JUDGMENT OF THE COURT

23 May 2000 *

In Case C-209/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Entreprenørforeningens Affalds/Miljøsektion (FFAD), acting for Sydhavnens Sten & Grus ApS

and

Københavns Kommune

on the interpretation of Article 90 of the EC Treaty (now Article 86 EC), read in conjunction with Article 34 of the EC Treaty (now, after amendment, Article 29 EC) and Article 86 of the EC Treaty (now Article 82 EC), Articles 36 and 130r(2) of the EC Treaty (now, after amendment, Articles 30 EC and 174(2) EC), Articles 7(3) and (10) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), and Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1), in particular Articles 2(j) and 13 thereof,

* Language of the case: Danish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, P. Jann, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Entreprenørforeningens Affalds/Miljøsektion (FFAD), acting for Sydhavnens Sten & Grus ApS, by M.S. Hansen, of the Copenhagen Bar,

— Københavns Kommune, by F. Schwarz, of the Copenhagen Bar,

— the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the Netherlands Government, by M. Fierstra, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by H.C. Støvlbæk, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Entreprenørforeningens Affalds/Miljøsektion (FFAD), acting for Sydhavnens Sten & Grus ApS, represented by M.S. Hansen, Københavns Kommune, represented by K. Gravesen and L. Groesmeyer, of the Copenhagen Bar, the Danish Government, represented by J. Molde, the Netherlands Government, represented by J.S. van den Oosterkamp, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by H.C. Støvlbæk, at the hearing on 1 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 21 October 1999,

gives the following

Judgment

1 By order of 27 May 1998, received at the Court on 8 June 1998, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 90 of the EC Treaty (now Article 86 EC), read in conjunction with Article 34 of the EC Treaty (now, after amendment, Article 29 EC) and Article 86 of the EC Treaty (now Article 82 EC), Articles 36 and 130r(2) of the EC Treaty (now, after amendment, Articles 30 EC and 174(2) EC), Articles 7(3) and 10 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32, hereinafter 'Directive 75/442'), and Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1, hereinafter 'Regulation No 259/93'), in particular Articles 2(j) and 13 thereof.

2 Those questions were raised in proceedings between the Danish company Sydhavnens Sten & Grus ApS (hereinafter 'Sydhavnens Sten & Grus') and Københavns Kommune (the Municipality of Copenhagen) concerning the system for the collection of non-hazardous building waste organised by the defendant in the main proceedings.

Community legislation

Directive 75/442

3 The first paragraph of Article 4 of Directive 75/442 provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment ...'.

4 Article 7(3) of Directive 75/442 provides:

'Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They shall inform the Commission and the Member States of any such measures'.

5 Article 10 of Directive 75/442 provides:

'For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to in Annex II B must obtain a permit.'

6 The operations referred to in Annex II B to Directive 75/442 are those which may lead to recovery of the waste.

Regulation No 259/93

7 According to Article 2(j) of Regulation No 259/93, for the purpose of that regulation authorised centre means 'any establishment or undertaking authorised or licensed pursuant to Article 6 of Directive 75/439/EEC, Articles 9, 10 and 11 of Directive 75/442/EEC and Article 6 of Directive 76/403/EEC'.

8 Article 13 of Regulation No 259/93 deals with shipments of waste within Member States. It provides, in particular, that Titles II, VII and VIII of that regulation are not to apply to shipments of waste within a Member State but that Member States may none the less apply them within their jurisdiction.

9 Article 13(2) of Regulation No 259/93 provides:

'Member States shall, however, establish an appropriate system for the supervision and control of shipments of waste within their jurisdiction. This system should take account of the need for coherence with the Community system established by this Regulation.'

The main proceedings

10 Sydhavnens Sten & Grus is a company whose activity has since 1983 consisted in the purchase and sale of materials extracted from the sea or from gravel pits, and also in the recycling of environmentally non-hazardous building waste in the form of concrete, brick and asphalt.

11 In 1993 Sydhavnens Sten & Grus applied, pursuant to Article 33 of the Miljøbeskyttelseslov (the Danish Law on Protection of the Environment) for approval to pursue its activities within the boundaries of the Municipality of Copenhagen, in particular the recycling of building waste.

12 Sydhavnens Sten & Grus obtained the approval sought from the Municipality of Copenhagen, by letter of 7 July 1994, and concluded a contract with Københavns Havn (the Port of Copenhagen) to set up at Prøvestenen, within the boundaries of the Municipality of Copenhagen, plant for the sorting and crushing of building waste.

13 By virtue of that approval, Sydhavnens Sten & Grus was qualified in environmental terms to process building waste, although it was not entitled to process waste produced within the boundaries of the Municipality of Copenhagen. In order to do so it also required specific approval from that municipality.

14 On 29 August 1994 Sydhavnens Sten & Grus requested the Municipality of Copenhagen to grant the necessary approval.

15 On 28 December 1994 the Municipality of Copenhagen rejected the request for approval and informed Sydhavnens Sten & Grus that the processing of building waste produced within its boundaries should primarily take place in a processing station at Grøften.

16 Sydhavnens Sten & Grus reiterated its request on 13 January 1995, but received a definitive refusal from the Municipality of Copenhagen. Sydhavnens Sten & Grus is therefore only able to receive building waste from neighbouring municipalities and, in principle, has not had access to building waste produced in the Municipality of Copenhagen, despite the fact that its plant is situated there.

The municipal regulations of 1992 and 1998

17 In Denmark the municipalities have competence for waste produced within their boundaries. In that capacity, the Municipality of Copenhagen adopted two regulations in succession, the first of which became applicable on 1 January 1992 (hereinafter the '1992 municipal regulation') and the second on 1 January 1998 (hereinafter the '1998 municipal regulation'), on the basis of which it refused to approve Sydhavnens Sten & Grus. The two municipal regulations establish a system for the collection of building waste for recovery which entails the

conclusion by the defendant of agreements with a limited number of undertakings concerning the receipt and processing of waste produced within its boundaries. The other reception sites, such as that run by Sydhavnens Sten & Grus, are thereby excluded from the market in the processing of building waste produced within the boundaries of the Municipality of Copenhagen. The Law on Environmental Protection and the municipal regulations provide for an exception, which is aimed at maintaining recycling agreements which have already been concluded.

18 The municipal regulations establish a system for collection which is different from that normally applicable in the case of other types of waste, at least as regards the processing of the waste. The normal system takes the form of contracts between the Municipality of Copenhagen and all the private waste shipment and reception undertakings which satisfy the environmental requirements.

19 The 1992 municipal regulation contains no specific provisions on exports and imports of building waste. However, the 1998 municipal regulation expressly provides that they are not covered by the municipal system; in principle, therefore, they are free.

20 Those municipal regulations followed on from the adoption of a regional plan aimed at establishing a high-capacity crushing plant at Grøften for building waste originating in greater Copenhagen.

The regional plan

21 The regional plan was drawn up by the Hovedstadsråd (Metropolitan City Council) in response to a request from the Ministry of the Environment in 1988.

The Ministry had noted that approximately one third of building waste, corresponding to 20% of all waste for the whole of Denmark, was produced in greater Copenhagen and that the few mobile crushing facilities operating in the area were only capable of dealing with a relatively small part of that waste.

22 According to the calculations of the Municipality of Copenhagen, in 1988 only some 16% of the estimated quantity of building waste produced in the municipality, which was put at 382 000 tonnes per annum, had been recycled, while the remaining 84% had been buried at disposal sites.

23 The Hovedstadsråd investigated the possibilities and conditions for reusing building waste in greater Copenhagen and concluded that in order to obtain the best-quality recycled product it was essential to use processing plant of a suitable size, so that the number of sites for the reuse of waste should, for reasons of investment and profitability, be limited to a minimum.

The formation of a company to manage the processing centre

24 At the same time the competent authorities contemplated forming a company to manage a regional processing site. A working group, composed of representatives of Miljøstyrelsen (Environment Directorate) and the Hovedstadsråd, issued a press release in June 1989 inviting all public or private persons interested in participating in the project to come forward.

25 Only three undertakings wished to subscribe for shares when the company, known as Råstof og Genanvendelse Selskabet af 1990 A/S (hereinafter 'RGS'),

responsible for managing the regional reprocessing site established at Grøften (hereinafter the 'Grøften centre'), was formed. Today RGS has only two shareholders, Entreprenørbilerne A/S and Renholdningsselskabet af 1898, an independent institution formed by associations of landowners in the municipalities of Copenhagen and Frederiksberg, although those two municipalities are represented on the management organs of the institution.

The contracts concluded by the Municipality of Copenhagen

26 It is apparent from the order of reference that, in accordance with the 1992 and 1998 municipal regulations, which provide that contracts for the processing of building waste are to be concluded with a limited number of undertakings, the Municipality of Copenhagen concluded contracts for the receipt and processing of environmentally non-hazardous building waste produced within its boundaries with three undertakings operating sites receiving such waste, including RGS, the main beneficiary. Those agreements have the effect of precluding other undertakings, like Sydhavnens Sten & Grus, from processing that waste, even though they are qualified to do so.

27 The draft waste management plan drawn up by the Municipality of Copenhagen for 2000 provides that the virtually exclusive right conferred on RGS should be reconsidered upon expiry of the normal writing-off period for its plant at the Grøften centre.

The action and the questions referred to the Court of Justice

28 On 21 November 1995 Sydhavnens Sten & Grus brought an action against the Municipality of Copenhagen before the Østre Landsret for, primarily, a

declaration that it had no authority to prevent third parties from shipping building waste to the reception site operated by Sydhavnens Sten & Grus with a view to its reuse. In the alternative, Sydhavnens Sten & Grus requested the Østre Landsret to order the Municipality of Copenhagen to recognise the site operated by Sydhavnens Sten & Grus as a reception station within the framework of the collection system organised by the Municipality of Copenhagen.

29 It was in those circumstances that the Østre Landsret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

Would a system such as that described in Question 1(a) be contrary to Article 90 of the EC Treaty, in conjunction with Articles 34 and 86 thereof, if the municipal provision forming the basis of that system provides that waste which is exported or imported is not covered by the municipal system mentioned in Question 1(a)?

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

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

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

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

(b) Must Article 7(3) of Directive 75/442, as amended by Directive 91/156, be construed as meaning that measures which a Member State or a competent authority in that Member State has adopted, and which are necessary to prevent movements of waste not in accordance with the

waste plans of the authority, are valid and enforceable against individuals or undertakings to which the measures are relevant only if the EC Commission has been notified of those measures?'

First question

30 It should be pointed out *in limine* that the first question, taken as a whole, concerns the compatibility of municipal rules, such as the 1992 and 1998 municipal regulations, with, first, the rules on freedom to export referred to in Article 90 of the Treaty, read in conjunction with Article 34 of the Treaty, and, secondly, the rules on competition referred to in Articles 90 and 86 of the Treaty.

The rules on freedom to export

31 For the purposes of ascertaining whether rules such as those in issue in the main proceedings are compatible with the rules on freedom to export, it should be observed that, since Article 34 of the Treaty is aimed directly at Member States and the application of the derogation set out in Article 90(2) of the Treaty was not raised in the order for reference or relied on by the parties to the main action to justify any restriction of exports, it is sufficient to examine the rules in light of Article 34 of the Treaty, without its being necessary to read that article in conjunction with Article 90 of the Treaty.

32 The question referred to the Court must therefore be construed to the effect that the national court is asking, essentially, first whether Article 34 of the Treaty precludes a system for the collection and receipt of non-hazardous building waste destined for recovery, such as that set up by the Municipality of Copenhagen,

under which a limited number of undertakings are authorised to process waste produced in the municipality, and, if necessary, whether that system can be justified either by one of the exceptions referred to in Article 36 of the Treaty or as a form of environmental protection pursuant, in particular, to Article 130r(2) of the Treaty.

33 The national court invites the Court to envisage in its answer two distinct situations, depending on whether or not the system applies to exports and imports.

34 According to the settled case-law of the Court, Article 34 of the Treaty applies to national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question (see Case 172/82 *Inter-Huiles and Others* [1983] ECR 555, paragraph 12).

35 Sydhavnens Sten & Grus maintains that by conferring the exclusive right to process waste on a limited number of undertakings which are expected to recycle as much waste as possible on their sites, the provision in issue has the effect of restricting exports in a way that is contrary to the Treaty.

36 The Municipality of Copenhagen states that the 1998 municipal regulation provides that exports are free and that that was already the case under the 1992 municipal regulation, so that the system in question is not contrary to Article 34 of the Treaty.

37 The Court would observe *in limine* that the mere fact that an exclusive right to process the building waste produced in a municipality is granted to a limited number of undertakings does not necessarily have the effect of creating a barrier to exports contrary to Article 34 of the Treaty, provided that waste producers are still able to export it (see, in that regard, *Inter-Huiles*, cited above, paragraph 11).

38 It is necessary, next, to examine the system applicable under each of the two municipal regulations.

39 The 1992 municipal regulation contains no express provision relating to exports. It is apparent from the documents before the Court, however, that producers of non-hazardous building waste are required to entrust their waste to an approved shipper who is himself required to take the waste solely to one of the three authorised centres.

40 In the absence of an express exemption for exports, a provision such as the 1992 municipal regulation might be construed as containing an implicit prohibition on exports, contrary to Article 34 of the Treaty (see, in that regard, Case 173/83 *Commission* v *France* [1985] ECR 491, paragraph 7). It is for the national court to ascertain whether that was the position in the case before it.

41 As for the 1998 municipal regulation, Sydhavnens Sten & Grus contends that, even though it expressly provides for the possibility of exporting waste, that regulation is just as restrictive of exports as its predecessor. The fact that exports are formally exempted does not bring the infringement of Article 34 of the Treaty to an end. The position would be otherwise only if intermediaries were ensured of genuine access to the collection and resale of building waste.

42 In that regard, it should be pointed out that municipal rules which prevent even qualified intermediaries from participating in the collection of the waste in question with a view to reselling it in other Member States constitute an obstacle to exports contrary to Article 34 of the Treaty (see, in that regard, Case 295/82 *Rhône-Alpes Huiles* [1984] ECR 575).

43 The question whether in this case producers of waste are able to use intermediaries to export their waste has been the subject of contrary assertions on the part of those who have submitted observations to the Court. Sydhavnens Sten & Grus maintains that qualified intermediaries like itself cannot collect building waste with a view to exporting it. The Municipality of Copenhagen, on the other hand, contends that exports can be effected through intermediaries. It is for the national court, therefore, to ascertain whether the rules in question, whether resulting from the 1992 municipal regulation or from the 1998 municipal regulation, allow producers of non-hazardous building waste to export their waste, using intermediaries if they wish.

44 Should it be held that the rules in question have the effect of restricting exports in a manner contrary to Article 34 of the Treaty, the national court raises the question whether those rules might be justified on the basis, on the one hand, of Article 36 of the Treaty and, on the other hand, of the protection of the environment as provided for, in particular, in Article 130r(2) of the Treaty.

45 As regards the derogation provided for in Article 36 of the Treaty, it must be pointed out that such a justification would be relevant if the fact that building waste was shipped over a greater distance, as a consequence of being exported, and processed in a Member State other than that in which it is produced represented a danger to the health and life of humans, animals or plants.

46 In the present case, however, the waste in question is non-hazardous waste and nothing has been put forward to show that there is a danger to the health and life of humans, animals or plants; the participants in the proceedings before the Court have merely stated, on this point, that any infringement of Article 34 of the Treaty would be justified by virtue of Article 36 of the Treaty.

47 It follows that the derogation in Article 36 of the Treaty in relation to the health and life of humans, animals and plants cannot, in these circumstances, justify a restriction on exports contrary to Article 34 of the Treaty.

48 As regards the justification based on the protection of the environment, and in particular the principle referred to in Article 130r(2) of the Treaty that environmental damage should as a priority be rectified at source, it must be pointed out that the protection of the environment cannot serve to justify any restriction on exports, particularly in the case of waste destined for recovery (see, to that effect, Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 49). That is so *a fortiori* where, as in the case before the national court, environmentally non-hazardous building waste is involved.

49 Nowhere in the documents before the Court is it argued that the waste in question is harmful to the environment.

50 In those circumstances, restrictions on exports contrary to Article 34 of the Treaty, such as those alleged in the main proceedings, cannot be justified by the need to protect the environment, in particular by application of the principle referred to in Article 130r(2) of the Treaty that environmental damage should as a priority be rectified at source.

51 The answer to the first part of the first question must therefore be that Article 34 of the Treaty precludes a system for the collection and receipt of non-hazardous building waste destined for recovery, under which a limited number of undertakings are authorised to process the waste produced in a municipality, if that system constitutes, in law or in fact, an obstacle to exports in that it does not allow producers of waste to export it, in particular through intermediaries. Such an obstacle cannot be justified on the basis of Article 36 of the Treaty or in the interests of environmental protection, in particular by application of the principle referred to in Article 130r(2) of the Treaty that damage should as a priority be rectified at source, in the absence of any indication of danger to the health or life of humans, animals or plants or danger to the environment.

The rules on competition referred to in Articles 90 and 86 of the Treaty

52 Second, the national court asks essentially whether Article 90 of the Treaty, read in conjunction with Article 86 of the Treaty, precludes the establishment of a local system, such as the system at issue in the case in the main proceedings, under which a limited number of specially selected undertakings can process environmentally non-hazardous building waste destined for recovery and produced in the area concerned, thus ensuring a sufficiently large flow of such waste to those undertakings, and excludes other undertakings even though they are qualified to process the waste.

53 It should be pointed out, first, that pursuant to the rules at issue in the main proceedings, three undertakings were authorised to receive building waste produced within the boundaries of the Municipality of Copenhagen with a view to recovering it and that the other undertakings, including Sydhavnens Sten & Grus, are precluded from doing so. Apart from those three undertakings, no undertaking in Denmark can receive building waste produced in that municipality with a view to processing it.

54 It follows that those three undertakings must be regarded as undertakings to which the Member State concerned has granted an exclusive right within the meaning of Article 90(1) of the Treaty (see, in that regard, Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 8, and Joined Cases C-147/97 and C-148/97 *Deutsche Post* [2000] ECR I-825, paragraph 37).

55 Second, it should be pointed out that, pursuant to Article 90(1) of the Treaty, in the case of the undertakings to which they grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to the rules on competition.

56 In considering whether rules such as those at issue in the case in the main proceedings are contrary to Article 90 of the Treaty, read in conjunction with Article 86 of the Treaty, it must be determined whether they give rise to a dominant position on the part of the undertaking to which the special or exclusive right is granted and whether they give rise to an abuse.

The existence of a dominant position

57 As regards the question of the existence of a dominant position, the Court has repeatedly emphasised that the definition of the relevant market is of fundamental importance, as is the delimitation of the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition (see, for example, Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 36).

58 Sydhavnens Sten & Grus maintains that the relevant market is the market in the receipt and processing of building waste produced within the boundaries of the Municipality of Copenhagen. That market forms a substantial part of the

common market, in view of the size of the part of Danish territory concerned and the fact that the plant at the Grøften centre ranks among the largest in Europe.

59 The Municipality of Copenhagen and the Danish Government contend that the Court does not have sufficient information to rule on the question, which therefore falls to be answered by the national court.

60 In that regard, it must be stated that it is for the national court to define the relevant market in the light of the facts available to it, first having regard to the particular features of the product or service in question and, second, with reference to a clearly defined geographical area in which it is marketed and where the conditions of competition are sufficiently homogeneous for it to be possible to evaluate the economic power of the undertaking or undertakings concerned (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 11).

61 As regards the product or service in question, the national court will have, *inter alia*, to determine whether the processing of environmentally non-hazardous building waste is a distinct market from the processing of other types of waste.

62 As regards the geographical market, it will have to take into account the fact that an exclusive right was granted to three undertakings, including RGS, the operator of the Grøften centre, which is the main beneficiary. If producers of waste in the municipality wish to have their waste processed in Denmark they can only deal with one of those three undertakings. That could have the effect of restricting the market to the area over which the exclusive right extends.

63 However, in view of the importance of the Municipality of Copenhagen in greater Copenhagen, whose building waste represents approximately one third of the building waste produced in Denmark, the national court must determine whether the exclusive right might have the effect of restricting effective competition not only within the boundaries of the municipality but also in a wider area.

64 Next, once the limits of the area affected have been defined, it will be necessary to consider whether that area constitutes a substantial part of the common market having regard, in particular, to the volume of building waste produced and processed in the Municipality of Copenhagen and its importance in relation to building waste processing operations as a whole in Denmark (see, in that regard, Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 15, and *GT-Link*, cited above, paragraph 37).

65 Only if the national court considers that the undertakings concerned have a dominant position on a market thus defined will it be necessary to consider the question of possible abuse.

The existence of abuse

66 It must be borne in mind that merely creating a dominant position by the grant special or exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State is in breach of the prohibitions contained in those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses (see, for example, Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 93).

67 The Court has thus held that a Member State may, without infringing Article 86 of the Treaty, grant exclusive rights to certain undertakings provided they do not abuse their dominant position or are not led necessarily to commit an abuse (see Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 41).

68 In that regard, it should be pointed out, first, that the grant of an exclusive right over part of the national territory for environmental purposes, such as establishing the capacity necessary for the recycling of building waste, does not in itself constitute an abuse of a dominant position.

69 It must next be considered whether the exclusive right does not nevertheless lead to an abuse of a dominant position.

70 According to the Municipality of Copenhagen, the rules at issue do not lead to any breach of the rules on competition referred to in Article 86 of the Treaty, whether in relation to the prices or the other terms of business applied by the three undertakings to which the exclusive right was granted.

71 As regards the prices charged by the three undertakings, the Municipality of Copenhagen claimed, without being challenged, that those prices were freely determined by the undertakings concerned and that where it considered them excessive it could request the competition authorities to intervene. Nor has there been any allegation of abusive conduct in relation to the other terms of business.

72 Sydhavnens Sten & Grus contends, however, that the grant of the exclusive right leads to abuse of a dominant position by limiting outlets and favouring the Grøften centre to the detriment of competitors.

73 The Danish Government maintains that even if the grant of an exclusive right gave rise to a restriction of competition it would be justified, pursuant to Article 90(2) of the Treaty, by the need to guarantee the performance of a task of general economic interest, namely the management of building waste. That task made it necessary to create sufficient capacity to process building waste produced in the Municipality of Copenhagen.

74 In that regard, it must be pointed out that it follows from the combined effect of paragraphs 1 and 2 of Article 90 that paragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to, in particular, Article 86 of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community (see, as regards exclusive rights contrary to Article 37 of the EC Treaty (now, after amendment, Article 31 EC), Case C-154/94 *Commission* v *France* [1997] ECR I-5815, paragraph 49).

75 The management of particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environmental problem.

76 It is clear from the documents before the Court that the Municipality of Copenhagen, acting in accordance with national legislation, entrusted to three

undertakings the task of processing building waste produced in that municipality and that those undertakings are required to receive that waste and process it so that it can be reused as far as possible. In those circumstances, it must be acknowledged that a task of general economic interest was entrusted to those undertakings.

77 Next, it is necessary to consider whether the exclusive right granted to the three undertakings is necessary for them to be able to perform the task of general economic interest which has been assigned to them under economically acceptable conditions (see *Corbeau*, cited above, paragraphs 14 and 16, and *Brentjens'*, cited above, paragraph 107).

78 It is apparent from the evidence before the Court that when the Grøften centre was set up and an exclusive right was granted to a limited number of undertakings, the Municipality of Copenhagen was faced with what was regarded as a serious environmental problem, namely the burial of most building waste in the ground when it could have been recycled. Recycling was impossible owing to the lack of undertakings capable of processing the waste. In order to deal with the volumes of waste produced in the municipality and to ensure that it was recycled to a high standard, the municipality considered it necessary to set up a high-capacity centre; and, in order to ensure that this newly-established centre would be profitable, the municipality considered it necessary to ensure that the centre was guaranteed a significant flow of waste by granting it an exclusive processing right.

79 Admittedly, that exclusive right had the effect of excluding even qualified undertakings wishing to enter the market, such as Sydhavnens Sten & Grus. In the absence of undertakings capable of processing the waste at issue in the main proceedings, however, the Municipality of Copenhagen considered it necessary to set up a high-capacity centre. Furthermore, in order to ensure that undertakings

would be interested in participating in the operation of a high-capacity centre, it was also considered necessary to grant an exclusive right, limited in time to the period over which the investments could foreseeably be written off and in space to the land within the boundaries of the municipality.

80 A measure having a less restrictive effect on competition, such as rules which merely required undertakings to have their waste recycled, would not necessarily have ensured that most of the waste produced in the municipality would be recycled, precisely because there was not sufficient capacity to process that waste.

81 In those circumstances, it must be held that even if the grant of an exclusive right led to a restriction of competition in a substantial part of the common market, that grant could be regarded as necessary for the performance of a task serving the general economic interest.

82 Nor is there anything in the documents before the Court to suggest that the exclusive right granted in the present case is such that it will necessarily lead the undertakings in question to abuse their dominant position.

83 The answer to the second part of the first question must therefore be that Article 90 of the Treaty, read in conjunction with Article 86 of the Treaty, does not preclude the establishment of a local system, such as the system in issue in the main proceedings, under which, in order to resolve an environmental problem

resulting from the absence of processing capacity for non-hazardous building waste destined for recovery, a limited number of specially selected undertakings may process such waste produced in the area concerned, thus making it possible to ensure a sufficiently large flow of such waste to those undertakings, which precludes other undertakings from processing that waste, even though they are qualified to do so.

Second question

84 By its second question the national court asks essentially whether Directive 75/442 and Regulation No 259/93 must be interpreted as meaning that they require the Member States to conclude contracts with all authorised undertakings within the meaning of Article 10 of Directive 75/442, for the purposes of receiving and recovering environmentally non-hazardous building waste.

85 As regards Directive 75/442, the Court held in Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 20, that the harmonisation provided for in Article 1 of Directive 75/442 has as its main object to ensure, with a view to protecting the environment, the effective management of waste in the Community, regardless of its origin, and has only ancillary effects on the conditions of competition and trade.

86 Under Article 10 of Directive 75/442 Member States are required to provide that only authorised undertakings can carry out certain recovery operations. That article therefore requires that Member States provide an authorisation procedure in order to protect the environment, but does not oblige them to deal with all authorised undertakings.

87 As regards Regulation No 259/93, it, too, is not intended to harmonise the conditions of competition and contains no provisions to that effect. As is clear, in

particular, from the fourth, fifth and sixth recitals in its preamble, the purpose of that regulation is to organise the supervision and control of transfrontier shipments and to establish minimum common rules for the supervision and control of shipments of waste within a Member State of the Community.

88 The answer to the second question must therefore be that neither Directive 75/442 nor Regulation No 259/93 requires that Member States conclude contracts with all the undertakings authorised, within the meaning of Article 10 of Directive 75/442, to receive and recover environmentally non-hazardous building waste.

Third question

89 The third question concerns, first, Member States' power under Article 7(3) of Directive 75/442 to take the measures necessary to prevent certain shipments of non-hazardous building waste and, second, the consequences of their obligation under that article to inform the Commission of any such measures.

The prohibition of shipment operations which are not in accordance with the waste management plan

90 By the first part of the third question the national court asks essentially whether Article 7(3) of Directive 75/442 must be interpreted as meaning that it allows a Member State to take measures in relation to the shipment of waste, including

measures prohibiting the shipment of non-hazardous building waste destined for recovery, if the shipment is not in accordance with its waste management plan.

91 According to Sydhavnens Sten & Grus, it follows from Directive 75/442 and Regulation No 259/93 that the shipment of non-hazardous waste destined for recovery cannot be subject to restrictions. The Municipality of Copenhagen cannot therefore prevent the shipment of non-hazardous building waste which is not in accordance with its waste management plan.

92 It must be pointed out that Article 7(3) of Directive 75/442 expressly authorises Member States to take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans as defined in Article 7(1) and (2). Article 7(3) thus provides that Member States may adopt restrictive measures to ensure that their waste management plans are implemented. It must therefore be interpreted as authorising a prohibition on making certain shipments of waste.

93 It follows that a measure prohibiting the shipment of non-hazardous building waste which is not in accordance with a waste management plan must be regarded as lawful provided that the plan is compatible with the rules of the Treaty and Directive 75/442.

94 The compatibility of a system such as that established by the Municipality of Copenhagen with the rules relating to Article 34 of the Treaty and those in Article 90 of the Treaty has been considered in paragraphs 30 to 83 of this judgment in the context of the answer to the first question. It is for the national court to verify whether the system also complies with Directive 75/442.

95 The answer to the first part of the third question must therefore be that Article 7(3) of Directive 75/442 must be interpreted as meaning that it allows a Member State to take measures in relation to the shipment of waste, including measures which prohibit the shipment of non-hazardous building waste destined for recovery, if the shipment is not in accordance with its waste management plan, on condition that that plan is compatible with the rules of the Treaty and of Directive 75/442.

The obligation to inform the Commission

96 By the second part of its third question, the national court asks essentially whether Article 7(3) of Directive 75/442 must be interpreted as meaning that it confers on individuals a right on which they may rely before the national courts in order to challenge a measure designed to prevent movements of waste which are not in accordance with a waste management plan, on the ground that that measure has not been communicated to the Commission.

97 Sydhavnens Sten & Grus maintains that a Member State cannot apply measures designed to prevent movements of waste which are not in accordance with its waste management plan if it has not informed the Commission of those measures pursuant to Article 7(3) of the Directive. In support of its interpretation, it refers to Article 6(6) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10), which provides that the Commission is to confirm certain measures introduced by the Member States in connection with the recycling and recovery of packaging.

98 It must be observed, however, that unlike Article 6(6) of Directive 94/62, Directive 75/442 places no specific obligation on the Commission after the

information has been communicated to it. It merely places Member States under an obligation to inform the Commission of the measures which they have taken, but lays down no procedure for Community monitoring of those measures and does not subject their entry into force to agreement or lack of objection on the part of the Commission.

99 The purpose of the obligation imposed on Member States by Article 7(3) of Directive 75/442 is to enable the Commission to be informed of the national measures concerned so that it can determine whether or not they are compatible with Community law and, should the need arise, take the appropriate steps.

100 Neither the wording nor the purpose of that provision provides any ground for the view that failure by the Member States to observe their obligation to give prior notice in itself renders unlawful the measures thus adopted (see, in that regard, concerning Article 3(2) of Directive 75/442, in the version prior to Directive 91/156, Case 380/87 *Enichem Base and Others* [1989] ECR 2491, paragraph 22).

101 It follows from the foregoing that Article 7(3) of Directive 75/442 concerns the relations between Member States and the Commission, but that it does not give rise to any right for individuals which can be injuriously affected in the event of breach by a Member State to fulfil its obligation to inform the Commission of the measures in question.

102 The answer to the second part of the third question must therefore be that Article 7(3) of Directive 75/442 must be interpreted as meaning that it does not confer on individuals any right on which they could rely before the national courts for the purpose of challenging a measure designed to prevent movements of waste which are not in accordance with a waste management plan, on the ground that that measure has not been communicated to the Commission.

Costs

103 The costs incurred by the Danish 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 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 Østre Landsret by order of 27 May 1998, hereby rules:

1. Article 34 of the EC Treaty (now, after amendment, Article 29 EC) prohibits a system for the collection and receipt of non-hazardous building waste destined for recovery, under which a limited number of undertakings are authorised to process the waste produced in a municipality, if that system constitutes, in law or in fact, an obstacle to exports in that it does not allow producers of waste to export it, in particular through intermediaries. Such an obstacle cannot be justified on the basis of Article 36 of the EC Treaty (now,

after amendment, Article 30 EC) or in the interests of environmental protection, in particular by application of the principle referred to in Article 130r(2) of the EC Treaty (now, after amendment, Article 174(2) EC) that damage should as a priority be rectified at source, in the absence of any indication of danger to the health or life of humans, animals or plants or danger to the environment.

2. Article 90 of the EC Treaty (now Article 86 EC), read in conjunction with Article 86 of the EC Treaty (now Article 82 EC), does not preclude the establishment of a local system, such as the system in issue in the main proceedings, under which, in order to resolve an environmental problem resulting from the absence of processing capacity for non-hazardous building waste destined for recovery, a limited number of specially selected undertakings may process such waste produced in the area concerned, thus making it possible to ensure a sufficiently large flow of such waste to those undertakings, and which excludes other undertakings from processing that waste, even though they are qualified to do so.

3. Neither Council Directive 75/442/EEC of 15 July 1995 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, nor Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and monitoring of shipments of waste within, into and out of the European Community requires that Member States conclude contracts with all the undertakings authorised, within the meaning of Article 10 of that directive, to receive and recover environmentally non-hazardous building waste.

4. Article 7(3) of Directive 75/422, as amended by Directive 91/156, must be interpreted as meaning that it allows a Member State to take measures in

relation to the shipment of waste, including measures which prohibit the shipment of non-hazardous building waste destined for recovery, if the shipment is not in accordance with its waste management plan, on condition that that plan is compatible with the rules of the Treaty and of that directive.

5. Article 7(3) of Directive 75/422, as amended by Directive 91/156, must be interpreted as meaning that it does not confer on individuals any right on which they could rely before the national courts for the purpose of challenging a measure designed to prevent movements of waste which are not in accordance with a waste management plan, on the ground that that measure has not been communicated to the Commission.

Rodríguez Iglesias	Moitinho de Almeida	Edward
Sevón	Kapteyn	Gulmann
Jann	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 23 May 2000.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President