Decrees of 1973 and 1974 were incompatible with Article 90(1) in conjunction with Article 86 of the EC Treaty. It held the differences between the hourly wage of the workers employed by Smeg (BEF 667) and that of recognised dockers (BEF 1 355 minimum) to be 'unfair' within the meaning of point (a) of the second paragraph of Article 86 of the Treaty in so far as, pursuant to the provisions of the 1972 Law, even ordinary maintenance operations carried out on Smeg's premises should have been performed by recognised dockers.

18 The Openbaar Ministerie appealed against the judgment at first instance to the Hof van Beroep, Ghent. That court found that the facts of the case brought before it were very similar to those which had given rise to Case C-170/90 *Merci Convenzionali* v *Porto di Genova* [1991] ECR I-5889 ('the *Merci* judgment'). It pointed out, however, that there was a fundamental difference between the two cases in so far as, unlike the Italian legislation at issue in *Merci*, the Belgian legislation merely recognises the occupation of dockers, who alone are entitled to

carry out given activities within a clearly defined area, but does not by any means confer a monopoly on undertakings or on trade associations.

19 In those circumstances, the Hof van Beroep, Ghent, decided to stay proceedings and refer the following two questions to the Court:

'1. As Community law now stands, can those subject to it, be they natural or legal persons, acquire rights under Article 90(1) of the EC Treaty, in conjunction with Articles 7, 85 and 86 thereof, which Member States must respect, where the loading and unloading in port areas of, in particular, goods imported by sea from one Member State into the territory of another Member State and port work in general are reserved exclusively to "recognised dockers", the conditions and procedures for the recognition of whom are determined by the King on the advice of the joint committee having responsibility for the port area in question, and where binding rates must be applied, even though the work can be performed by ordinary (that is to say non-recognised) dockers?

2. Are recognised dockers, as referred to in Article 1 of the Law of 8 June 1972 and having the exclusive right to perform dock work within port areas, as defined in greater detail in the relevant legislative provisions, to be regarded as entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the EC Treaty, and would they no longer be able to carry out their special duties if Article 90(1) and the prohibitory provisions of Articles 7, 85 and 86 of the EC Treaty were to be applied to them?'

## The first question

20 By its first question, the national court is asking essentially whether Article 90(1) of the Treaty, read in conjunction with the first paragraph of Article 6, and Articles 85 and 86 thereof, is to be interpreted as meaning that it confers on individuals the right to oppose legislation of a Member State which requires them to have recourse, for the performance of dock work, exclusively to recognised dockers such as those referred to in the 1972 Law, and to pay those dockers remuneration far in excess of the wages of their own employees or the wages they pay to other workers.

21 In this regard, it must first be pointed out that it follows from the case-law of the Court that the provisions of the Treaty which, like the first paragraph of Article 6 and Articles 85 and 86, have direct effect remain directly effective and give rise for individuals to rights which the national courts must protect even in the context of Article 90 (see in particular the *Merci* judgment, paragraph 23, and Case C-242/95 *GT-Link* v *DSB* [1997] ECR I-4449, paragraph 57).

22 It should next be recalled that Article 90(1) of the Treaty provides that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94'.

23 Finally, it must be found that, by allowing only a particular category of persons to perform certain work within well-defined areas, the national legislation at issue in the main proceedings grants to those persons special or exclusive rights within the meaning of Article 90(1). This is particularly true in view of the fact that the recognition granted by the Ghent Joint Subcommittee on the basis of the 1977 Royal Decree is valid only for the Ghent port area and is not automatically granted to all dockers satisfying the conditions for eligibility to seek such recognition but is conferred according to labour requirements.

24 However, the prohibition contained in Article 90(1) of the Treaty, which appears in Part Three, Title V (now, after amendment, Title VI EC), Chapter 1 — relating to rules on competition —, Section 1 — entitled 'Rules applying to undertakings' — of the EC Treaty, is applicable only if the measures to which it refers concern 'undertakings'.

25 The conditions relating to work and pay, in particular those of recognised dockers in the Ghent port area, are governed by collective labour agreements concluded on the basis of the 1968 Law and made mandatory by Royal Decree pursuant to that law (see, as regards the Port of Ghent, the Royal Decree of 11 May 1979, *Staatsblad*, 28 June 1979, p. 7378). Furthermore, the Belgian Government maintains, without being contradicted on this point, that the recognised dockers used by the various undertakings which commission dock work are in fact engaged under fixed-term contracts of employment, as a rule for short periods, and for the purpose of performing clearly defined tasks.

26 It must therefore be concluded that the employment relationship which recognised dockers have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as 'workers' within the meaning of Article 48 of the EC Treaty (now, after amendment, Article 39 EC), as interpreted by the case-law of the Court (see, as regards the definition of 'worker', the *Merci* judgment, paragraph 13). Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law.

27 It should be added that, even taken collectively, the recognised dockers in a port area cannot be regarded as constituting an undertaking.

28 On the one hand, it follows from the case-law of the Court that a person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association (see, to this effect, the *Merci* judgment, paragraph 13).

29 On the other hand, as the Advocate General points out in points 58 to 60 of his Opinion, neither the order for reference nor the answers to the questions put by the Court show that the recognised dockers in the Ghent port area are linked by a relationship of association or by any other form of organisation which would support the inference that they operate on the market in dock work as an entity or as workers of such an entity.

30 It follows from the foregoing considerations that legislation such as that at issue in the main proceedings cannot fall under the prohibition laid down in Article 90(1) of the Treaty, which is applicable only to undertakings, read in conjunction with any other provision of the Treaty.

31 Nor is such legislation capable of falling under the prohibitions laid down in Articles 85 and 86 of the Treaty, taken separately, which are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations adopted by Member States (see, *inter alia*, C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del Porti di Genova and Others* [1998] ECR I-3949, paragraph 35).

32 As for the first paragraph of Article 6 of the Treaty, which lays down the general principle of the prohibition of discrimination on grounds of nationality, it is settled case-law that it applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific rule against discrimination (see, to this effect, Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 19, and Case C-336/96 *Gilly* v *Directeur des Services Fiscaux du Bas-Rhin* [1998] ECR I-2793, paragraph 37). That principle has been specifically applied, as regards employed persons, by Article 48 of the Treaty and,

as regards the freedom to provide services, by Article 59 of the Treaty (now, after amendment, Article 49 EC).

33 There is nothing in the actual provisions of the national legislation, in the order for reference, or even in the observations submitted to the Court which would support the view that there is any discrimination on grounds of nationality as regards the right to take up and pursue the activity of recognised docker.

34 Furthermore, since the order for reference does not mention the question whether the obligation to have recourse, for dock work, to the services of recognised dockers such as those referred to in the 1977 Royal Decree is capable of constituting, for other recognised dockers and/or workers satisfying the conditions for recognition, a barrier for the purposes of Article 48 and/or Article 59 of the Treaty, the Court has not been put in a position to rule on this issue. It is for the national court to determine, if necessary, whether that is the case.

35 In so doing, it may find it necessary to establish whether the national legislation at issue in the main proceedings, by requiring, for the performance of dock work, that recourse be had to recognised dockers who are 'workers', makes it mandatory for the relations between the parties to take the legal form of a contract of employment and thus in principle falls under the prohibition.

36 It follows from the judgment in Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091 that national legislation which, by making it mandatory for the relations between the parties to take the legal form of a contract of employment, prevent economic operators from one Member State from pursuing their activities in another Member State as self-employed persons working under a contract for the provision of services constitutes a barrier capable of falling within the ambit of the prohibition laid down in Article 59 of the Treaty.

37 In the light of all the foregoing considerations, the answer to be given to the first question must be that Article 90(1) of the Treaty, read in conjunction with the first paragraph of Article 6, and Articles 85 and 86 thereof, must be interpreted as meaning that it does not confer on individuals the right to oppose the application of legislation of a Member State which requires them to have recourse, for the performance of dock work, exclusively to recognised dockers such as those referred to in the 1972 Law, and to pay those dockers remuneration far in excess of the wages of their own employees or the wages they pay to other workers.

## The second question

38 In view of the answer to the first question, there is no need to answer the second, which has been submitted only in the event that national rules such as those referred to in the first question are contrary to Article 90(1) of the Treaty read in conjunction with another provision thereof.

## Costs

39 The costs incurred by the Belgian, Italian and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hof van Beroep, Ghent, by order of 15 January 1998, hereby rules:

**Article 90(1) of the EC Treaty (now Article 86(1) EC), read in conjunction with the first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC), and Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC), must be interpreted as meaning that it does not confer on individuals the right to oppose the application of legislation of a Member State which requires them to have recourse, for the performance of dock work, exclusively to recognised dockers such as those referred to in the Belgian Law of 8 June 1972 organising dock work, and to pay those dockers remuneration far in excess of the wages of their own employees or the wages which they pay to other workers.**

Kapteyn Murray Schintgen

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass — Registrar

P.J.G. Kapteyn — President of the Sixth Chamber