OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 9 October 1997 *

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I — Introduction

1. This preliminary reference requires the Court once again to examine the compatibility with Community law of aspects of the legislation regulating activities at Italian ports. In *Merci Convenzionali Porto di Genova* [1] the Court held that Article 90(1) of the Treaty, in conjunction with Articles 30, 48 and 86 of the Treaty, precluded rules which conferred on undertakings established in Italy the exclusive right to organise dock work at Italian ports and required them to have exclusive recourse to the services of dock-work companies formed exclusively of dockers of Italian nationality. The present reference concerns the conformity with Community law of a fresh exclusive right conferred on a reconstituted version of those dock-work companies regarding the provision of temporary port labour only.

1 — Case C-179/90 [1991] ECR I-5889, hereinafter the '*Porto di Genova*' case.

II — The legal context

2. The national legislative provisions are complex. In order to facilitate comprehension of the current ports legislation, I will, first, set out the legislative provisions in force prior to the *Porto di Genova* judgment; then I will examine in some detail the relevant aspects of the Court's judgment in that case before describing the general national legislation on employment procurement. Finally, I will summarise the relevant provisions of the new ports legislation, adopted by Italy largely in reaction to *Porto di Genova*.

A — *The pre-*Porto di Genova *legislative context*

3. The salient features of the pre-*Porto di Genova* legislation may be described as follows. First, as is apparent from the Report for the Hearing in *Porto di Genova*, Italian seaports were (as they remain) administered

and regulated by public port authorities. [2] Secondly, under Article 110 of the Codice della Navigazione [3] (Shipping Code, hereinafter 'the Code') workers employed for dock work were formed into companies or groups (*compagnie portuali*, hereinafter 'dock-work company(ies)') having their own legal personality but subject to supervision by the port authority. All 'loading, unloading, trans-shipment, storage and general movement of goods or material of any kind ...' was reserved, under Article 110 of the Code, to such dock-work companies. This monopoly was reinforced by Article 1172 of the Code, which prescribed penalties for any person who used for dock work a docker not affiliated to a dock-work company. [4] Thirdly, Articles 150, 152 and 156 of the Regolamento per la Navigazione Marittima (Maritime Shipping Regulation) [5] provided for the compulsory registration of dockers engaged by dock-work companies on appropriate temporary or permanent registers, a precondition for which was the possession of Italian nationality.

4. Article 111 of the Code empowered the relevant port authorities to grant concessions for 'the carrying on by undertakings of port operations for third parties ...'. The undertakings granted such concessions were, as a rule, private undertakings (*imprese portuali*, hereinafter 'dock-work undertaking(s)') which organised the provision of services, comprising, *inter alia*, dock work at Italian ports on behalf of third-party port users. [6] Dock-work undertakings were limited to using only the workforce provided by the dock-work companies. [7] The scale of fees and other rules governing the services performed by the dock-work companies were fixed, in accordance with Articles 112 of the Code and 203 of the Regulation, by the relevant port authorities. [8]

5. The compatibility with Community law of the above-described system of rules was impugned in the *Porto di Genova* case.

2 — [1991] ECR I-5889, at p. I-5891. The public regulation of ports is a phenomenon which is probably replicated in most, if not all, Member States and could not, in itself, be regarded as incompatible with Community law.

3 — Royal Decree No 337 of 30 March 1942.

4 — See section 2 of the Opinion of Advocate General Van Gerven; [1991] ECR I-5889, at p. I-5905.

5 — Decree No 328 of the President of the Republic of 15 February 1952, hereinafter 'the Regulation'.

6 — It is clear from the explanation of the Italian legislation furnished by the national judge in the memorandum annexed to the order for reference (hereinafter 'the memorandum') that the port authorities were entitled to authorise other companies to carry out activities in ports under the supervision of the harbourmaster. It appears from the response to a question posed at the hearing that such authorisations were granted pursuant to Article 68 of the same Code and that the undertakings represented by Mr Raso's co-defendants in the main proceedings each held such an authorisation.

7 — The obligation of concessionaires under Article 111 of the Code appears only to have applied to the provision of labour or services involving a high labour content.

8 — It should be noted that at the time of the *Porto di Genova* case, the dock-work company at the Port of Genoa was wholly owned by the public authority which administered the port. Accordingly, that authority effectively fixed the fees charged by its own subsidiary; see section 2 of the Opinion of Advocate General Van Gerven, [1991] ECR I-5889, at p. I-5906.

B — *The* Porto di Genova *case*

6. In *Porto di Genova* an Italian company, Siderurgica, imported a consignment of steel from Germany in a chartered vessel. [9] Although the ship was equipped for unloading by its own crew, the Code reserved such dock work to the relevant dock-work company at the Port of Genoa; viz. the Compagnia Unica Lavoratori Merci Varie del Porto di Genova (hereinafter 'Compagnia'). [10] Accordingly, Siderurgica, in conformity with the Code, was obliged to call upon Merci Convenzionali Porto di Genova, the relevant dock-work undertaking (hereinafter 'Merci'), to organise the unloading of its steel. Merci, in turn, was obliged to utilise the services of Compagnia.

7. The delivery of the goods was, however, delayed due to a series of strikes involving Compagnia's workforce. Siderurgica ultimately sought compensation for the damage thus caused and reimbursement of the charges levied for the compulsory, but unsolicited, use of Compagnia's dockers. The Tribunale di Genova (District Court, Genoa) took the view that the dispute [11] raised a problem of compatibility of the Italian rules with Community law and, consequently, referred two questions to the Court.

8. The decision of the Court combines two elements. Firstly, the principle of non-discrimination on grounds of nationality found in Article 7 of the EEC Treaty (now Article 6 of the EC Treaty) had been specifically applied to workers by Article 48 of the Treaty. For this purpose, the Court construed the Community-law concept of a 'worker' as covering a person who '... whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association'. [12] Secondly, it considered Merci and the Compagnia to be in a dominant position on the market in respect of 'the organisation on behalf of third persons of dock work ... and the performance of such work' in the Port of Genoa, which, for the purposes of the case, '[could] be regarded as constituting a substantial part of the common market'. [13] On the possible abuse of that dominant position, the Court, having referred both to its earlier decisions in *Höfner and Elser* [14] and *ERT* [15]

9 — See the Report for the Hearing, [1991] ECR I-5889, at p. I-5892.

10 — See section 3 of the Opinion of Advocate General Van Gerven, [1991] ECR I-5889, at p. I-5906.

11 — In fact, the parties were in agreement as to the incompatibility of the Italian legislation with Community law. As Advocate General Van Gerven pointed out in footnote 5 to his Opinion, there was disagreement between the parties regarding only 'the consequences which the incompatibility involves for Merci as regards the reimbursement of the sums paid by Siderurgica for the dock-work services'; see [1991] ECR I-5889, at p. I-5906.

12 — *Porto di Genova*, paragraph 13.

13 — Ibid., paragraph 15.

14 — Case C-41/90 [1991] ECR I-1979.

15 — Case C-260/89 [1991] ECR I-2925.

and to the terms of subparagraphs (a), (b) and (c) of Article 86, held that it appeared 'from the circumstances described by the national court ... that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question are, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involves an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain customers and at the same time to offset such reductions by an increase in the charges to other customers'. [16] Consequently, the Court was satisfied '... that a Member State creates a situation contrary to Article 86 of the Treaty where it adopts rules of such a kind as those at issue before the national court, which are capable of affecting trade between Member States ...'. [17] It, therefore, advised the national court that: [18]

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

16 — *Porto di Genova*, paragraph 19.

17 — See paragraph 20.

18 — See paragraph 24.

C — *The general Italian labour-procurement legislation*

9. The employment-procurement market in Italy is subject to a mandatory placement system administered by public employment agencies (*sezioni circoscrizionali per l'impiego*), which are regulated primarily by Law No 264 of 29 April 1949 (hereinafter the '1949 Law'), Article 11(1) of which prohibits any other persons from acting as employment intermediaries. Article 1(1) and (2) of Law No 1369 of 23 October 1960 (hereinafter the '1960 Law') prohibit, subject to criminal penalties, the management of any undertaking from arranging with intermediaries or subcontractors for the provision of labour, or from entrusting the execution of particular tasks to such persons or, indeed, to third parties. The objective of the rules is '... aimed at protecting employees against exploitation and loss of rights where the real employer is different from the person formally described as the employer, but who in reality is a mere intermediary'. [19] The present case is concerned with specific employment-procurement rules applicable in the ports sector. However, failure to respect those rules can expose those responsible to the penalties prescribed by the 1960 Law.

19 — See paragraph 3 of the Opinion of Advocate General Elmer in Case C-111/94 *Job Centre* [1995] ECR I-3361. At paragraph 39 of his subsequent Opinion of 15 May 1997 in Case C-55/96 *Job Centre COOP. a. r. l. en voie de constitution* (hereinafter '*Job Centre II*'), where the compatibility of the system established by the 1949 and 1960 Laws with various provisions of the Treaty is raised, Advocate General Elmer states that it is logical to regard the prohibition of the provision of temporary workers under the 1960 Law as constituting an integral part of the general monopoly in favour of public placement established by the 1949 Law, although he accepts that a final determination of the objectives of national laws is a matter for the national court.

D — *The relevant Italian ports legislation*

10. The new national legislation referred to in the order for reference in the present case comprises Law No 84 of 28 January 1994 (hereinafter 'the 1994 Law') amending the legislation applicable in respect of ports. [20] However, in response to a question posed at the hearing, counsel for the defendants in the main proceedings, who was not contradicted on this point by the agent representing Italy, stated that the amendments introduced by the 1994 Law merely codified the rules contained in certain emergency decrees adopted by the Italian Government in 1992 following the *Porto di Genova* judgment and which, by virtue of successive renewals, operated until the entry into force of the 1994 Law. Although it is for the national court to determine the effective temporal scope of the rules contained in the 1994 Law, it is reasonable to assume for the purposes of this reference that equivalent rules were in force for most of the period covered by the indictments at issue in the main proceedings. [21]

11. The new rules essentially restrict the monopoly of the former dock-work companies to the provision of temporary labour. It would, however, appear from Article 27(8) of the 1994 Law that the pre-existing monopolies, established under Articles 110 and 111 of the Code, were to be abolished only with effect from 19 March 1995.

12. An authorisation from the port authority is normally required [22] for the carrying on of 'port operations', defined by Article 16(1) of the 1994 Law as comprising the 'loading, unloading, trans-shipment, storage and movement in general of goods and any other materials, carried out in the port area ...'. According to Article 16(6) 'the duration of the authorisation shall be based on the operational programme submitted by the undertaking or, where the authorised undertaking is also the holder of a concession under Article 18, the authorisation shall be coterminous with the concession ...'. [23] Article 16(7) prescribes that the number of authorisations granted be determined 'having regard to the operating requirements of the port and of traffic, but ensuring maximum competition in the sector'.

13. Article 18 provides for the temporary grant to individual operators, by way of exclusive concession, of the 'State-owned areas and wharves in the port area to the

20 — GURI, No 21 of 4 February 1994. According to the information provided by the Commission in its written observations, the 1994 Law entered into force on 19 April 1994.

21 — See further paragraph 17 below.

22 — It is, however, material to the present case that the reconstituted dock-work companies are exempt from this requirement. See paragraph 16 below.

23 — Thus, both such authorised undertakings (hereinafter 'authorised port operators') and those undertakings granted concessions under Article 18 to operate designated port terminals, discussed in the next paragraph, must be entered on the register.

undertakings referred to in Article 16(3) for the purposes of carrying out port operations, without prejudice to the use of State-owned property by public administrations for the discharge of functions relating to maritime and port activities ...'. [24] Article 18(2) provides for the reservation of 'operational zones within the port for port operations to be carried on by other undertakings not enjoying a concession'. Article 18(6) lays down three sets of conditions which must be met by an undertaking to which a concession is granted under Article 18(1): namely, '[it] (a) shall, with its application, lodge a programme of activities, backed by appropriate guarantees, which may be of a fiduciary nature, with a view to increasing the traffic and productivity of the port; (b) must possess adequate technical equipment and organisational facilities of such a kind, *inter alia*, from the safety point of view, as to meet the requirements of a continuous and integrated production and operational cycle for itself and for third parties; (c) must have a workforce appropriate to the programme of activities referred to under (a) above'.

14. In summary, as is stated in the memorandum of the national judge, the new rules 'continue to allow the simultaneous presence of authorised undertakings and concessionaire undertakings which, in theory, operate in the same port areas'. Nevertheless, a terminal operator is now not only permitted to use its own labour but, indeed, required to have a workforce that is 'appropriate to the programme of activities' for which it has been granted its concession. It is not permitted to obtain dock labour from authorised port operators.

15. The express derogation from the general prohibition under the 1960 Law of the private procurement of labour, to which reference is made in the order for reference, is contained in Article 17 of the 1994 Law, which must be read in conjunction with Articles 21(1) and 23(3) thereof. Article 17(1) provides as follows:

'Where the employees of [the authorised port operators] referred to in Article 16, including those employed under "temporary mobility" conditions within the meaning of Article 23(3), [25] are not sufficient to meet operating requirements, the said undertakings may, by way of derogation from Article 1 of Law 1369/60 of 23 October 1960, ask the companies or cooperatives referred to in Article 21(1)(b) of this Law to

24 — The grantees of such concessions will hereinafter be described for convenience as 'terminal operators'.

25 — Those employees of the dock-work companies who are not required upon the reconstitution of those companies in accordance with Article 21 and who are not otherwise engaged by authorised port operators and terminal operators must, apparently, be retained by the reconstituted companies under a temporary-employment scheme. The details concerning the operation of this scheme are to be fixed by decree, but the Court has not been referred to any such decree.

provide the workforce necessary to provide the services comprising only labour.' [26]

Article 21 of the 1994 Law obliged the dock-work companies which formerly derived their monopolies from Article 110 of the Code [27] to reconstitute themselves prior to 18 March 1995 into either of two forms of enterprise, namely: [28]

'(a) a company or a cooperative of the kind provided for in Titles V and VI of Book Five 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 Five of the Civil Code, to supply services, including, by way of derogation from Article 1 of Law No 1369/60 of 23 October 1960, services comprising only labour, until 31 December 1995.' [29]

16. It would appear from the observations submitted to the Court, and, notably, the replies given by the agent representing Italy to questions posed at the hearing, that both forms of reconstituted company under Article 21(1) of the 1994 Law may carry out port operations in respect of which other undertakings hold authorisations granted under Article 16 thereof (or Article 68 of the Code). Consequently, a reconstituted 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

26 — In those ports where no companies or cooperatives have been reconstituted in accordance with Article 21(1)(b) of the 1994 Law (to which reference will presently be made), the relevant port authorities are empowered, as the Commission points out in its written observations, under Article 17(2) to promote the establishment, again in derogation from Article 1 of the 1960 Law, of a port labour association (*una associazione del lavoro*) to deal with fluctuations in traffic and guarantee the maximal efficiency of port activities, and from which terminal operators may request the provision of temporary labour. The present reference, which concerns the Port of La Spezia, deals, however, with a situation where, notably on the basis of the information provided to the Court at the hearing, it appears that a dock-work company has been reconstituted under Article 21(1)(b). Certainly, the national court's express omission of any reference to the terms of Article 17(2) in its memorandum also provides a strong indication that no port labour association exists at La Spezia.

27 — See paragraph 3 above.

28 — They will hereinafter be referred to as 'the reconstituted company(ies)'.

29 — It appears from information provided by the Commission and Italy, in response to a written question posed by the Court, that the deadline of 31 December 1995 was initially extended until 30 September 1996 by Decree-Law No 322/96 of 17 June 1996. Furthermore, pursuant to Law No 647 of 23 December 1996 (GURI, *Serie generale*, No 303 of 28 December 1996), Article 17 of the 1994 Law has been replaced by a new Article 17 which currently governs the duration of the derogation from the prohibition of private employment-placement activities set out in Articles 17 and 21(1) of the 1994 Law. Pending the amendment of the 1960 Law, which is apparently now under consideration, the new provision envisages the establishment, on the initiative of the relevant port authorities, of a voluntary cooperative (*un consorzio volontario*) at each port comprising the existing authorised port operators, terminal operator(s) and reconstituted company(ies). Where such a cooperative is formed, the port authority may authorise one, or several, of the cooperative's potential members to provide, in derogation from the 1960 Law, temporary labour to other members. In the event of no such cooperative being formed, the new provision envisages the establishment of an exclusive 'agency' to provide the service of making temporary workers available (*l'Agenzia per l'erogazione de mere prestazioni di mano d'opera*). Nevertheless, pending the creation either of such a cooperative or agency, the new Article 17(2) would seem to preserve indefinitely, in favour of the reconstituted companies, the sole right to derogate from the 1960 Law in respect of the provision of temporary labour at ports.

users, with undertakings like those represented by the defendants in the main proceedings and simultaneously enjoy an exclusive right regarding the provision to those undertakings of temporary labour. The latter right might extend, at least according to the interpretation of the 1960 Law contended for by the prosecuting authorities in the main proceedings, to the provision, by way of subcontract, of labour-intensive services at ports. Finally, it is apparent, particularly from the oral observations submitted to the Court, that such an Article 21(b) reconstituted company existed at La Spezia during at least most of the period (see paragraph 17 below) to which the prosecutions in the main proceedings relate. [30]

III — The facts and proceedings before the national court

17. In the main proceedings before the Pretura Circondariale, La Spezia (District Magistrates' Court for the District of La Spezia, hereinafter 'the national court'), Mr Raso and his co-defendants (hereinafter 'the defendants') have been accused, jointly and severally, of having committed various infringements of Articles 1 and 2 of the 1960 Law. [31] According to the indictment, issued on 31 October 1995, the particular alleged offences comprise, respectively: '(a) providing "under labour contracts" workers who are members of cooperatives duly authorised under the said Article 68 of the Shipping Code for the execution of services for the terminal operator La Spezia Container Terminal; (b) using, as persons in authority within the said terminal undertaking, workers "made available" by the said authorised cooperatives' during the period running from 9 July 1990 to 31 May 1994. [32]

18. In the order for reference, the national court considers that the application contended for by the prosecution 'of the provisions of the said Article 1 of Law No 1369/60 to the contractual relationships between the terminal operator (as principal) and outside undertakings (as contractors)

30 — Indeed, at the hearing, it was claimed on behalf of the defendants in the main proceedings that the reconstituted company at the Port of La Spezia actually operated as a terminal operator.

31 — The defendants are in fact the legal representatives of the terminal operator and five other companies and cooperatives whose activities have been impugned by the prosecution. According to information provided to the Court at the hearing, all of them were initially authorised to carry out port activities under Article 68 of the Code but subsequently obtained authorisations under Article 16 of the 1994 Law (and presumably also the corresponding provisions of the emergency decrees that predated the enactment of that Law). The terminal operator, La Spezia Container Terminal (hereinafter, for brevity, 'LSCT'), of which Mr Raso is the representative, has been granted a terminal-operator concession under Article 18 of the 1994 Law.

32 — The duration of this period (hereinafter 'the relevant period') is apparent upon examination of the case-file. The Commission submits that the Court should assume May 1994, to wit the month following the entry into force of the 1994 Law, to be the operative part of the relevant period for the purpose of answering the questions referred. Since the 1994 Law effectively codifies the rules contained in earlier emergency rules (see paragraph 10 above), this suggestion would appear to be sound notwithstanding the fact that part of the relevant period (almost a year and a half) actually predated the judgment in *Porto di Genova*.

would have the effect of requiring the terminal operator to provide itself with a "vertical" organisation such as to ensure availability to users of the totality of services ...' that they might require. Although the national court does not comment on the financial repercussions of such an organisation, either for terminal operators or their clients, it does identify the following consequences: '... first: access to the market would be denied to any outside undertaking, and, second: the existing dominant position would be further strengthened ...'. [33]

19. While the national court has not yet decided whether the 1960 Law 'can be interpreted so as to prohibit those forms of cooperation between terminal operators and authorised undertakings that are not terminal operators other than those referred to in Article 17 of Law No 84/94, namely former port companies that have adopted another form', it, none the less, states that, if that interpretation were correct, the two consequences cited in the previous paragraph would ensue. The national court states that '... the Port of La Spezia is the leading Mediterranean container port and that the company La Spezia Container Terminal moves about 70% of the containers entering and leaving the port. Users of La Spezia Container Terminal are also shippers and shipping lines of various Member States of the European Union'. Hence, it decided to refer the following questions to the Court under Article 177 of the Treaty:

'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

33 — In this respect, the national judge refers, without further explanation, to *Porto di Genova*.

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?'

IV — Observations

20. Written observations have been submitted by the defendants, the Italian and French Republics, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the Commission, all of whom, with the exception of Germany and the United Kingdom, additionally presented oral observations.

V — Consideration of the first question

21. The first question is concerned in substance with the compatibility, exclusively with Article 59 of the Treaty, of the national legislation that operates to restrict terminal operators at Italian ports from engaging the services of all but one type of subcontractor (viz. reconstituted companies) when providing terminal-operator services to port users. Notwithstanding the doubts which have been expressed regarding the relevance of Article 59 to the facts of the dispute before the national court, it is appropriate to consider the potential application of that article before addressing the other questions referred, since, if the Court were to find such a restriction to be incompatible with Article 59, the prosecution in point in the main proceedings would have to fail.

A — *The prima facie application of Article 59 of the Treaty*

22. The first question focuses on the restrictive effects of the prohibition of terminal operators from having recourse to supplies

of temporary labour, other than from reconstituted companies. While this restriction flows as much from the 1960 as the 1994 Law, it follows, to my mind, from the national court's express reference in the body of its first question to Article 21(1)(b) of the 1994 Law that it wishes the Court to focus its analysis on the 1994 Law.

23. In this respect, the national court, as stated at paragraph 18 above, refers especially to the consequences of the prohibition upon the capacity of terminal operators to provide to their clients 'the totality of the services'.

24. The defendants claim that the 1960 Law constitutes a restriction on the freedom of terminal operators to provide their services to the shipping companies that use the port. By preventing terminal operators from using the specialised services of authorised port operators they are forced to integrate vertically. It is claimed that such integration would cause them to lose the benefits of the economies of scale and professionalism which result from being able, in respect of certain services required by users, such as the releasing and fixing of containers, to call upon the services of specialised undertakings operating throughout the port; they are forced to incur the increased costs of employing the workforce necessary to provide such services themselves. The defendants claim that the many services required by a port user can most efficiently be provided through a single contract with a terminal operator, which employs subcontractors. Thus, responsibility for loss is more easily allocated. It suffices to establish the applicability of Article 59 of the Treaty, in the defendants' view, that the Italian rules restrict terminal operators in the provision of their services to shipping companies established in other Member States. [34]

25. Both Italy and the Commission point out that all of the undertakings involved in the main proceedings are Italian. The only conceivable trans-frontier element in the services provided to LSCT by the companies represented by Mr Raso's co-defendants is wholly hypothetical; to wit, the possibility that, but for the exclusive nature of the derogation from the 1960 Law in favour of the reconstituted companies, a non-Italian undertaking might be prevented from providing such services. However, if the Court were to find such an element sufficient in principle to render Article 59 applicable, the Commission would submit that the reservation of the benefits of the derogation from the general provisions of the 1960 Law to the reconstituted companies, which are all Italian, should be regarded as incompatible with that article.

34 — To rely on this principle against their own Member State, the defendants cite, in particular, *Alpine Investments*; Case C-384/93 [1995] ECR I-1141.

26. The national judge, without reaching a final decision on the applicable national law, considers that it is appropriate for present purposes to assume that the services at issue may be regarded as coming within the prohibition set out in Article 1 of the 1960 Law. Consequently, the issue that arises for consideration, at least as regards Article 59 of the Treaty, is whether the combined effects of a prohibition, such as that contained in the 1960 Law, and an exclusive derogation therefrom, like that granted under the 1994 Law in favour solely of Italian companies, constitute a restriction on the freedom to provide services.

27. In my opinion, the objections of Italy and the Commission concerning the relevance of Article 59 to the facts of the main proceedings are misconceived. By focusing on the freedom to provide employment-procurement services at ports, which is reserved under the relevant national rules to the reconstituted companies, their objections fail to address the real restriction identified by the national court in the order for reference (see, in particular, paragraph 22 above); viz., the restriction affecting the activities of terminal operators and, by extension, those of authorised port operators in the provision of port services to clients many of whom are shipping companies established in other Member States. From the information contained in the case-file, it is clear that none of the defendants has ever sought to establish itself as a procurer of labour, temporary or otherwise. Instead, LSCT claims that it has sought, by subcontracting the performance of specified tasks to other authorised enterprises, to supply the most efficient terminal-operator service to the users of its terminal. Enforcement of the reconstituted companies' monopoly would preclude a form of cooperation hitherto found to constitute an efficient means of carrying out their authorised activities at the port.

28. Therefore, it is the compatibility with Article 59 of the Treaty of the grant of a monopoly for the provision of temporary labour in favour of certain (necessarily national) port companies that is central to the first question in the present reference. The issue of its compatibility with Community law arises because of the effects of the monopoly on the provision of port services to national and non-national users of Italian ports by undertakings, like the defendants, who have been authorised to provide such services; notably in the light of the fact that those undertakings may face competition from the undertakings enjoying the monopoly. In my opinion, since Mr Raso's co-defendants have effectively been charged in the main proceedings with cooperating with LSCT in the provision by the latter of a comprehensive service to its clients, it is appropriate to focus, as, indeed, the national court has done in its reference, on the situation of terminal operators under the impugned national rules. Indeed, if the situation of Mr Raso's co-defendants, all of whom represent Italian companies charged

with having engaged in illegal cooperative activities with LSCT, another Italian company, were viewed on its own, it would be difficult to identify a concrete Community-law dimension for the purposes, at least, of Article 59.

29. In *Procureur du Roi* v *Debauve* the Court held that 'the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State', [35] which '... depends on findings of fact which are for the national court to establish'. [36] In the present case the national court has based its view on the existence of a sufficient intra-Community element on the fact that many of the users of the services at issue were undertakings established in Member States other than Italy. The agent for the Commission at the hearing claimed that it was not possible to identify the nationality of the users of LSCT's services. The Court has held that, once there is a trans-border element, the precise nationality of the recipients is not relevant. [37] Furthermore, in the light of the national court's view regarding the non-Italian nationality of LSCT's clients, the application of the national rules sought by the prosecution would also potentially affect non-Italian port users. [38]

30. It is true that in *Höfner and Elser*, where: 'the dispute [was] between German recruitment consultants and a German undertaking concerning the recruitment of a German national', the Court, referring to *Procureur du Roi* v *Debauve*, found '... no link with any of the situations envisaged by Community law', a conclusion which could not 'be invalidated by the fact that a contract concluded between the recruitment consultants and the undertaking concerned includes the *theoretical possibility* of seeking German candidates resident in other Member States or nationals of other Member States'. [39]

35 — Case 52/79 [1980] ECR 833, paragraph 9 of the judgment.

36 — Ibid.

37 — See Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* (hereinafter '*Svensson and Gustavsson*') [1995] ECR I-3955, where the fact that the plaintiffs in the main proceedings were, at the material time, nationals of a third country was not regarded by the Court, contrary to the express recommendation of Advocate General Elmer, as capable of precluding their capacity to rely on Article 59 to challenge a Luxembourg interest-rates subsidy provision which was available effectively only to loans taken out with Luxembourg-based banks.

38 — In Joined Cases C-321/94 to C-324/94 *Pistre* [1997] ECR I-2343, the Court, admittedly in the context of Article 30 of the Treaty, rejected the submission that the article was inapplicable to a prosecution brought in France of a French company for having allegedly unlawfully labelled, as originating in a specific French mountainous region, certain French goods destined for sale on the French market. The Court stated (at paragraph 44) that, '... whilst the application of a national measure having no actual link to the importation of goods does not fall within the ambit of Article 30 of the Treaty ..., Article 30 cannot be considered inapplicable simply because all of the facts of the specific case before the national court are confined to a single Member State'. Even in those circumstances, the Court found (at paragraph 45) that '... the application of the national measure may also have effects on the free movement of goods between Member States, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods'.

39 — Loc. cit., at paragraphs 38 and 39 (emphasis added).

However, in the present case, as the national court has said, a substantial proportion of the users of the port, and of the services of LSCT in particular, are established in other Member States.

31. As to the fact that all of the defendants in the present case are Italian companies, the recent case-law of the Court provides convincing support for the view that a person may invoke Article 59 of the Treaty against its own Member State. This emerges most recently from *Alpine Investments*, [40] *Corsica Ferries* [41] and *Sodemare*. [42] In *Corsica Ferries*, the Court, though dealing with the scope of freedom to provide maritime transport services as established by Regulation No 4055/86, [43] stated that '[I]n a case such as that in point in the main proceedings, an undertaking established in one Member State and operating a liner service, covered by Regulation No 4055/86, to another State, provides those services, by reason of their nature, *inter alia* for persons established in the latter State'. [44] In *Sodemare*, which concerned the provision of services at homes for the elderly, the Court stated that 'the right freely to provide services may be relied upon by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State ...'. [45]

32. It follows, in my opinion, that a terminal operator based in one Member State which frequently provides port services at least to clients established in other Member States may invoke Article 59 of the Treaty against national rules which operate to restrict its ability freely to provide such services. It is, therefore, necessary to examine whether the rules in point in this case comprise such a restriction.

B — *The possible application of Articles 30 and 48 of the Treaty*

33. Although no question has been referred in the present case regarding the application of Article 30 of the Treaty, I would not like to ignore the views of the Court on that issue in *Porto di Genova*. The Court referred to the national court's finding '... that the

40 — Loc. cit. at footnote 34 above, especially at paragraph 30 of the judgment.

41 — Case C-18/93 [1994] ECR I-1783.

42 — Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395.

43 — Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 1986 L 378, p. 1. I agree with the view expressed by Advocate General Van Gerven in section 16 of his Opinion in *Porto di Genova* that 'dock work must be distinguished from actual maritime transport properly so called ...'; see [1991] ECR I-5889, at p. I-5913. In my opinion, the same distinction should apply, *mutatis mutandis*, between the provision of port services and maritime transport services.

44 — *Corsica Ferries*, at paragraph 30. It should be noted that Article 1(1) of the Regulation expressly states that '[F]reedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

45 — *Sodemare*, at paragraph 37. In the event, however, the recipients of the services, though to some extent non-Italian, were all considered to be resident in Italy where the services were provided, see paragraph 39.

unloading of the goods could have been effected at a lesser cost by the ship's crew, so that the compulsory recourse to the services of the two undertakings enjoying exclusive rights involved extra expense and was therefore capable, by reason of its effect on the prices of the goods, of affecting imports'. [46] The Court in its answer to the national court referred to Article 90(1) 'in conjunction with Articles 30, 48 and 86 of the Treaty'. Article 30, but not Article 48, had been raised in the questions posed by the national court, although the latter loomed large in the judgment. Since I think the restrictive effects of the arrangements under the 1994 Law concerning the provision of temporary labour at Italian ports on imports would be speculative at best, I am satisfied that no issue concerning Article 30 is raised by the present case. [47]

34. It is not so easy to discount possible application of Article 48 of the Treaty despite the silence of the order for reference on this point. In my opinion, the combined effects of the fact that the 1994 Law provides both for the reconstitution of former dockwork companies, which, by their very nature as cooperatives of workers of Italian nationality, were exclusively Italian enterprises, and for rules requiring reconstituted companies, terminal operators and authorised port operators to engage on a priority basis the dockers formerly employed by the dockwork companies, may well result in the effective perpetuation of the infringement of Article 48 identified by the Court in *Porto di Genova*. It is, however, for the national court to determine, in accordance with the case-law of the Court, whether Article 48 is still being infringed, and what relevance, if any, such a possible infringement might have on the prosecution in the main proceedings.

C — *Restriction of freedom to provide terminal-operator services*

(i) Observations of parties and Member States

35. The defendants allege that to prevent terminal operators from using the services of other authorised port operators merely because those services have a high labour component is to restrict the provision of port services by both the terminal operators and the other authorised port operators, since it effectively induces the former uneconomically to expand their operations (and workforce) so as to be able to provide a complete range of port services to users while denying the latter a valuable source of

46 — *Porto di Genova*, at paragraph 22.

47 — See, in this respect, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraphs 23 to 25 of the judgment.

potential work. [48] The ostensibly objective and non-discriminatory terms of the restriction do not save it from incompatibility withArticle 59 of the Treaty since, the defendants claim, the means used to promote that objective in the ports sector are disproportionate and run contrary to the stated logic of the reform of that sector in Italy, which is to promote increased specialisation and subcontracting of activities. In their opinion, a rigorous application of existing legislation applicable to the ports sector, notably national competition rules regarding possible abuses by terminal operators of their pivotal position in respect of the provision of port services and protective labour legislation such as minimum rates of pay and social insurance in respect of the treatment of the dock workers, would suffice to ensure that the objectives underlying the 1960 Law are met in that sector. Finally, the reservation of work to reconstituted companies which were inherently likely to be composed of persons of Italian nationality could constitute an indirect discrimination on grounds of nationality.

36. Italy, supported by Germany, refers to the sensitive nature of the labour-hiring market. At the hearing, its agent submitted that the need to protect dockers from suffering abuse of their rights consequent upon the inherent fluctuations in the amount of work available to them justifies the adoption of special measures concerning the provision of temporary dock labour. The judgment in *Webb*, in particular, recognised that Member States may limit freedom to provide manpower-procurement services. [49] The agent representing France, though accepting that some protective measures might be justified, submitted that the grant of a monopoly of the sort in issue constituted a discriminatory and unjustifiable measure. The agent for Italy submitted, however, that, given the special nature of the reconstituted companies under Italian law, they being both cooperative associations of dock workers and commercial enterprises, such a monopoly constituted an appropriate means of ensuring the protection of dockers' rights.

(ii) Analysis

37. The general Italian employment-procurement regime established by the 1949 and 1960 Laws has never been applied to the ports sector. In effect, the original monopoly conferred upon the dock-work companies

48 — They also rely on the consequential restriction on the users' right to receive all the port services they require from one source. The possible adverse consequences for such service recipients of a restriction affecting the provision of the services in question, may not, in my view, be relied upon by the provider in order to establish an infringement of Article 59 of the Treaty unless the exercise of its activity is also thereby prejudiced. Thus, in *Svensson and Gustavsson*, for example, loc. cit., it was clear that the restriction affecting the provision of loans by banks not established in Luxembourg to Luxembourg-resident clients which resulted from the impugned Luxembourg measures also adversely affected the freedom of the plaintiffs in the main proceedings to receive banking services. In the present case, since I am of the view that the restriction on procuring labour other than from the reconstituted companies adversely affects the provision of terminal-operator services, I do not consider it necessary to examine separately the relevance of the possible restriction on the right of non-Italian users of the Italian ports freely to receive port services.

49 — Case 279/80 [1981] ECR 3305.

by the provisions summarised in Section II above has now been replaced by a fresh monopoly for the benefit of reconstituted versions of the former monopolists and covering the provision of temporary labour to terminal operators and authorised port operators. Thus, unlike the former dock-work undertakings, which could not carry out dock work themselves but had to entrust the entire labour content of such work to dock-work companies, the new monopoly applies only when terminal operators are unable to provide their services solely through their own dock workers. Nevertheless, a close examination of the details of the new regime reveals that, to a degree, the restrictions applicable under the old ports legislation have been maintained, albeit in a modified form, by the 1994 Law.

38. In the first place, the terminal operators are required to employ a workforce 'appropriate' to their submitted programme of activities. In this respect, it is noteworthy, as the Commission points out in its written observations, that until 31 December 1996 Article 23(3) of the 1994 Law required both terminal operators and authorised port operators, as well as the reconstituted companies, to employ, on the basis of priority, whenever positions became available those dock workers formerly employed by the old dock-work companies but not permanently re-engaged upon the reconstitution of those companies. Secondly, those dockers of the former dock-work companies who were not otherwise re-employed had to be engaged by the reconstituted companies pursuant to a temporary scheme the details of which were to be determined by ministerial decree. Finally, before being entitled to call upon the reconstituted companies to provide temporary labour under Article 17(1), both authorised port operators and terminal operators must initially utilise whatever labour is available under the temporary scheme.

39. Do these arrangements constitute a restriction on freedom to provide services? As they affect a terminal operator in the position of LSCT, I think they do. LSCT claims the right to offer to port users (which for the purposes of this analysis are those established in other Member States) a complete package of port services, i. e. it wishes to subcontract various highly labour-intensive components of its package to other port operators who are, themselves, authorised to provide such services directly to the users. The 1994 Law prohibits the terminal operator and the various authorised port operators from cooperating to this end. The cooperative arrangement is designed to enable the terminal operator to provide to the end-user a service which adapts to the varying needs

of the port over time and to the need to use labour efficiently and, thereby, to provide the services at lower cost to the port user. If the equivalent services were furnished by the reconstituted companies at lower cost or if higher cost were compensated by higher quality, it may be assumed that the terminal operator would choose to use them. It is the refusal to the terminal operator of the right to choose that, in my view, constitutes the restriction. Finally, it should be recalled that the reconstituted companies alone are entitled to provide services both directly to end-users and to intermediaries in the chain of supply. Authorised port operators are, in contrast, free to provide services to end-users but not to intermediaries: but I have already said that this restriction, being internal to a Member State, does not, in itself, come within Article 59 of the Treaty. [50] However, the position of the terminal operator is different. It is refused the right to engage temporary labour services of its own choice when designing its package for end-users.

40. Since I am satisfied that the rules constitute a restriction on the freedom of terminal operators to provide port services to users from other Member States, it is necessary to assess whether that restriction can be justified.

D — *Justification*

(i) Discrimination on grounds of nationality

41. In the present case, France, supported in the alternative on this point by the Commission, has alleged that, given the Italian nationality of the reconstituted companies, the restriction at issue discriminates on grounds of nationality. Naturally, if this were the case, the Italian measures could only be justified on the general-interest grounds set out in Article 56(1) of the Treaty, as applied to the freedom to provide services by Article 66 thereof. Such grounds do not, as the Court has repeatedly stated, include economic aims. [51]

42. I do not think that France's view on the issue of discrimination is correct. As I have already stated (see paragraph 28 above), the essential issue raised by the first question does not concern the compatibility with Community law of the reconstituted companies' monopoly but, instead, its downstream effects on the free provision of port services

50 — See, in particular, paragraph 28 above.

51 — See, for example, *Svensson and Gustavsson*, loc. cit., paragraph 15 of the judgment.

particularly by terminal operators. [52] Under Article 18 of the 1994 Law, no restriction is placed on non-Italian undertakings from applying for terminal-operator concessions. Accordingly, the monopoly in point potentially affects both national and non-national concessionaires in the same way and cannot, in my view, be regarded as discriminatory.

(ii) Justification of the indistinctly applicable restriction

43. The Court has consistently held that non-discriminatory restrictions on the freedom to provide services may be imposed in the pursuit of a policy interest '... justified by the general good' and where the provisions in question '... are imposed on all persons and undertakings operating in the said State in so far as that interest is not safeguarded by provisions to which the provider of the service is subject in the Member State of his establishment'. [53] This principle has also been applied to restrictions imposed on a service provider by its Member State of origin. [54] Since I am of the view that the reconstituted companies' monopoly potentially restricts freedom to provide port services to non-national users, it is necessary to assess whether any imperative reason of public interest recognised by Community law would provide a justification for the restriction.

44. I should state initially that I do not think that the restriction imposed on the activities of terminal operators by the monopoly conferred upon the reconstituted companies may be justified by reference to the general policy underlying the system of public employment agencies in Italy. I am satisfied that a comparison of the original dock-work companies' and reconstituted companies' dock-work monopolies demonstrates that it would be inappropriate to compare the labour-procurement rules applicable to the ports sector in Italy with the general employment-procurement system established under the 1949 and 1960 Laws. As Advocate General Elmer points out in his Opinion in *Job Centre II*, that system, unlike the monopoly of the reconstituted companies, is based upon a mandatory placement scheme administered by public employment agencies. [55] Moreover, while little information regarding the nature of the reconstituted companies is before the Court, it is clear, apart altogether from the likelihood that the priority rules (described above) governing the re-employment of dockers formerly employed by the dock-work companies operate largely to preserve the infringement of Article 48 of the Treaty

52 — This issue must be distinguished from the possible infringement of Article 48 of the Treaty to which I referred in paragraph 34 above, and the more hypothetical possibility that the grant of the monopoly to the reconstituted companies regarding the provision of temporary port labour restricts the potential freedom of establishment in Italy of undertakings from other Member States specialising in the provision of such labour.

53 — See, among many others to the same effect, *Webb*, loc. cit. footnote 49 above, paragraph 17 of the judgment.

54 — See, for example, *Alpine Investments*, loc. cit., and the discussion at paragraph 31 above.

55 — Paragraph 11 of the Opinion; see also footnote 19 above.

identified by the Court in its *Porto di Genova* judgment, [56] that the combined commercial and cooperative objectives of those companies distinguish them significantly from public employment agencies. Italy has nevertheless alleged that a more general worker-protection objective provides a justification for the 1994 Law. Although such an objective might be recognised by Community law, I do not agree that it is applicable in the present case.

45. Italy submits that in *Webb* the Court recognised the 'sensitive' nature of activities comprising the provision of manpower. [57] Accordingly, the Court regarded as being a permissible policy choice for Member States the subjection of '... the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded'. [58] More recently, in *Guiot*, the Court has also identified 'the social protection of workers in the construction industry' as meriting protection, 'because of conditions specific to that sector'. [59] Community law therefore accepts that the protection of the rights of workers may constitute an overriding policy requirement. In the present case, however, other than a general reference to the cooperative nature of the reconstituted companies, the Court has no information as to how and to what extent the monopoly enjoyed by those companies serves to further the protection of dock workers.

46. The Court has consistently held that the restrictive effects on service providers of indistinctly applicable national measures 'must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective'. [60] Thus, even if the effects of the monopoly of the reconstituted companies were capable, in a general way, of enhancing the protection of the dock workers, the information available to the Court provides no indication that the monopoly is either indispensable for the attainment of such enhanced protection or, as has been submitted by the defendants, that the same level of protection could not be achieved through less restrictive means. [61] In the circumstances, it must rest with the national court to assess such evidence as is provided by the parties regarding the justification of the restriction.

56 — In this respect, it is only necessary to recall that all of the dockers employed by the former dock-work companies were Italian nationals and it is this class of dockers which enjoys preferential rights to employment under the new rules; see paragraph 34 above.

57 — Loc. cit., paragraph 18 of the judgment.

58 — Ibid., at paragraph 19.

59 — Case C-272/94 [1996] ECR I-1905.

60 — See, for example, Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 15 of the judgment.

61 — It might be of assistance to the national court to note that no allegation has been made in the proceedings before the Court to the effect that dockers formerly employed by the dock-work companies and subsequently re-employed by terminal operators or authorised port operators have suffered any consequential diminution of their rights.

47. In short, unless it can be established that the monopoly is indispensable for the protection of dock workers at Italian ports, I am of the view that its application to the activities of terminal operators such as LSCT would constitute an impermissible restriction on freedom to provide intra-Community port services contrary to Article 59 of the Treaty.

VI — The second and third questions

A — *Introduction*

48. If the Court does not agree with the recommendation that I have made regarding the first question, it will be necessary for it to address the issues raised by the second and third questions, which concern, respectively, a combination of Articles 86 and 90(1) of the Treaty, on the one hand, and of Articles 59, 86 and 90 thereof, on the other.

49. In the memorandum, the national court focuses both on the general prohibition of the activities of workforce intermediaries under the 1960 Law and the derogation favouring the reconstituted companies contained in the 1994 Law. Referring to the established fact that authorised port operators represented by Mr Raso's co-defendants provided a number of services to LSCT, it wishes essentially to know whether Community law would prevent national law being interpreted so as effectively to prohibit cooperation between a terminal operator and authorised port operators. Thus, the second question focuses on a conceivable abuse by terminal operators of the monopoly conferred upon them by the 1994 Law concerning the use of certain facilities at ports that might result from the application to them of a broad construction of Articles 1 and 2 of the 1960 Law, whereby they are precluded from obtaining temporary labour from port undertakings other than reconstituted companies. In contrast, the third question focuses more concretely on the potential for the occurrence of unavoidable abuse that flows from the grant by the 1994 Law of the monopoly to reconstituted companies, which also carry out port activities and may even be terminal operators at some Italian ports — such as is allegedly the case at La Spezia. Since the objective of the complaint which led to the initiation of the prosecution in the main proceedings may, to my mind, reasonably be assumed to have concerned the protection of the monopoly of the reconstituted company at the Port of La Spezia, I share the opinion expressed on behalf of the defendants at the hearing that an answer to the third question would be of greater moment in so far as those proceedings are concerned.

50. It must, nevertheless, be recalled that the defendants' prosecution does not concern — at least not directly — an alleged infringement of the monopoly of the reconstituted companies but, rather, a potential infringement of the 1960 Law. Accordingly, I do not

fully share the Commission's view that the second question is purely hypothetical and need not be addressed at all. If the Court were to find a monopoly such as that of the reconstituted companies to be incompatible with Community law, that finding would not, on its own, preclude the application to terminal operators and authorised port operators of an interpretation of national law that viewed as incompatible with Articles 1 and 2 of the 1960 Law the sort of cooperation between them that is at issue in the main proceedings. However, a finding that the exclusive right of reconstituted companies to derogate from the 1960 Law is incompatible with Community law could not but have significant implications for the compatibility with Community law of the restriction of the right of terminal operators to have recourse to other authorised port operators for the provision of labour-intensive port services. Thus, while I shall consider only the third question in detail, I shall later return briefly to the second question.

B — *The third question*

51. The *de facto* consequence of the mandatory reconstitution of the dock-work companies pursuant to the 1994 Law is that the reconstituted companies enjoy a monopoly regarding the provision of temporary labour. [62] Moreover, if the interpretation of the 1960 Law adopted by the prosecution in the main proceedings is upheld, that monopoly will also extend to the provision of all labour-intensive services at those ports. Accordingly, I think that the Commission is correct to reformulate the wording of the third question so as to focus on the position of the reconstituted companies. Essentially, the national court wishes to know whether, by creating such a monopoly in favour of the reconstituted companies, the Member State concerned may be responsible for an infringement of Article 86 of the Treaty. In this respect, the national court's additional reference to Article 59 in the third question would appear to be superfluous. If Article 59 does not apply autonomously, as I have advised, I do not think that it can gain force from combining it with Articles 86 and 90. [63]

(i) The application in principle of Article 86

52. Article 86 of the Treaty applies only to undertakings enjoying a dominant position in the common market or a substantial part thereof. There is no doubt that the notion of

62 — It does not appear that the public employment agencies established under the 1949 Law operate in the ports sector.

63 — It has not been alleged in the observation submitted to the Court that the provision of temporary dock workers constitutes 'a service of general economic interest' within the meaning of Article 90(2) of the Treaty. Nor, in view of the Court's decision in *Porto di Genova* (see paragraph 27), and the even more forthright view of Advocate General Van Gerven (see section 27 of his Opinion, [1991] ECR I-5889, at p. I-5919), could that provision apply.

an 'undertaking' includes enterprises which, like the reconstituted companies, have both a cooperative and a commercial role. [64]

53. It is necessary, firstly, to determine whether the effect of the 1994 Law is such as to confer a dominant position in a substantial part of the common market upon the reconstituted companies. There would appear to be no particular relationship or links between the reconstituted companies operating at different Italian ports. It must, thus, be considered whether the reconstituted company functioning at the Port of La Spezia may be said to enjoy a dominant position for the purposes of Article 86.

54. The relevant product market should first be identified in accordance with the criteria established in the Court's case-law. [65] It is central to the relevant product market to establish whether there are competing or substitutable products or services. [66] In the present case, the reconstituted companies alone may supply temporary labour at Italian ports, since Italian law does not permit the employers of permanent labour at ports to compete with those companies. In other words, other potential suppliers of dock workers may not lawfully substitute their service for that of the reconstituted company. Thus, the scope of the relevant market is defined by law. However, for Article 86 of the Treaty to be applicable, dominance on a particular market is not, in itself, sufficient. Thus, in *Höfner and Elser* the Court held that 'an undertaking vested with a legal monopoly *may* be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty ...'. [67] It follows that for Article 86 actually to apply the national court must be satisfied that the monopoly granted in favour of the reconstituted company at the Port of La Spezia constitutes a substantial part of the common market.

55. In this respect, the national court has already found La Spezia to be the leading Mediterranean container port. Although the agent for Italy intimated at the hearing that the finding may now actually underestimate the position of the Port of Genoa, it has not been alleged that the national court's view of the importance of La Spezia is substantially flawed. Accordingly, subject to the prerogative of that court ultimately to determine whether the market in question constitutes a substantial part of the common market, the importance for intra-Community trade of the Port of La Spezia as a container terminal is, in my view, sufficient in principle to render substantial, for the purposes of Article 86 of the Treaty, the position held by the reconstituted company regarding the provision of

64 — In *Höfner and Elser*, for example, the Court declared that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed ...'. It also held expressly that 'employment procurement is an economic activity'; loc. cit., at paragraph 21.

65 — See, for example, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, notably paragraph 11 of the judgment, and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, at paragraphs 23 to 28.

66 — See, for example, *United Brands* v *Commission* and *Michelin* v *Commission*, ibid., paragraphs 22 and 37 of the respective judgments, and Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, at paragraph 19.

67 — Loc. cit., paragraph 28 (emphasis added).

temporary labour at that port. This assessment is not, to my mind, affected by the otherwise important fact that the 1994 Law, in contrast to the previous rules applicable under the Code, permits (or, in the case of a terminal operator like LSCT, obliges) the potential clients of the temporary labour-procurement services offered exclusively by the reconstituted company to employ a workforce appropriate to their own needs. I am therefore satisfied that the position of exclusivity conferred by the 1994 Law on a reconstituted company, such as that operating at a port of the size and importance in freight terms of that at La Spezia, is capable, subject to findings of all the necessary facts by the national court, of constituting a dominant position on a substantial part of the common market for the purposes of the application of Article 86 of the Treaty.

56. I have already viewed the restriction on freedom to provide intra-Community port services flowing from the monopoly conferred upon reconstituted companies as capable of falling within the scope of Article 59 of the Treaty. [68] Given the importance of the Port of La Spezia, I am also satisfied that any abuse by the reconstituted company at that port of the dominant position it enjoys would affect trade between Member States for the purposes of Article 86. In any event, it must be recalled that it does not have to be established that the impugned abusive conduct has actually affected such trade for the purposes of applying Article 86, but, instead, as the Court has consistently stated, '[I]t is sufficient to establish that the conduct is capable of having such an effect'. [69]

(ii) Member State responsibility and the requirements of Article 90(1)

57. Article 86 of the Treaty is directed only at the conduct of undertakings. However, the case-law of the Court demonstrates that in certain circumstances Member States may be held responsible for breaches of Community competition law resulting from the activities of undertakings. In this respect, the Court held in *Porto di Genova* that 'the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86'. [70] Nevertheless, it also held that a Member State would breach those provisions if the undertaking upon which the monopoly has been conferred either abuses its dominant position merely by exercising its exclusive rights, or if

68 — See paragraphs 22 to 32 above.

69 — See, *inter alia*, *Höfner and Elser*, paragraph 32 of the judgment. Indeed, in his Opinion in that case, Advocate General Jacobs had recommended (paragraph 48) that Article 86 could even apply in cases involving purely internal situations. Thus, as regards the application of Article 86, the Court is concerned with 'the consequences of the conduct complained of for the competitive structure in the Common Market ...'; see Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 33 of the judgment.

70 — Paragraph 16.

the rights conferred are liable to create a situation in which it is induced to commit such abuses. It is, therefore, necessary to examine the scope of those conditions so as to determine whether legislation such as the 1994 Law may be regarded as satisfying them.

58. In its observations the United Kingdom submits that the judgment of the Court in *Porto di Genova*, and particularly its statement at paragraph 20 'that a Member State creates a situation contrary to Article 86 of the Treaty where it adopts rules of such a kind as those at issue before the national court', is difficult to apply. The United Kingdom submits that it is unclear from paragraph 19 of the judgment in *Porto di Genova* what particular State measure was contrary to Articles 86(1) and 90, since there was no obvious link between the creation of the monopoly and the abuses cited by the Court. [71] Accordingly, the United Kingdom suggests that the approach elaborated by the Court regarding the application of Articles 5 and 85 of the Treaty to measures adopted by Member States, namely that there must be a clear and direct causal link between the impugned State measure and the conduct of the undertakings concerned, should also be applied when considering the possible combined application of Articles 90(1) and 86. Furthermore, it contends that the Court should only hold the grant of an exclusive right to be contrary to Articles 90(1) and 86 where the abuse constitutes the inevitable consequence of the grant. Where, however, the abuse results merely from encouragement by the Member State concerned, the United Kingdom contends that it is, at most, the act of encouragement or inducement, rather than the grant of the relevant exclusive right, that constitutes the unlawful State measure.

59. I accept that a distinction may be made between situations where, on the one hand, the grantee of an exclusive right is placed in a dominant position on a substantial part of the common market capable of affecting trade between Member States and either, merely by exercising the rights conferred upon it, cannot avoid abusing its position, or is compelled or encouraged by the relevant Member State measure to commit such an abuse, and those where, on the other hand, the national measure merely places the grantee in a position to commit an abuse but does not directly compel or encourage abuse.

60. In choosing to adopt this delimitation of the extent of Member State responsibility, I have consciously drawn upon the wording used by the Court in the English-language texts of its judgments in, respectively, *Höfner and Elser* [72] and *France* v *Commission*, [73] since, to my mind, some of the difficulties alleged by the United Kingdom to be inherent in interpreting the *Porto di Genova* judgment may be attributed to the differing

71 — The relevant part of paragraph 19 of the judgment is quoted at paragraph 8 above. By way of recapitulation the alleged abuses in question comprised: (i) demanding payment for unrequested services; (ii) charging disproportionate prices; (iii) the adverse cost and temporal consequences of refusing to use modern technology; (iv) practising a discriminatory price reductions policy.

72 — Loc. cit., paragraph 29.

73 — Case C-202/88 [1991] ECR I-1223; see paragraph 56 of the judgment.

wording used in English by the Court initially in *ERT* and, subsequently, in *Porto di Genova* when referring to *ERT*. [74]

61. The purpose of the distinction is to attribute responsibility. Since Article 90(1) permits Member States to grant 'exclusive rights', this act does not, in itself, constitute an abuse in terms of the Treaty, whatever the underlying economic reality. A distinction is, thus, made between the creation of the exclusive right and 'any measure contrary to the rules contained in this Treaty, in particular ... Articles 85 to 94'. Consequently, where an abuse for which a Member State is not responsible occurs, the victims must undeniably seek their remedy against the dominant firm pursuant to Article 86 of the Treaty which has direct effect. In the absence of such a distinction, Member States would effectively be obliged to justify the grant of exclusive rights notwithstanding the Court's consistent case-law to the effect that the mere creation of a dominant position through the grant of such rights cannot, in itself, be incompatible with Article 86. [75] To impose such an obligation on Member States would be contrary to the purpose of Article 90(1), which, as the Court has repeated on numerous occasions, is to prevent Member States from adopting or maintaining in force measures which deprive the Community's competition rules of their effectiveness. [76]

62. While this distinction may be clear in principle, its precise application in practice is not easy. Thus, the *Höfner and Elser* and *Porto di Genova* judgments have been criticised for not defining 'what factors make it possible to distinguish *a situation necessarily leading to an abuse* from a situation which on the other hand does not have that effect'. [77] To my mind, *Höfner and Elser* is one of those necessarily rare cases where the nature of the exclusive right of employment placement granted to the Bundesanstalt für Arbeit (Federal Office for Employment) in Germany was such that, for all practical purposes, its mere grant placed the grantee in the unenviable position of being unable to avoid abusing the right. [78] Thus, had it insisted upon the exercise of its monopoly in circumstances where it was manifestly unable to meet demand, at least for the placement of business executives, a finding of abuse would have been almost inescapable. The situation was complicated somewhat by

74 — Thus, in *ERT* the Court refers in the English-language text of its judgment (at paragraph 37) to '... a situation in which [an] undertaking *is led* to infringe Article 86 ...', while in *Porto di Genova* (paragraph 17 of the English version of its judgment) it cites paragraph 37 of its *ERT* judgment as supporting a formulation of the relevant principle as involving circumstances in which the dominant undertaking '*is induced*' to abuse its dominant position (emphasis added). In, for example, the French-language texts of these judgments, the same wording, 'est amenée', is employed in both paragraphs.

75 — See, *inter alia*, *Höfner and Elser*, paragraph 29 of the judgment. See also, in this respect, the views expressed by Advocate General Jacobs at paragraph 43 of his Opinion.

76 — See, *inter alia*, *ERT*, loc. cit., paragraph 35 of the judgment.

77 — See the Opinion of Advocate General Tesauro in Case C-320/91 *Corbeau* [1993] ECR I-2533, at paragraphs 11 and 12, who, moreover, in the accompanying footnote 11 to his Opinion, refers, *inter alia*, to the criticism made by Gyselen in his case-note on *Porto di Genova* in (1992) *CML Rev* 1228; see particularly pp. 1238 to 1241.

78 — As Gyselen, op. cit., at p. 1240, has appositely noted, '[O]ne can easily see how in this configuration, the existence of monopoly power and the "abusive" exercise of this power become one and how the true root of the abuse lies with the existence, not with the exercise, of the monopoly power'.

the fact that the Bundesanstalt voluntarily indicated that it was prepared 'to tolerate certain activities on the part of recruitment consultants concerning business executives'. [79] Nevertheless, the Court was satisfied that an unavoidable abuse had effectively occurred, at least in respect of executive recruitment, because the Bundesanstalt was '... manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void'. [80]

63. The monopoly rights at issue in *Porto di Genova* were not of the same character as those involved in *Höfner and Elser*. Nevertheless, the Court was satisfied that the link between the Italian measures in point and the abuses which it identified sufficed to render the Member State responsible. [81] I think it emerges, notably from paragraphs 18 and 19 of the judgment in *Porto di Genova* (see paragraph 8 above) that the Court was satisfied that the abusive conduct, though ostensibly effected by the dock-work company and undertaking concerned, resulted directly from monopoly rights granted under the relevant Italian legislation. In this respect, I think it is particularly noteworthy that in paragraph 19 of its judgment, when referring to the rights granted, the Court states that, '*as a result*', the undertakings in question are 'induced' to commit the abuses at issue (emphasis added). The Court thus, presumably, shared the view expressed by Advocate General Van Gerven, that those abuses '... are made possible, if not inevitable, by the national legislation and are facilitated, if not made compulsory, by the port authorities under the powers conferred upon them by national legislation'. [82] Unfortunately, there is a significant difference between inevitable and possible abuses of legal monopolies. Few would contest the culpability of a Member State for the former but many might feel that responsibility for the latter type of abuse should rest with the dominant undertaking.

64. The *Höfner and Elser* and *Porto di Genova* cases exhibit an approach by the Court which goes beyond the legal provisions granting the exclusive right and involves the formation of a judgement about the practical consequences of its exercise by its beneficiary. That type of exercise is

79 — *Höfner and Elser*, paragraph 9 of the judgment. However, Advocate General Jacobs did observe (paragraph 45 of his Opinion) that the Bundesanstalt could arguably have made greater use of its power, in certain circumstances, to commission organisations or other persons to carry out employment procurement for individual professions or groups of persons.

80 — Ibid., paragraph 31 of the judgment.

81 — The abuses are enumerated by the Court in paragraph 19 of the judgment, which is quoted at paragraph 8 above and summarised in footnote 71 above.

82 — See section 22 of his Opinion in *Porto di Genova*, [1991] ECR I-5889, at p. I-5916.

fraught with difficulty from the legal point of view. The Court is rarely in possession of a sufficient factual basis to enable it to form for itself a confident view about complex economic, social and legal considerations within a Member State. National courts when applying Article 90(1) of the Treaty and Member State governments when contemplating the grant of exclusive rights will reasonably look to the Court to give clear principled guidance in its judgments. The language of that provision, whilst explicitly noting the right of Member States to grant 'special or exclusive rights', enjoins them not to enact or maintain in force any *'measure'* contrary to certain rules of the Treaty (emphasis added). In my view, the primary focus of the prohibition is, therefore, on 'measures'. Naturally, the scope and effect of 'measures' cannot be analysed in isolation from their surroundings. None the less, it seems to me that the Court should, in applying Article 90(1), look to identify some measure leading clearly to an infringement of the competition articles of the Treaty, or, to use the language proposed by the United Kingdom, 'national rules which are *de facto* inextricably linked with the statutory monopoly'.

65. I do not think that any general test can be enunciated for determining in advance the existence of such a link. Instead, in each individual case when guiding national courts, it will be necessary to assess the impact of impugned national rules in the economic and factual circumstances in which they operate.

66. In my opinion, the judgment in *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne* [83] (hereinafter '*La Crespelle*') provides support for the approach I have just suggested. *La Crespelle* concerned the compatibility with Articles 5, 86 and 90(1) of the Treaty of the French system of regional artificial insemination centres, each centre enjoying a monopoly regarding the insemination of animals within their assigned geographic area. The alleged abuse consisted essentially of the charging of exorbitant prices by the insemination centres to breeders, notably, when the latter requested the centres to provide them with semen from other production centres. The Court formulated the issue as being whether such an alleged abusive practice could be regarded as '... the *direct consequence* of the national Law'. [84] Noting that the French legislation permitted the insemination centres to charge breeders 'the additional costs entailed by [choosing semen from other centres]', the Court was still satisfied that '... the task of calculating those costs' did not constitute a provision that would 'lead the centres to charge disproportionate costs and thereby

83 — Case C-323/93 [1994] ECR I-5077.

84 — Ibid., paragraph 20 of the judgment (emphasis added). In Ireland a similar regional artificial insemination monopoly was challenged in *O'Neill* v *The Minister for Agriculture and Food, Ireland and the Attorney General* [1995] ICLR 494 (High Court). The applicant had been refused a licence to provide a comprehensive artificial insemination service because the Minister's policy was to grant only one such licence in each of the nine areas into which the State had been divided. Mr O'Neill sought a declaration that the regional monopoly system was contrary, *inter alia*, to Articles 85, 86 and 90 of the Treaty. Mr Justice Budd refused to grant the relief sought, since, on a thorough review of the Court's case-law, notably *Höfner and Elser* and *La Crespelle*, he was not satisfied that the exclusive licensees had committed abuses of their dominant position which could be regarded as the direct consequence of the licences granted to them, or that, in merely exercising their exclusive rights, they were unable to avoid such abuses; see [1995] ICLR 494, pp. 548 to 556. This judgment was reversed on 14 May 1997 by the Supreme Court on a purely national-law ground.

abuse their dominant position'. [85] It follows, in my opinion, that it is not sufficient for an infringement of Article 90(1) in conjunction with Article 86 of the Treaty to occur for the grantee of an exclusive right under national law to be placed, by virtue of its resulting dominance, in a position to commit abuses unless the monopoly system itself compels or strongly encourages the abuse by being directly linked to and largely responsible for it.

(iii) The abusive conduct alleged in the present case

67. It is appropriate, first, to note that, in respect of the third question, the national court has not identified any specific abuse with which the reconstituted company at the Port of La Spezia is reproached. [86] Instead, various allegations have been made in the observations submitted. Thus, France contends that there is a *de facto* abuse akin to that identified by the Court in *Porto di Genova*, while the defendants and the Commission allude to various potential abuses. Having regard to the division of competence that exists between the Court and national courts in Article 177 references, it is, of course, for the national court to determine whether any of the alleged abuses have in fact occurred.

68. Based on the information available to the Court, I do not think that the monopoly granted to the reconstituted company at the Port of La Spezia is such that its mere exercise or enforcement through criminal prosecutions at issue in the main proceedings may, in itself, be regarded as constituting an abuse within the meaning of Article 86 of the Treaty for which Italy is responsible. The reorganisation of Italian ports which followed the *Porto di Genova* judgment allowed terminal operators and authorised port operators to engage their own labour. Only the supply of temporary or casual labour is reserved to the reconstituted companies. It seems to me, notwithstanding the persuasive economic arguments advanced by the defendants in their written observations concerning the allegedly greater efficiency that a system which allowed terminal operators to choose their own subcontractors would have at Italian ports, in comparison with the present exclusive system of temporary labour procurement, that the mere grant by a Member State of an exclusive right to procure such labour cannot, on its own, be viewed as incompatible with Community

85 — *La Crespelle*, paragraphs 20 and 21 of the judgment. Advocate General Gulmann in his Opinion in *La Crespelle*, although of the view that if a payment were demanded for fictitious expenses an abuse of Article 86 would occur, did not regard that risk of abuse as being of such a nature as to render the right to demand payment for additional expenses, in itself, contrary to the Member State's Treaty obligations (see paragraph 36). On the contrary, he thought that, '[T]here [was] nothing in the French rules to induce the centres to act in that way' (see paragraph 43). Thus, if unjustified expenses were charged, the centre concerned would alone be potentially responsible under Article 86.

86 — In the order for reference in *Porto di Genova*, the national court in that case described certain circumstances which might have amounted to abusive conduct on the part particularly of Compagnia: see paragraph 19 of the judgment and section 18 of the Opinion of Advocate General Van Gerven. In the present case, on the other hand, it is merely in respect of the second question that the national court refers (see paragraph 49 above) to a possible abuse by LSCT of its position as a terminal operator at the Port of La Spezia.

law. Therefore, subject to one exception, if abuse attributable to the State were to exist in the present case, it would have to lie in the *de facto* operation of the amended system of rules introduced by the 1994 Law.

69. The categories of potential abuse at issue may, for convenience, broadly be described as concerning the sufficiency and suitability of the services provided by the reconstituted company and the costs of its services. I shall treat separately of the appropriateness of permitting the reconstituted companies also to compete with terminal operators and authorised port operators regarding the provision of port services. Although it is this last aspect of the system established by the 1994 Law which, more than any other aspect, differentiates the present case from *Porto di Genova*, I shall initially consider the first two abovementioned broad categories of conceivable abuse, which recall the circumstances of the earlier case.

70. Regarding the first two categories, the defendants submit that the fact that the cooperation impugned in the prosecution underlying the main proceedings occurred at all indicates that various authorised port operators at La Spezia are able to provide both a cheaper and better quality of service to LSCT than that of the reconstituted company. It is also alleged that the reconstituted company is unable to meet demand. These allegations have not, directly at least, been contradicted by Italy. While it is for the national court ultimately to determine their veracity, the following observations may be made by way of assistance.

71. The Court has not been informed whether the provisions of Articles 112 of the Code and 203 of the Regulation (see paragraph 4 above), whereby the port authorities effectively fixed the tariffs, have been preserved by the 1994 Law. Nor has it been told whether there are now any provisions or rules in place which oblige the reconstituted company to use the modern equipment which Compagnia, at least, at the Port of Genoa was apparently loath to use. In this respect, it must be recalled that reconstituted companies are obliged to re-employ as many as possible of the dockers formerly employed by the dock-work companies and pre-existing work practices may thus continue. On the capacity of the reconstituted company at the Port of La Spezia to meet demand, virtually no information is available to the Court apart from certain references made at the hearing by the agent representing Italy to recent redundancies among such companies. [87] If the supply of labour is found to be inadequate, the extent of that inadequacy would, in my opinion, need to go at least as far as in *Höfner and Elser* in

87 — The reconstituted company may still employ enough workers, whether on a permanent or temporary basis, to be able expeditiously to satisfy demand for labour from terminal operators and authorised port operators whensoever it arises and on a non-discriminatory basis. No information is, however, available to the Court regarding the temporary-employment scheme referred to in Article 23 of the 1994 Law; see footnote 25 and paragraph 38 above.

order to attract State responsibility. Similar considerations would apply to any suggested lack of suitably trained staff or apposite equipment. In brief, the national court would have to be satisfied of the direct causal link between any abuses within the meaning of Article 86 of the Treaty whose occurrence it ultimately establishes and the rights conferred on the reconstituted company by the 1994 Law.

72. In any event, I am convinced that the most disturbing aspect, from the point of view of the combined application of Articles 90(1) and 86 of the Treaty, of a system of rules such as that established by the 1994 Law must be the dual role granted to reconstituted companies. It seems to me to be inescapable that a company to which not only an exclusive right to provide temporary labour is granted but which is simultaneously permitted, without apparently even the need to satisfy the normal requirements of Articles 16 and 18 of the 1994 Law, to compete with terminal operators and authorised port operators on the market for the provision of port services, will be compelled or feel strongly encouraged to abuse its dominant position. The position enjoyed by the reconstituted company is particularly privileged when it is recalled that its monopoly powers will be enhanced in the only circumstances in which its services are required by the terminal operator. The latter has its own workforce and will, except in cases of high demand, be normally in a position to serve port users without resort to the reconstituted company. When peak demand occurs at the port, access to a temporary labour supply will be essential if the terminal operator is to provide services to all its customers, since it is not permitted to have resort to any unengaged labour among authorised port operators. At the same time, the monopoly supplier of temporary labour is free to supply services directly and in competition with the terminal operator. The vice of the system is that one part of the market is controlled, while the other is free. Thus, looking at the matter only from a point of view of principle, the reconstituted company may quote to the port user a price which is equal to or lower than that which it quotes to the terminal operator. [88] The latter will be compelled to charge out the services at cost or less to compete. If the reconstituted company were also free to negotiate a higher price to the end-user than that charged to the terminal operator, it would be able to withhold services (presumably it is free to do so) and still gain the business at the expense of the terminal operator, which could not go elsewhere for temporary labour.

73. In my opinion, the privileged position conferred upon the reconstituted company by the 1994 Law is akin to that conferred upon the Greek radio and television monopolist in *ERT*. In that case, the Court found that 'Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit broadcasts to an undertaking

88 — It must, however, be noted that no information is before the Court regarding the actual prices charged, or method of calculation thereof, by the reconstituted company at the Port of La Spezia. Thus, for example, the Court has not been informed (as noted in paragraph 71 above) whether Articles 112 and 203 of the Regulation still apply, or apply in a modified form: see paragraph 4 and footnote 8 above.

which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes'. [89]

national rules but which may only procure temporary outside labour from the grantee.

C — *The second question*

74. On the basis of the information available to the Court, I am satisfied that national legislation such as the 1994 Law, which grants to one undertaking the exclusive right to provide temporary labour, under conditions to be determined freely by that undertaking, to other undertakings authorised to provide port services to port users at a port of the size and importance in trade terms as La Spezia, may be such as directly to compel or strongly to encourage the grantee undertaking to infringe Article 86 of the Treaty. Such compulsion or encouragement will arise when the grantee undertaking is also permitted in derogation, *de jure* or *de facto*, from the ordinary national rules governing the granting of authorisations regarding the provision of port services to port users, to provide itself such services in competition with other undertakings, which have been duly authorised in accordance with the aforesaid

75. For the reasons stated notably in paragraphs 67 to 74 above, I am satisfied that a system of exclusive, temporary labour procurement such as that established by the 1994 Law at Italian ports is incompatible with Article 90(1) read in conjunction with Article 86 of the Treaty. Such a view, if it were accepted by the Court, would not, in itself, in my opinion call into question the compatibility in principle of granting derogations from a general, national legislative prohibition such as that affecting private labour procurement under the 1960 Law in Italy. Instead, it would, in my opinion, preclude either the Italian authorities or reconstituted companies themselves from invoking, in the circumstances of this case, the exclusivity of the derogation granted by the 1994 Law, particularly against a terminal operator which is desirous of providing port services under the same competitive conditions as the reconstituted company itself, subject, of course, to the right of the appropriate Italian authorities to verify that all derogating undertakings comply with the relevant provisions of Italian labour protection legislation. Consequently, I do not think that it is necessary in the present case, for the purposes of providing a useful response to the national court, to address the issues raised by the second question.

89 — Loc. cit., paragraph 37 of the judgment. Similarly, the Court, at paragraph 51 of its judgment in *France* v *Commission*, loc. cit., footnote 73 above, stated that to entrust to an economic operator the function of granting type-approval for equipment to be used by itself and its competitors was 'tantamount to' placing it 'at an obvious advantage over its competitors'.

VII — Conclusion

76. In the light of the foregoing, I recommend that the following answers be provided to the questions referred by the Pretura Circondariale, La Spezia:

(1) As regards the first question, I suggest the following answer:

Article 59 of the Treaty precludes national legislation which prohibits an undertaking holding a port terminal concession from having recourse, in order to supply port services to port users established in other Member States, to work done by other undertakings authorised to carry out activities at ports with the exception of reconstituted versions of the type of dock-work company involved in Case C-179/90 *Merci Convenzionali Porto di Genova*, unless the indispensability and appropriateness, for the purpose of ensuring the protection of dock workers at Italian ports, of granting such an exclusive right to the reconstituted companies concerned can be established.

In any event, national rules which, on the one hand, reserve the provision of temporary port labour to such reconstituted companies, all of which used to be established as dock-work companies in the Member State concerned and employed only dock workers having the nationality of that State, and, on the other, now oblige those companies to re-employ those dockers on a preferential basis, discriminate on grounds of nationality against non-Italian dock workers desirous of seeking employment at Italian ports and, accordingly, are not compatible with Article 48 of the Treaty unless capable of justification on one of the non-economic grounds set out in Article 48(3).

(2) If the Court does not agree with the above recommendations in respect of the first question, I do not suggest that it provide any specific answer to the

second question but, instead, propose that the third question be answered as follows:

Article 90(1) of the Treaty, in conjunction with Article 86 of the Treaty, precludes national rules which grant an undertaking, permitted to carry out port activities on behalf of port users, an exclusive right, under conditions which it is free to determine, to provide temporary labour to other undertakings authorised to provide similar port services for the benefit of users at a port of the size and importance for intra-Community trade of the Port of La Spezia in Italy.