JUDGMENT OF THE COURT (Fifth Chamber)
12 February 1998 *

In Case C-163/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale, La Spezia (Italy), for a preliminary ruling in the criminal proceedings pending before that court against

Silvano Raso and Others

on the interpretation of Articles 59, 86 and 90(1) of the EC Treaty,

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J. C. Moitinho de Almeida, P. Jann and L. Sevón, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Silvano Raso and Others, by Sergio Carbone, Camillo Paroletti and Francesco Munari, of the Genoa Bar,

— the Italian Government, by Umberto Leanza, Head of the Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the French Government, by Régine Loosli-Surrans, Chargée de Mission in the Legal Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Head of Sub-Directorate in the same Directorate, acting as Agents,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Christopher Vajda, Barrister,

— the Commission of the European Communities, by Laura Pignataro and Richard Lyal, of its Legal Service, acting as Agents,

having regard to the report for the hearing,

after hearing the oral observations of Silvano Raso and Others, the Italian Government, the French Government and the Commission at the hearing on 10 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 9 October 1997,

gives the following

Judgment

1 By order of 12 April 1996, received at the Court on 10 May 1996, the Pretura Circondariale, La Spezia, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions concerning Articles 59, 86 and 90 of that Treaty.

2 The questions arose during criminal proceedings against Mr Raso and 10 other persons, the legal representatives of La Spezia Container Terminal SRL (hereinafter 'LSCT'), the concessionaire for a terminal within the port of La Spezia, and four other undertakings authorised to carry out dock work there, who were accused of having unlawfully used and supplied labour in breach of Article 1(1) of Law No 1369 of 23 October 1960 (hereinafter 'the 1960 Law').

The Italian legislation

3 Prior to the judgment of 10 December 1991 in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 Italian seaports were administered by public port authorities.

4 Under Article 110 of the Codice della Navigazione (Shipping Code, hereinafter 'the Code'), dock workers were formed into companies or groups (hereinafter 'dock-work companies') having their own legal personality, to whom all dock

work was reserved. This monopoly was reinforced by Article 1172 of the Code, which prescribed penalties for any person who used for dock work labour not affiliated to a dock-work company.

5 Article 111 of the Code empowered the relevant port authorities to grant concessions for 'the carrying on of port operations for third parties'. The undertakings granted such concessions were, as a rule, private undertakings which organised the provision of services, including dock work, for users of Italian ports. In order to do so they were obliged to use labour supplied by the dock-work companies. The scale of fees and other rules governing the services performed by the dock-work companies were fixed by the port authorities, in accordance with Article 112 of the Code and Article 203 of the Regolamento per la Navigazione Marittima (Maritime Shipping Regulation).

6 In the judgment referred to above the Court held that Article 90(1) of the EC Treaty, in conjunction with Articles 30, 48 and 86 of the Treaty, precluded rules of a Member State which required an undertaking established in that State, to which the exclusive right to organise dock work had been granted, to have recourse for that purpose to a dock-work company formed exclusively of national workers.

7 As a result of that judgment the Italian Government adopted legislation in the form of decree laws which were applied, by virtue of successive renewals, until the entry into force of Law No 84/94 of 28 January 1994 amending the legislation applicable in respect of ports (*Gazzetta Ufficiale della Repubblica Italiana* No 21 of 4 February 1994, 'the 1994 Law'), which in effect codified the rules contained in certain emergency decrees.

8 The new rules essentially restrict the monopoly of the former dock work companies to the supply of temporary labour.

9 Article 18(1) of Law No 84/94 provides that for the purposes of carrying out dock-work concessions may be granted in State-owned areas and wharves in the port area, with the exception of State-owned property used by public authorities for the discharge of functions relating to maritime and port activities.

10 Article 18(2) provides that the duration of the concession, the supervisory and inspection powers of the authorities in issuing concessions, the terms of renewal of the concession and the concession of facilities to a new concessionaire are to be governed by decree of the Minister for Transport and Shipping in conjunction with the Minister for Finance. Furthermore, Article 18(3) of the 1994 Law lays down the criteria to be observed by the port or maritime authorities in issuing concessions in order to reserve operational zones within the port area for dock work to be carried on by other undertakings not enjoying concessions, and adapts the rules concerning the concession of port zones and wharves to the Community legislation.

11 Other undertakings which do not have a concession, therefore, may carry out dock work, defined in Article 16(1) Law No 84/94 as loading, unloading, transshipment, storage and movement in general of goods and other materials carried out in the port area. The same article provides that authorised undertakings are to be entered in a special register (paragraph 3) and undertakings to whom a concession has been granted in accordance with Article 18 are likewise authorised for that purpose for a period equal to that of the concession (paragraph 6). The maximum number of authorisations is determined by the operating requirements of the port and of traffic, but ensuring maximum competition in the sector (paragraph 7).

12 Contrary to what was the case before, authorised undertakings, including concessionaires, may by virtue of Article 27 of the 1994 Law use their own employees to physically execute dock work; they need no longer, therefore, have recourse to the dock-work companies in normal circumstances.

13 However, Article 17(1) of the 1994 Law provides that where the employees of the authorised undertakings, including the concessionaires, and the staff employed under the 'temporary mobility' conditions within the meaning of Article 23(3) of the 1994 Law are not sufficient to meet operating requirements, the undertakings may ask the companies or cooperatives referred to in Article 21(1)(b) of the Law to provide the staff necessary to provide services comprising only labour.

14 Article 21(1)(b) of the 1994 Law concerns the former dock-work companies, and required them to reconstitute themselves by 18 March 1995 into either of two forms of enterprise, namely:

'(a) a company or a cooperative of the kind provided for in Titles V and VI of Book 5 of the Civil Code, to carry out port operations under competitive conditions;

(b) a company or a cooperative of the kind provided for in Titles V and VI of Book 5 of the Civil Code, to supply services, including, by way of derogation from Article 1 of Law No 1369 of 23 October 1960, services comprising only labour, until 31 December 1995.'

15 By those provisions, the 1994 Law therefore introduces a derogation from the general prohibition on supplying labour laid down by the 1960 Law in favour of the reconstituted former dock-work companies.

16 Article 1(1) and (2) of the 1960 Law makes it a criminal offence for an undertaking to contract for the provision of services comprising only labour by having recourse to a work-force engaged and paid by the contractor or his intermediary, whatever the nature of the work or service concerned. Any form of contract or subcontract,

including those for the execution of works or services, whereby the contractee uses capital, machinery and equipment supplied by the contractor is to be regarded as a contract for the provision of services comprising only labour. Undertakings are likewise prohibited from entrusting to intermediaries work to be carried out on a piece-work basis by providers of services engaged and paid by such an intermediary. The purpose of the rules is to protect workers against exploitation and undermining of their rights resulting from the fact that the person technically described as their employer is not their real employer, in fact, but merely an intermediary.

17 It appears from the observations submitted to the Court, and in particular the replies given by the Italian Government to questions posed at the hearing, that both forms of reconstituted company under Article 21(1)(b) of the 1994 Law may perform dock work in competition with undertakings which hold authorisations under Article 16(3) thereof. Consequently, a company such as that currently operating at the Port of La Spezia, which has been reconstituted pursuant to Article 21(1)(b), may both compete, in the supply of services to port users, with authorised undertakings and the holders of terminal concessions and simultaneously enjoy an exclusive right regarding the provision of temporary labour for those undertakings.

The main action

18 LSCT is the concessionaire of a terminal within the Port of La Spezia, described by the national court as the leading Mediterranean container port. LSCT handles about 70% of the container traffic of the port. Its clients are shippers and shipping lines of the various Member States.

19 Between 9 July 1990 and 31 May 1994 LSCT contracted out for labour to be supplied by the cooperative associations Duveco and Il Sole 5 Terre as well as the companies Sincor and Bonifiche Impiantistica e Manutenzioni Generali Di Moise Pietro. Although the four undertakings are authorised to do dock work they are not former dock-work companies.

20 Accordingly, criminal proceedings were brought before the Pretora Circondariale, La Spezia, against Silvano Raso and 10 other persons, the legal representatives of LSCT and the four undertakings mentioned above, for the unlawful supply of labour.

21 On the issue of the compatibility with Community law of the monopoly exercised by the former company now reconstituted as regards the supply of temporary labour, the national court referred the following three questions to the Court of Justice for a preliminary ruling:

'1. Does Article 59 of the Treaty preclude Italian legislation which prohibits an undertaking holding a port terminal concession from having recourse to work done by other undertakings — not set up by former port companies and groups — comprising the supply of services of the kind provided for users, including those belonging to other Member States, with the further implication that, as a result of the Italian legislation, the terminal operator itself is required to make available the whole range of services that might be required by users in the port terminal, giving rise to the risk of hampering access to the market for the provision of individual services by undertakings authorised to operate in the port other than those referred to by Article 21(1)(b) of Law No 84/94?

2. Does Article 90(1) of the EC Treaty, in conjunction with Article 86, preclude national legislation which (by reason of its effects on the market, namely, first, the fact that it prevents undertakings other than the terminal operator — not set up by former port companies and groups — from providing services within the confines of the port for would-be users; secondly, the fact that the

terminal operator is obliged to provide all port operations and services required at the terminal; and, thirdly, the fact that it is impossible for users to entrust certain services to undertakings of their own choice other than the terminal operator) gives rise to arrangements in the market whereby users may have contractual relationships only with the terminal operator for the whole range of services which they need when visiting a port in which the terminal operator or operators hold a dominant position in the market within the meaning of Article 86 of the Treaty?

3. Do Articles 59 and 90 of the EC Treaty, in conjunction with Article 86, in any event preclude national legislation which only allows an undertaking operating in a port to provide to other undertakings operating in the port, and in particular terminal operators, services limited to the mere supply of labour?'

22 By those questions, in particular the third, which should be examined first, the national court asks essentially whether Community law precludes a national provision whereby the right to supply temporary labour to other undertakings operating in the port in which it is established is reserved to a dock-work company, having regard to the fact that that company is also authorised to carry out dock work.

23 The first point to note is that an undertaking with a monopoly in the supply of labour to other undertakings authorised to carry out dock work is an undertaking which has been granted exclusive rights by the State within the meaning of Article 90(1) of the Treaty (see Case C-179/90, cited above, paragraph 9).

24 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 relating to competition.

25 It is settled law that an undertaking having a statutory monopoly in a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 28; Case C-260/89 *ERT* v *DRP* [1991] ECR I-2925, paragraph 31, and Case C-179/90, paragraph 14).

26 As regards the definition of the market in question, it appears from the order for reference that it is that of the organisation on behalf of third persons of dock work relating to container freight in the port of La Spezia. Having regard to the volume of traffic in that port, which is regarded as the leading Mediterranean port for container traffic, and its importance in intra-Community trade, that market may be regarded as constituting a substantial part of the common market (Case C-179/90, paragraph 15).

27 Next, it should be recalled that although merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86, 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, 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 (Case C-41/90, paragraph 29; Case C-260/89, paragraph 37, Case C-179/90, paragraph 17, and Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph 18).

28 In view of that it is clear that in so far as the scheme laid down by the 1994 Law does not merely grant the former dock-work company now reconstituted the exclusive right to supply temporary labour to terminal concessionaires and to other undertakings authorised to operate in the port but also enables it, as stated in paragraph 17 of this judgment, to compete with them on the market in dock services, such former dock-work company now reconstituted will have a conflict of interest.

29 That is because merely exercising its monopoly will enable it to distort in its favour the equal conditions of competition between the various operators on the market in dock-work services (Case C-260/89, paragraph 37, and Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 25).

30 The result is that the company in question is led to abuse its monopoly by imposing on its competitors in the dock-work market unduly high costs for the supply of labour or by supplying them with labour less suited to the work to be done.

31 In those circumstances a legal framework such as that which results from the 1994 Law must be regarded as being in itself contrary to Article 90(1) in conjunction with Article 86 of the Treaty. In that regard, it is therefore immaterial that the national court did not identify any particular case of abuse by the reconstituted former dock-work company (Case C-18/88, paragraphs 23 and 24).

32 In the light of those considerations the reply to the third question must be that Articles 86 and 90 of the Treaty must be interpreted as precluding a national provision which reserves to a dock-work company the right to supply temporary labour to other undertakings operating in the port in which it is established, when that company is itself authorised to carry out dock work.

33 In the light of the reply given to the third question in so far as it relates to Articles 86 and 90 of the Treaty, there is no need to answer that question in so far as it relates to Article 59 of the Treaty or to answer the other questions referred by the national court.

Costs

34 The costs incurred by the Italian, German, French and United Kingdom Governments, and by the Commission of the European Communities, 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 (Fifth Chamber),

in answer to the questions referred to it by the Pretura Circondariale, La Spezia, by order of 12 April 1996, hereby rules:

Articles 86 and 90 of the EC Treaty must be interpreted as precluding a national provision which reserves to a dock-work company the right to supply

temporary labour to other undertakings operating in the port in which it is established, when that company is itself authorised to carry out dock work.

Gulmann Wathelet Moitinho de Almeida

Jann Sevón

Delivered in open court in Luxembourg on 12 February 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber